



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 508 OF 2014

(Formerly Nyeri HCC NO. 166 OF 2011)

JOSEPH MWAI KAMURWA PLAINTIFF

-VERSUS-

JOSEPH GICHIRI 1ST DEFENDANT

JOHN MURIITHI KINYUA 2ND DEFENDANT

DISTRICT LAND REGISTRAR, NYERI REGISTRY 3RD DEFENDANT

THE HON. ATTORNEY GENERAL (*Sued on*

***behalf of The Ministry of Lands and Settlement*) 4TH DEFENDANT**

RULING

Background

1. By a plaint dated **14th November, 2011** the plaintiff instituted the suit herein seeking judgment against the defendants jointly and severally for a declaration that:-

- a. **Land parcel number Iriani/Chehe/371 (hereinafter referred to as suit property) belongs to the estate of Gachiri Njege and the same to be registered in his name as the administrator;**
- b. **The Registrar, Nyeri District Land Registry do rectify the register with regard to the suit property and the registration of the 1st and 2nd defendants herein be accordingly cancelled.**
- c. **Costs of the suit be borne by the defendants.**

2. The plaintiff contends that the suit property was fraudulently registered in the name of the 1st defendant by the 3rd defendant. The plaintiff also contends that in effecting transfer in favour of the 1st defendant the 3rd defendant acted negligently and fraudulently. The particulars of fraud on the part of the 1st defendant and the 3rd defendant are particularised in paragraphs 7 and 8 of the plaint respectively. The suit property was subsequently transferred to the 2nd defendant.

3. Upon being served with summons to enter appearance, the 3rd and 4th defendants entered appearance and filed a statement of defence to the plaintiff's suit. Vide paragraph 3 of their statement

of defence, the 3rd and 4th defendants issued a notice of preliminary objection to the plaintiff's claim. The objection is premised on the following grounds:-

i) That the suit offends the mandatory provisions of **Section 12, 13 and 13A** of the Government Proceedings Act;

ii) That the suit offends the mandatory provisions of **Sections 2, 3 and 5** of Public Authorities Limitation Act; and

iii) That the suit is *res judicata*.

4. When the matter came up for hearing on **13th May, 2015** by consent of the parties, directions were issued to the effect that the 3rd and 4th defendant's notice of preliminary objection be disposed of first.

The notice of preliminary objection was disposed off by way of written submissions.

Submissions:-

6. On behalf of the 3rd and 4th defendants, reference is made to the provisions of **Section 13A(1)** of the Government Proceedings Act which prohibits institution of proceedings against the Government unless the notice contemplated therein has been served on the Government in relation to the proceedings as held in the case of **Ngugi v. Attorney General (2004) e KLR**. It was submitted that failure to issue the notice required by Section 13A(1) is fatal to the plaintiff's case.

7. Further reference is made to **Section 3(1)** of the Public Authorities Limitation Act, the cases of **Joseph Mugo Mwangi v. Attorney General (2005) eKLR** and **Manfred Walter Schemitt & another v. Attorney General & 3 others (2013)** and submitted that under **Section 27(a)** of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) as read with **Section 107(1) and (2)** of the Land Registration Act, 2012, interest in land is conferred by registration.

8. Since the suit property was registered in favour of the 1st defendant in 1988, it is contended that the plaintiff's cause of action against the 3rd and 4th defendant accrued in that year (1988).

9. Since the claim against the 3rd and 4th respondents is based on negligence (tort), it is submitted that under **Section 3(1)** the Public Authorities Limitation Act, the plaintiff's cause of action on the alleged tortious acts lapsed twelve months after the suit property was registered in favour of the 1st and the 2nd defendant respectively.

10. Since the plaintiff instituted his claim after the time he could lawfully do so against the 3rd and 4th defendants had lapsed, it is submitted that his case against them is unmaintainable.

11. As for the claim that the suit is *res judicata*, it is contended that **Ombwayo, J.** on 28th June, 2013 decided that the suit property belongs to the 2nd defendant. Based on that decision of the **Ombwayo, J.** it is submitted that further adjudication over ownership of the suit land is tantamount to abuse of the court process. In view of the foregoing, the 3rd and 4th defendants urge this court to allow the preliminary objection and dismiss the claim against them.

12. On behalf of the 2nd defendant, it is submitted that the suit is *res judicata* Kerugoya SRMC's Civil Case No.418 of 2005 in which it was decreed that the suit property be transferred to the 2nd defendant. It is contended that since the issue of ownership of the suit property was determined in the earlier suits it should not be determined afresh.

13. On behalf of the plaintiff, reference is made to the case of **Mukisa Biscuit Manufacturers Company v. West End Distributors (1969) EA 696** in which the principles which undergird a preliminary objection were espoused and submitted that the preliminary objection by the 3rd and 4th defendants is premature, misconceived and unmeritorious.

14. Based on the authority of **George Waithaka Gituru v. Attorney General & another (2008) eKLR**, it is submitted that from the history of this matter, the matter should not be disposed off preliminarily.

