



**Otieno v Omunya (Civil Appeal E011 of 2024)
[2024] KEHC 13444 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E011 OF 2024
DK KEMEL, J
OCTOBER 30, 2024**

BETWEEN

EUNICE ANYANGO OTIENO APPELLANT

AND

JOANES ONYANGO OMUNYA RESPONDENT

*(An appeal from the Ruling and order of the Chief Magistrate's
Court at Siaya (Hon. Benjamin Limo) Principal Magistrate given on
12th March 2024 in Chief Magistrate's Civil Case No. E035 of 2023)*

JUDGMENT

1. The appeal herein arises from the ruling of Hon. Benjamin Limo (PM) in Siaya Chief Magistrate's Court Civil Case No. E035 of 2023, wherein he dismissed the appellant's preliminary objection dated 3/10/2023 and ordered the matter to proceed to trial.
2. The Appellant was aggrieved by the said ruling and has raised the following grounds of appeal.
 - i. That the learned magistrate erred in law and fact in failing to appreciate sufficiently or at all, the nature of the application which was before him.
 - ii. The learned magistrate erred in law and fact in rendering a decision on a "Preliminary Objection" when what was before him for determination was an application by the applicant which was presented by way of a motion on notice dated 3rd October, 2023 filed under order 2 Rule 15 (1) of the Civil Procedure Rules.
 - iii. The learned magistrate erred in law and fact in failing to appreciate the only preliminary objection which was before the court was in the nature of a response by the Respondent to the Appellant's preliminary objection.



- iv. The learned magistrate erred in law and fact in dismissing the applicant's application on the grounds that the court needed to ascertain the "status of the parties before the court, the nature and terms of the parental responsibility agreement and paternity of the alleged minor" yet the appellant had applied for the striking of the suit for disclosing no reasonable cause of action on the straight forward ground that the suit was debarred by the well known legal maxim of *ex dolo malo non oritur* (no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act).
- v. The learned magistrate erred in law and fact in failing to deal with the issue(s) which the appellant presented to the court for determination and that the magistrate further erred in law when he failed to specifically deal with the Appellant's application which called for a determination but instead dismissed a nonexistent preliminary objection.
- vi. The learned trial magistrate erred in law and fact in failing to allow the Appellant's application yet the application was irresistible in view of the fact that the cause of action pleaded by the Respondent arose at a time when the Respondent was aware that the Appellant was married to another man and that the "romantic relationship" which the Respondent pleaded was therefore immoral.

The appellant therefore prayed that the appeal be allowed with costs and that the ruling of the lower court dated 12/3/2024 be set aside and in place thereof be substituted with an order allowing the Appellant's application dated 3/10/2023 with costs.

- 3. The appeal was canvassed by way of written submissions. Both parties duly complied.
- 4. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and reach its own independent conclusion as to whether to uphold the decision of the trial court. See *Selle Vs. Associated Motor Boat Company Ltd* [1968] EA 123.
- 5. It is noted that the matter before the trial court had not proceeded to trial and that the Appellant had filed an application dated 3/10/2023 seeking to have the suit struck out for being an abuse of the court process since the claim does not disclose any reasonable cause of action in that the claim was founded on an immoral transaction. I have given due consideration to the appeal as well as the rival submissions. I find the issue for determination is whether the appellant's appeal has merit.
- 6. I will start first with the Appellant's gravamen that the learned trial magistrate's ruling was based on a preliminary objection yet the appellant had only filed an application dated 10/3/2023. It is noted that the Respondent had also filed a notice of preliminary objection filed on 15/11/2023 seeking for dismissal of the Appellant's application on grounds that the same was not accompanied by a supporting affidavit. Indeed, the appellant's application aforesaid had been filed under Order 2 Rule 15 (1) (2) of the Civil Procedure Rules which provide as follows.

15(1). at any stage of the proceedings, the court may order to be struck out or amended any pleadings on ground that: -

a. It discloses no reasonable cause of action or defence....."

(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.

From the foregoing provision, it is clear that no affidavit is required to accompany an application seeking for striking of a pleading if the same is brought under sub rule (1) (a) thereof. That being



the position, the Respondent's Notice of Preliminary Objection had no basis in law and hence the Applicant's application dated 3/10/2023 was quite sound in law.

Turning to the Appellant's grouse that the purported Notice of Preliminary Objection alluded to by the learned trial magistrate was a creation of the said magistrate since they had filed an application and not a Notice of Preliminary Objection, it is instructive that a perusal of the said application dated 3/10/2023 leaves no doubt that the same was a kin to a preliminary objection seeking for the striking out of the Respondent's suit. Hence, i find that the learned trial magistrate saw it that way and as such i do not see any prejudice suffered by the Appellant since her application was deemed by the trial court as a preliminary objection. In any event, the maxim of equity that "equity treats as done that which ought to be done" must come in as a fall back regarding the issue in question. I am therefore unable to fault the learned trial magistrate in treating the Appellant's application dated 3/10/2023 as Notice of Preliminary Objection.

7. The Appellant's application dated 3/10/2023 had sought for the striking of the Respondent's suit as the plaintiff disclosed no reasonable cause of action and was founded on an immoral transaction. The definition of a preliminary objection was given in the famous cause of *Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors (1969) EA 696* where it was held;

"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 facts are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

From the foregoing authority, the notice of preliminary objection must be purely on point of law and that if matters of fact are required to be established then the same will not suffice to be a preliminary objection. I have perused the plaint dated 15/5/2023 and note that the same raises several issues inter alia; paternity of a child; economic support to appellant and child; parental responsibility agreement; DNA test; Respondent suffering emotional pain, distress, psychological damage and financial hardship; child upkeep etc.

The defence also raises several issues inter alia; that Respondent was aware that the Appellant was a married woman; existence of an illicit relationship between the parties; financial transactions made by the Respondent were on account of the illicit relationship; parties undergoing DNA tests; that the Respondent was aware that he was not the biological father of the child; that the claim is based on an immoral transaction; that the Respondent did not provide for the child as alleged etc.

From the foregoing issues raised in both the plaint and defence, it is obvious that there is need to establish the facts. Since there is need to ascertain the various issues raised in the pleadings, i find that the preliminary notice raised herein does not meet the threshold.

8. Indeed, the Appellant's notice of preliminary objection sought for the striking of the Respondent's suit. It is noted that striking of suits is a draconian measure and ought to be resorted to as a last resort or where the suit is hopeless and so weak as to be beyond redemption and incurable by amendment. See the case of *Uchumi Supermarkets Ltd & Ano. Vs. Sidhi Investments Ltd (2019) eKLR*.

Looking at the pleadings by the parties herein, i am satisfied that the circumstances do not warrant an order for striking the Respondent's suit. It is appropriate for the parties to present their rival claims and evidence plus documents and that the trial court will render its deliberation on merit. Let the parties present their respective evidence and that the trial court will then determine whether or not the Respondent's claim is founded on an immoral transaction. The trial court is best suited to make



the appropriate orders and hence it is appropriate to allow the trial court to handle the matter to its logical conclusion.

9. In the result, it is my finding that the Appellant's appeal lacks merit. The same is ordered dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 30TH DAY OF OCTOBER, 2024

D. KEMEI

JUDGE

In the presence of :

Amuga for Appellant

Joanes Amunya for Respondent

Ogendo Court Assistant

