

**IN THE COURT OF THE CIVIL JUDGE & JMFC AT
SULLIA.**

**PRESENT:- JAYAPRAKASH. V.,
B.A., LL.B.**

Civil Judge & JMFC: SULLIA

Dated this the 6th Day of October 2017

O.S.03/2017

Plaintiff :-

Smt. Katheejamma
W/O Late Mahammad,
Aged about 65 years,
R/at Kandigemoole House
Aivarnadu Village,
Sullia Taluk, D.K.
Rep. by GPA holder of her son
Abdul Mutalib

(Sri. S.N. Advocate)

V/s.

Defendants:-

Damodhara Gowda,
S/O Subraya Gowda,
Aged 64 years,
R/at Kandigemoole House,
Amarapadnur village,
Sullia Taluk, D.K.

(Sri CNG -Advocate)

IA.NO.II

Applicant :-

Katheejamma
V/s.

Opponents:-

Damodhara Gowda

ORDER ON I.A.No.II FILED BY PLAINTIFF
UNDER 26 RULE 9 R/W SECTION
151 OF C.P.C.

The applicant/Plaintiff filed an application under Order 26 Rule 9 read with Section 151 of C.P.C. to appoint an advocate of Sullia Bar Association as Court Commissioner for local investigation for note and report regarding the existing facts like fence, cultivation, compact block along with adjacent remaining tenanted land, residential house with facility of telephone and electricity, improvements of the plaintiff in the suit land and other facility attached to the suit filed etc.

2. In the affidavit annexed to I.A.No.II the applicant stated that, the plaintiff filed suit for declaration that she is the absolute owner of the plaint schedule property. The plaintiff stated that the plaintiff along with her children are the absolute owner in possession and enjoyment of land bearing Sy.No. 150/3C1 an extent of 0.76 acres situated in Amarapadnur Village Sullia Taluk, D.K. more fully described in suit schedule by virtue of grant made by the Land Tribunal Sullia as per Karnataka Land Reforms Act, file No. LRY:443/75-76 wide order dated 20-10-1981 and Form No. 10 dated 16-11-1981. That the suit property is covered with clear-cut fence along with its side field as common block and contains the residential house out house of the plaintiff since from the 1972 onwards. That the portion of land granted to the plaintiff is plotted as Sy.No.150/3C1 for 0.76 acres and remaining portion is plotted as 150/3C2 for 1.03 acres in the name of land lord as per

plotting work carried out by the survey department in 1983 itself.

3. The plaintiff further stated that even though the said granted land plotted as Sy.No. 150/3C1 for 0.76 acres on the basis of occupancy right granted by the Sullia Land Tribunal infavour of the plaintiff as said above, the RTC is not carried out in the name of plaintiff. That on 25-02-2016 the defendant raised objection for repairing fence and told that the RTC of property in possession of the plaintiff stands in his name, instead of his eastern portion in same Sy.No. 150/3C and also directed to take necessary steps by correct the same. That after verification it is revealed that the property granted to the plaintiff in Sy.No.150/3C western portion of 0.76 acres has been subdivided as 150/3C1 for 0.76 acres but wrongly mutated in the name of defendant instead of their portion purchased from the very same land lord.

4. Plaintiff further stated that since the defendant likely deny the title of the plaintiff, the suit for declaration of title over the suit schedule property and consequential injunction and for other relief is sought against the defendant in this suit. Further stated that the plaintiff has title and possession of suit land on the other hand, the defendant neither does not have any title nor having possession of the suit property. That the suit property is covered with clear-cut fence along with its side filed and contains the residential house out house etc of the plaintiff since from the 1972 onwards. Further stated that the plaintiff will put to great

loss and hardship if the annexed application is rejected on the other hand the respondent/defendant will not cause any loss or injustice in allowing the same. Hence the plaintiff prayed to allow the application.

5. On the other hand, the defendant filed detailed objection to I.A.No.II by denying all the averments made in the affidavit annexed to I.A.No.II. The defendant contended that, the application filed by the petitioner Under Order XXVI Rule 9 for appoint court commissioner to hold local investigation is not maintainable at law or on the facts of the case. The defendant submitted that, the said Land Tribunal Sullia passed an order of the occupancy right and granted in name of one Nanjabi, who is unknown person to this respondent. Therefore application is mischievous one and hence the petitioner have no rights to claim any relief from this Hon'ble Court.

6. The defendant further contended that the petitioner/plaintiff falsely stated that, originally the plaintiff's husband named Mohammad Beary claimed occupancy right over suit property and since he dead subsequently in pending the same is granted in the name of petitioner and said occupancy right is not challenged by the land lord or any body. Therefore unless and until petition proof the occupancy right and grant made in her favour the petitioner have no rights to claim the relief of appointment of court commissioner for local investigation of suit property.

7. The defendant contended that unless and until petitioner prove the portion of land granted to the plaintiff is plotted as S.No.150/3C1 for 0.76 acres as per occupancy the petitioner have no rights to claim the relief of appointment of Court commissioner for local investigation of suit property.

8. The defendant further contended that the averments of the petitioner/plaintiff that the name of respondent/defendant wrongly reflected in the RTC of the suit schedule property, and while applied for correction the revenue department issued the endorsement dated 09-11-2016, expressing inability to rectify and to approach competent authority. Therefore since the dispute with regard to title and said complication is purely revenue in nature. Therefore the petitioner/plaintiff can claim any relief against the revenue authority only.

9. The defendant further contended that, the respondent/defendant being in possession of land bearing S.No. 150/3C1 extent 0.66 acres since the year 1956, the dispute arising between the plaintiff and defendant is highly baseless and only with an intention to dupe this respondent/defendant, the petitioner/plaintiff has filed a false suit. Therefore it is submitted that the petitioner/plaintiff has not come with this Court with clean hands and a false affidavit filed with an intention to harass this respondent. The defendant further stated that there is no valid grounds made out for appointment of court commissioner. The documents produced are sufficiently providing evidence to dispose this case of the petitioner. Hence no necessary to appoint

a court commissioner to hold local investigation and a report called for. Hence, defendant prayed to dismiss the application.

10. From the above rival contention, the following points arise for my consideration.

1. Whether the plaintiff has made out Ground to allow I.A.No.II?
 2. What order?
11. Heard the arguments by both sides.
12. Upon appreciation of rival contention in the arguments advanced by the both parties, my findings to the above points as follows;-
- 13.
- Point No. 1 : **In the Negative**
- Point No. 2 : As per final order,
for the following:-

REASONS

13. **POINT NO.1:** - Admittedly the plaintiff has filed the suit for the relief of declaration of her title to the suit schedule property. Upon the rival contentions taken by the party this Court carefully perused the documents and record. In the present case issues are not yet framed and the evidence of plaintiff not yet commenced. In the event of the application is allowed it will amounts to collection of evidence at this stage. A commissioner can be appointed to make local inspection to investigate the facts or materials, which are found in the

property. The matter to be decided by the Court on the basis of evidence, either oral or documentary evidence to be adduced by the parties and it cannot be delegated to the commissioner. The court has to decide the matter on the basis of evidence to be adduced by the parties. Since the evidence of parties is not yet commenced, the application for appointment of commissioner is premature. In this regard this court relied on the decision reported ILR 2007 KAR 3029 Between Miss Renuka v/s Thammanna and others. In this decision, his lordship held at para-7 that:-

“It is well settled position of law that Court Commissioner cannot be appointed to collect evidence in support of a claim. After completion of evidence on both sides, if it is found that there is any ambiguity in the evidence adduced by the parties, then the court may appoint a Commissioner for the purpose of clarification of such an ambiguity. In the instant case, the evidence is not yet commenced and therefore, the question of ambiguity in the evidence will not arise at this stage. The Trial Court without considering the settled position of law committed an error in passing the impugned order appointing a court commissioner. On this ground the impugned order is liable to be quashed”

14. In the present case the trial not yet commenced. The oral and documentary evidence is very much necessary to adjudicate the matter. Hence, at this stage no grounds are made out to allow the application. The application filed by defendant for appointment of court commissioner is premature. The defendant is liberty to file the commission application after completion of evidence on both sides, if it is found that there is

any ambiguity in the evidence adduced by the parties. Hence, I answer point No.1 in the negative.

15. **POINT NO.2:-** In view of the above said reasons stated in point No.1, I proceed to pass the following:

ORDER

The I.A.No.II filed by the applicant/
plaintiff U/o 26 Rule 9 R/ W Sec.151 of C.P.C.
for appointment of court commissioner is hereby
dismissed on cost.

(Typed by me, corrected and then pronounced in the
open Court on this the 6th day of October 2017)

(JAYAPRAKASH.V.)
Civil Judge & JMFC, Sullia.