REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 14 OF 2020

UNILEVER TEA KENYA LIMITED.....PLAINTIFF

VERSUS

ANDREW CHERUIYOT ROTICH.....1ST DEFENDANT

CHRISTOPHER KIPLAGAT TUITOEK.....2ND DEFENDANT

HENRY KIMAIYO ROTICH.....3RD DEFENDANT

FRANCIS KIPKOGEI KEMBOI.....4TH DEFENDANT

RULING

1. This ruling is on a preliminary objection raised by 1st – 4th defendants by way of a Notice of Preliminary Objection dated 14th May 2020. The notice was filed in court on 15th May, 2020. The objection is a three pronged attack on the plaintiff's suit. It is premised on the following:

1. That the present suit is an abuse of the court process as the plaintiff seeks to enforce an illegality by reliance on a fraudulent title.

2. The suit seeks to legitimize a non-extent title, which is L.R NO 9932/4, IR NO 83722.

3. The principle of public policy, which is EX DOLO MALO NON ORITUR ACTIO (no action arises from deceit) requires that the suit be not entertained.

2. Some background is necessary in order to appreciate well what the dispute is about. The plaintiff claims to own land parcel NO 9932/4; IR NO 83722. The defendants claim to own the same parcel of land but under a different title, which is L.R NO 31892. The parcel of land is 8km from KERICHO MUNICIPALITY, within KERICHO COUNTY. Each side accuses the other of acquiring title illegally. The defendants aver that their title is the genuine one and that this suit itself is an attempt at legitimizing the plaintiff's illegal title. It is the defendants position that the plaintiff's title was fraudulently obtained.

3. The objection filed is meant to end the suit preliminarily. The defendants believe that this is the way to go as the suit is a deception, an abuse of the court process, and an ill-conceived attempt to legitimize an illegal title.

4. The objection was canvassed by way of written submissions. The 1st- 4th defendants' submissions were filed on 5th June, 2020. It was reiterated that the suit is an abuse of the court process as the plaintiff's title does not exist. The land was said to have been allocated to the 1st- 4th defendants, not the plaintiff. The plaintiff's title was said to have been fraudulently obtained, hence deceitful, and therefore caught up by the principle of public policy, which requires that no action be founded on falsehood.

5. The plaintiff's submissions were filed on 12th June, 2020. It was submitted that a preliminary objection is normally based on a pure point of law which is based on the presumption that the facts raised by the other side are correct. In the matter at hand, the objection is said to be based on factual maters which require canvassing through evidence during the trial. The 1st- 4th defendants were said to be disputing the facts pleaded by the plaintiff.

6. I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.

7. A decided case may be useful to drive home my point. **In Achola & Another Vs Hongo & Another (2004) I KLR 462**, the appellants had filed a case against the respondents alleging, interalia, the tort of fraudulent misrepresentation. The second respondent, Municipal Council of Kisumu, which was second defendant in the High Court, raised a preliminary objection that the suit against it was time barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997.

8. A defence which had been previously filed by the 2nd respondent had neither pleaded the defence of limitation nor specifically pleaded that the claim was time-barred under the Public Authorities Limitation Act. The High Court nevertheless allowed the issue of limitation, upheld the preliminary objection, thereby terminating the appellant's claim.

9. On appeal, it was held, interalia, that the 2nd respondent having failed to plead limitation in its defence, was not entitled to rely on that issue and base a preliminary objection on it. The High Court was faulted for allowing the issue of limitation to be raised and in upholding the preliminary objection of the second respondent based on the issue of limitation.

10. In the matter at hand, the 1st – 4th defendants have not filed a defence. The issues raised in the preliminary objection are instead raised in the response to the interlocutory application that came with the suit. It would have made sense if the issue as raised later in the notice was directed to the application. But the notice is directed to the suit, not the application, and given the holding in Achola's case (supra), the approach taken was wrong. A defence should have been filed and in that defence the intention to raise the objection should have been expressed.

11. But that is not the only problem with the objection as raised. The law on how to raise a preliminary objection was stated in the case of **MUKISA BISCUIT MANUFACTURING CO LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696**. And the law is simply that the objection should raise a pure point of law and the point must be based on facts that are either correct, admitted, or undisputed. It cannot be raised if the facts require to be established through trial.

12. The position in Mukhisa's case (supra) has been echoed in later cases – see for instance **MUIRURI VS KIMEMIA (2002) 2 KLR 677**, and **SIRMA VS KIPRONO (2005) I KLR 197**. In this case itself, it is clear that the 1st- 4th defendants are not admitting any of the material facts pleaded by the plaintiff. In fact they are seriously disputing the facts. It is clear that when the defendants are alleging that the plaintiff's title was fraudulently obtained, the plaintiffs are equally alleging fraud against the defendant without expressly saying so. Given this scenario therefore, it is clear that the 1st – 4th defendants were wrong to raise an objection. They should have waited for trial. The facts are contested and the defendants are wrong to assume that they should be held as the genuine title holders at this stage.

13. It is also useful to appreciate that courts of law always endeavor to try a matter and give a decision on the merits. In **PETER NGUGI KABIRI VS ESTHER WANGARI GITHINJI & ANOTHER (2015)eKLR** and **KUTIMA INVESTMENTS LIMITED VS MUTHONI KIHARA & ANOTHER: (2005)eKLR** the Court of Appeal emphasized that it is a fundamental right

for parties to be heard on merits. This court's desire is to see this matter fully heard and determined on its merits.

14. When all is considered therefore, it is clear that the objection raised by 1st – 4th defendants is one for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 12th day of October, 2020.

A. K. KANIARU

JUDGE

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