



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 341 OF 2013

LEMITEI OLE KOROS.....1ST PLAINTIFF

PARIT OLE SETEK.....2ND PLAINTIFF

VERSUS

ATTONERY GENERAL1ST DEFENDANT

KIPIRA OLE SANTAI.....2ND DEFENDANT

TULASHA ENOLE NYAMO.....3RD DEFENDANT

OLOTUEK NYAMO.....4TH DEFENDANT

RULING

(Preliminary objection; suit touching on issues related to land adjudication; preliminary objection that no consent of the Land Adjudication Officer was obtained before filing suit; plaintiff contending that consent was obtained; clear that there is a question of fact which is in contest, that is , whether or not consent of the Land Adjudication Officer was obtained; preliminary objection not raising a pure point of law; question of fact not to be determined in a preliminary objection; preliminary objection dismissed)

1. This ruling is in respect of a preliminary objection dated 17 September 2008 and filed on 18 September 2008. The preliminary objection is seeks the striking out of the plaintiffs' suit on the following grounds , That :-

(1) The plaintiffs' suit and the entire proceedings herein have been filed in contravention of the mandatory provisions of Section 29 (1) and 30 (1) of the Land Adjudication Act, CAP 284.

(2) By reason of the aforesaid provisions of the Act, the suit and the entire proceedings herein are premature, misconceived, incompetent and a complete nullity.

(3) Further, by reason of the aforesaid provisions of the Act, this honourable court has no jurisdiction to entertain the suit and the proceedings herein, which should therefore be struck out with costs to the 2nd and 4th defendant.

2. The preliminary objection is opposed and before I go to the submissions filed, I think it is necessary that I lay down the background to this suit.

3. This suit was commenced by way of plaint filed on 31 January 2003. The suit as filed is against the Attorney General as 1st defendant and three other individuals. The Attorney General is sued on behalf of the District Commissioner, Narok; the District Officer, Olokurto Division, Narok District; and the Director of Land Adjudication and Settlement Officer, Narok. The 2nd, 3rd and 4th defendants are individuals who reside in Olokurto Division of Narok District. It is pleaded in the plaint that the plaintiffs and the 2nd - 4th defendants are members of the Maasai community and are inhabitants and resident within Olokurto Adjudication Section which was established in the year 1975 under the Land Adjudication Act, CAP 284. It was pleaded that the adjudication has not been closed but that the adjudication objections were closed in the year 1990.

4. The plaintiffs aver that they are proprietors under Maasai customary law of the land parcel numbers 138 and 139 respectively in Olokurto Land Adjudication Section. It is averred that prior to adjudication, there were no claims over these two parcels and no objections to the plaintiffs being recorded as owners. It is said that after adjudication, the 2nd - 4th defendants lodged complaints or objections to the land adjudication officers, the result of which led to the filing of appeals to the District Commissioner (DC) in case Numbers 111, 107, 108, and 109 all of 2001. It is pleaded that the DC, without jurisdiction and without proper assessment of the evidence before him, decided that the plaintiffs' parcels of land be reduced in acreage and that the acreage excised from their land be added to the land of the 2nd - 4th defendants. He dismissed the appeals lodged by the plaintiffs.

5. It is pleaded that the Director of Land Adjudication, through a letter dated 19 October 2001, had written to the DC, Narok, advising him against embarking on the matters related to the parcels No. 1540 and 1541 which had been falsified, but the DC ignored this advice and continued to hear the appeals as though they were against the parcels No. 138 and 139. It is pleaded that this infringed on their constitutional rights and that the acts of the officers have taken away the plaintiffs' land without following proper procedure. It is said that the Adjudication Officer and the DC have irregularly created the parcel numbers 1540 and 1541 carved out of the plaintiffs' land parcels No. 138 and 139.

6. In the suit, the plaintiffs have asked for the following orders :-

(a) A declaration that the prior warning by the Director, Land Adjudication and Settlement to the District Commissioner Narok, in the letter Ref. LA/5/4/G VOL XVII/25 dated 19th October 2002 about forged or falsified record was justified and should have been heeded.

(b) A declaration that the District Commissioner's proceedings and decision on the 23rd of April 2002 were irregular.

(c) A declaration that the Director of Land Adjudication cannot in the circumstances of the case certify the District Commissioner's proceedings and decisions of 23rd April 2002 concerning the appeals and disputes over land parcels in Olokurto Adjudication Section, Narok District known as parcels No. 138, 139, 1549, 1541 and 50.

(d) A declaration that the creation of land parcels 1540 and 1541 in Olokurto Adjudication Section, Narok District is null and void.

(e) An order that the Chief Land Registrar do register Parit Ole Setek and Limitei Ole Koros (the plaintiffs) as proprietors of parcels No. 138 and 139 as appropriate without excision therefrom of parcels known as No. 1540 and 1541.

(f) General damages for breach of the plaintiffs' rights and interests in their land parcels 138 and 139 and 50 Olokurto Adjudication Section under Maasai customary law, the Land Adjudication Act, the Trust Land Act and the Constitution of Kenya.

(g) *Injunction to restrain trespass on the plaintiffs' land parcels No. 138, 139, and 50, Olorurto Adjudication Section, Narok District by persons claiming under the District Commissioner's decision of 23rd April 2002 and in particular to restrain the 2nd, 3rd and 4th defendants by themselves, their agents, servants, relatives or persons claiming under them in whatever manner and for whatsoever reason.*

(h) *Damages for loss of user and compensation for wrongful and unconstitutional taking away and possession of the plaintiffs' land by the defendants jointly and severally.*

(i) *Costs.*

7. The defendants entered appearance and filed their respective defences. For the State, it was inter alia pleaded that the DC, Narok had jurisdiction to determine the appeals as he was exercising powers delegated by the Minister of Lands vide Legal Notice No. 73 of 25 April 1978. It was further pleaded that the Land Adjudication Officer Narok and the DC, Narok, acted within the law in deciding the matters raised by the plaintiffs during the adjudication process. For the 2nd to 4th defendants, it was inter alia pleaded that the decisions of the DC were proper and regular and made in exercise of the powers conferred by Section 29 (4) of the Land Adjudication Act. They pleaded that their objections and the appeals were brought within time and in accordance with Section 26 of the Land Adjudication Act (the Act). They also pleaded that the suit is incompetent for contravening Section 30 (1) of the Act (which requires consent of the Land Adjudication Officer before filing suit).

8. In his submissions, counsel for the 2nd- 4th defendants inter alia, that no consent of the Land Adjudication Officer was sought; that the decision of the Minister is final in accordance with Section 29 (1) of the Act, and that this court has no jurisdiction to handle the matter.

9. On the part of the plaintiffs, it was submitted by counsel among other things, that the consent of the Land Adjudication Officer was sought and obtained. In his written submissions, counsel referred me to various letters in the plaintiffs' bundle of documents to be relied upon at trial and was of the view that some of the letters give consent to the institution of this suit.

10. It follows that there is an issue of fact which is in contest, that is, whether or not the consent of the Land Adjudication Officer was sought and obtained, before the filing of this suit. That question of fact must first be decided so as to make a determination of whether or not this suit is in contravention of the law. However, what is before me is a Preliminary Objection. It is trite law that preliminary objections need to be confined solely to matters of law. The locus classicus is the decision in the case of ***Mukisa Biscuit Manufacturing Company Limited vs West Ends Distributors Limited (1969) EA 696***. In the matter, counsel for the defendant at the opening of the hearing of the case, asked the court, by way of preliminary objection, to dismiss the suit for want of prosecution. The judge declined to dismiss the suit and an appeal was made against this order. It was argued on appeal that an order seeking to dismiss a suit for want of prosecution has to be made by way of Motion and not a preliminary objection. The court agreed with this submission, but held that since the learned judge proceeded to entertain the application, notwithstanding its defective form, that objection was not well grounded. Law J.A, then proceeded to make the following dictum at p699 :-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Newbold J.A, on his part, stated as follows at p701 :-

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

11. I agree with the above dicta. Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection. In our case, it is a contested fact, as to whether or not the consent of the Land Adjudication Officer was obtained.

12. In such instances, the proper avenue is for a party to file an application to strike out suit, supported by an appropriate affidavit setting out the facts leading to the application, and the plaintiff given opportunity to respond to the matters of fact raised, through the filing of a replying affidavit. The court can then be in a position to make a determination of both fact and law within the application, and decide whether in the circumstances, the suit ought to be struck out.

13. It would have been a different issue if it was accepted that the consent was not sought and obtained, and all that remained was a determination in law, as to whether or not, in the circumstances of the case, the consent was required. If that were the scenario, then what would be open for determination would be a pure point of law which this court would have entertained as a preliminary objection.

14. I am afraid that given the contested fact, of whether or not consent of the Land Adjudication Officer was sought before these proceedings were filed, which fact I am not able to determine within the confines of a preliminary objection, I have little choice but to dismiss this Preliminary Objection with costs.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20TH day of January 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In the presence of :-

Mrs. Oliech holding brief for Ms. Njoroge instructed by M/s Kiplenge & Kurgat for the plaintiffs/respondents.

No Appearance on the part of M/s Tobiko & Njoroge Advocates for the defendants/applicants.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU