



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 1177 OF 2014

**BONIFACE MBUGUA (SUING ON HIS OWN BEHALF OF THE MEMBERS OF
BEDSANGO RIVER FARMERS GROUP).....PLAINTIFF**

-VERSUS-

ARCH DIOCESE OF NAIROBI REGISTER.....1ST DEFENDANT

FATHER PARTICK KANJA WACHIRA.....2ND DEFENDANT

EDELAVALE TRUST.....3RD DEFENDANT

RULING

1. By a Notice of objection dated the 10th October, 2014 the 3rd Defendant objects *in limine*, not to the suit herein commenced by way of Originating Summons but also to the Notice of Motion dated 29th September, 2014. The gist of the preliminary objection is that the suit is incompetent and incurably defective.
2. The Preliminary objection was urged before me on 3rd November, 2015 when counsel for the 3rd Defendant pushed for the striking out of both the Notice of motion as well as the suit in its entirety for being in contravention of order 2 Rule 4 and 10 of the Civil Procedure Rules. According to counsel, the pleadings were lacking in material particulars. There was no specific reference made of the land claimed. Mr. Makori submitted that in the circumstances the court's hands are tied and had to strike out the pleadings as the requirements for provisions of particulars are mandatory.
3. Mrs. Koech advocating for the 1st and 2nd Defendants supported the preliminary objection and fully associated herself with submissions of learned counsel for the 3rd Defendant, save that Mrs. Koech further made reference to Order 37 Rule 79(c) of the civil Procedure Rules stating that the Originating Summons which was brought under Section 38 of the Limitation of Actions Act (Cap 22) Laws of Kenya was incurably defective as a certified copy of the land claimed copy of the search certificate had not been exhibited. Counsel for the 1st and 2nd Defendants also urged the court to strike out the suit in its entirety.
4. The Applicant's response to the preliminary objection was brief and to the point that the same was

not well founded. Mr. Owuor for the applicant held the view that even though the suit was brought pursuant to the provisions of Order 37 Rule 7, the absence of the particulars was not fatal. The court could invoke its inherent powers under Section 3A, avoid all the technicalities and direct an amendment of the pleadings if the same were inadequate. Counsel did not however seek leave to amend the pleadings as in counsel's words the plaintiff is still investigating to ascertain the correct number.

5. I have considered the rival submissions. I have also read the affidavit in support of the Originating Summons as well as the Summons itself. First though I must be clear on whether the Preliminary Objection as raised meets the threshold of what is a preliminary objection. It is now settled law that a preliminary objection is such objection *in limine* which is to be argued on the assumption that all facts as stated by the objecting party are correct and are not disputed. The preliminary objection must also not be such is to invite a determination of facts or the exercise of judicial discretion: see **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** especially the two leading judgments of Sir Charles Newbold and Justice Law, President and Justice of the Court of Appeal respectively.
6. In the instant case, the preliminary objection meets the standard. The facts are not in dispute. The Plaintiff has wilfully conceded that in both the Originating Summons and the notice of motion, the particulars or details of the property now occupied by the plaintiffs and for which they claim an uninterrupted occupation and user for a period of more than twelve (12) years have not been revealed or pleaded. How fatal then is that to these proceedings?
7. The starting point ideally in suits touching and concerning real property should be Order 4 Rule 3 of the Civil Procedure Rules. The said rule is to the effect that where the subject matter of the suit is immovable property then the plaint or statement of claim must contain a description of the property sufficient to identify it. This rule is far more specific than Order 2 Rules 4 and 10 which are couched in more general terms. The effect of non-compliance with Order 4 Rule 3, in my view is however not fatal to the pleadings for one of two reasons also found under the same Civil Procedure Rules. Firstly is Order 2 Rule 10(2). Under the said rule the court has a discretion to order a party who has not availed particulars in his pleadings to avail such particulars. Secondly, Order 11 Rule 3(2) (b) also gives the court the leeway to order or direct the supply of particulars at any of the Pretrial case conferences. In my view, the particulars referred to both under Order 2 Rules 10 and Order 11 Rule 3 of the Civil Procedure Rules include the particulars under Order 4 generally and in particular Rule 3 of the said Order.
8. Would the same apply to interlocutory applications? I would answer that question in the negative. Interlocutory applications are intended to be disposed of immediately and much earlier in the proceedings. There is no room for delay and for supply of particulars subsequent to their filing and especially where the applicant is not making any effort to amend the interlocutory application. Order 2 Rule 10 and Order 11 Rule 3 would therefore not apply to interlocutory applications and where the application is lacking in any material particular then it cannot stand.
9. I am conscious of the fact that striking out pleadings or suits is a draconian course see **DT Dobie & Co (K) Ltd –vs- Muchina 1982 KLR 1**. The same results in a denial of access to court and the court should always be very reticent before exercising such a power. Yet it is a power that the court has, especially, where the circumstances of the case so dictate or where the survival of the pleadings would serve no particular purpose.
10. I would in the instant case not strike out the Originating Summons. The same can certainly be amended. Likewise nothing should restrain this court at the time of giving directions on the Originating Summons under Order 37 Rule 18 for the amendment of the same or the filing of a Further Affidavit to ensure compliance with the requirements of Order 37, Rule 7(2) of the Civil Procedure Rules.
11. With regard to the Notice of Motion dated 29th September, 2014 no useful purpose will be served

if the same is still left on record. It is pegged on a defective, yet curable originating summons. The motion is itself defective in so far as it fails to identify the land the subject matter of the suit by way of an appropriate legal and physical description. On the Plaintiffs' own admission, the particulars are still unknown to the Plaintiffs. Even if the court was to find that the Plaintiffs are entitled to a negative injunction the court will not be in a position to grant orders touching and concerning an unknown parcel of land. The notice of motion should not survive the preliminary objection, in my view.

12. The upshot is that, I uphold the preliminary objection but only in so far as the notice of motion is concerned. I order that the Notice of Motion dated 29th September, 2014 be struck out.

13. I however award no costs on this representative suit.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the 1st & 2nd Defendants

..... for the 3rd Defendant