15. On failure to issue the notice required by **Section 13A(1)** of the Government Proceeding Act (GPA), reference is made to the cases of **Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 Others (2012) e KLR** and **Kenya Bus Service Ltd & Another v. Minister for Transport & 2 Others (2012) e KLR** and submitted that **Section 13A(1)** has no place in Kenya's new Constitutional dispensation (is unconstitutional).

16. In the case of **Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 Others (2012) e KLR** (supra) it was stated:-

“On the issue of issuance of notice to sue the Government as required by Section 13A of the Government Proceedings Act the court is of the view that this section is no longer tenable in the context of the new Constitution and the Attorney General and the Law Reform Commission need to take cue and to propose to Parliament its repeal or amendment to align with the Constitution.”

In **Kenya Bus Service Ltd & Another v. Minister for Transport & 2 Others**

(supra) it was held:-

“Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the Government Proceedings Act provides an impediment to justice. ...the law should not impose hurdles on accountability of the Government through the courts...it is my finding therefore that Section 13A of the Government Proceeding Act as a mandatory requirement violates the provisions of Article 48.”

17. With regard to the contention that the suit is *res judicata* reference is made to the provisions of **Section 7** of Civil procedure Act and submitted that it has not been show that the plaintiff was a party in the previous proceedings or was represented in those proceedings.

18. In view of the foregoing, it is asserted that the issues raised by the 3rd and 4th plaintiff are issues to be determined during trial as they require to be proved by way of evidence.

Analysis and determination

19. It is not in dispute that the plaintiff did not issue the notice required under **Section 13A(1)** when instituting the suit. Other than the contention that the said requirement is unconstitutional, no explanation has been offered why the plaintiff failed to issue the notice.

20. Despite **Section 13A** having been held to be no longer tenable in the context of the new Constitution and to be in violation of **Article 48** of the Constitution, being of the view that the notice is necessary to notify the Government of impending suits and to enable it plan its affairs, I must say that the conduct of the plaintiff must be discouraged, especially where it may lead to orders being issued against the Government without representation. Because in these proceedings, the Government is already represented and there being no prejudice occasioned on the Government by failure to issue the notice required under **Section 13A(1)** on the strength of the decisions in the cases of **Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 Others (2012) e KLR** and **Kenya Bus Service Ltd & Another v. Minister for Transport & 2 Others (2012) e KLR** I decline to declare the suit bad in law merely because the notice contemplated in **Section 13** of the Government Proceedings Act was not issued.

21. That determination, in my view properly accords with the provisions of **Article 262 (7)** of the Constitution which requires this court to construe all laws in force immediately in force before the promulgation of the new constitution with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. In my considered view, **Section 13A(1)** was

not made to shield Government from participating in proceedings brought against it or its officers but to ensure that the Government is not condemned unheard. That mischief has been cured by the fact that the Government is already a party in these proceedings.

22. With regard to the contention that the suit is unmaintainable for offending **Section 3(1)** of the Public Authorities Limitations Act, whereas it is true that the time within which the plaintiff ought to institute a suit against the 3rd and 4th defendants on the alleged negligence on the part of the 3rd defendant had lapsed when the suit was instituted, I note that the plaintiff also alleges fraud on the part of the 3rd defendant. Whereas the claim based on negligence is time barred, that based on fraud is not.

23. Be that as it may, having read and considered the statement of defence filed by the defendants' in this suit and being of the view that the 3rd and 4th defendants are necessary parties for the purpose of assisting the court make a just and fair determination of the issues raised in the suit, I would, nevertheless have declined to strike them from the suit.

24. On the contention that the suit is *res judicata* Kerugoya SRMC's civil Case No. 418 of 2008 of 2008, there being no evidence that the plaintiff was a party to that suit or represented in that suit, on the basis of the material placed before me, I am unable to find that the current suit is *res judicata* that suit (Kerugoya SRMC's civil Case No.418 of 2008 of 2008).

25. On whether the finding by **Ombwayo J.**, conclusively determined the plaintiff's interest in the suit property, I hasten to point out that the issue the court was called upon to determine was whether the 1st and 2nd defendants should have been restrained from interfering, trespassing, wasting or alienating and/or engaging in any dealings over the suit property and/or whether there should be stay of proceeding regarding the estate of the deceased pending the outcome of the case. Whereas the judge found the application to be lacking in merits and dismissed it, the reason for dismissing it was that the applicant did not satisfy the conditions for granting of those orders. The judge did not find the plaintiff's suit to be unmaintainable merely because it failed to convince him to grant the interim orders sought. That fact is discernable from the judge's observation that:-

“On the second issue of the applicant suffering

irreparable injury, the plaintiff has not established that the defendants will be unable to compensate him if temporary injunction is not granted and the plaintiff succeeds on trial...”

26. Although from the sentiments expressed by the Judge concerning the plaintiff's failure to apply for review of the decision of the lower court the plaintiff's case may appear weak, weakness of a party's case is no reason for shutting the party from the seat of justice.

27. The upshot of the foregoing is that the notice of preliminary objection is dismissed. Costs of defending the preliminary objection shall be in cause.

Dated, signed and delivered at Nyeri this 17th day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia

