



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. E008 OF 2021

JOSEPH OCHELE OJANGO.....APPELLANT

VERSUS

MAURICE OCHIENG LAJI.....1ST RESPONDENT

ANASTASIA LAJI.....2ND RESPONDENT

[Being an Appeal from the Ruling of R.S. Kipngeno (PM) in the Original Nyando SPM'S Court

Civil Case No. E002 of 2021 delivered on 26th January 2021]

JUDGMENT

The appeal before me arises from the Ruling which the learned trial magistrate delivered on a Preliminary Objection.

1. The appeal is premised upon the following 4 grounds;

“1. **THAT** the learned trial magistrate erred in law by failing to determine that a Preliminary Objection must be on a point of law and proceeded to entertain facts in disposing the Preliminary Objection.

2. **THAT** the learned Trial Magistrate erred in law and fact by intentionally ignoring the appellant's submissions in response to the Preliminary Objection raised by the Respondents and wrongfully indicating that the appellants failed to file submissions yet, it is the appellant's counsel who took the Ruling date upon indicating to the court that he had filed submissions in opposition to the Preliminary Objection.

3. **THAT** the learned Trial Magistrate erred in law by failing to hear parties on the issue of relations with the deceased which issue was contested and was subject of the appellant's suit.

4. **THAT** the learned trial magistrate misconstrued his own directions that parties deal with the Preliminary Objection first and proceed to entertain submissions on the application and subsequently to rule on the application to the detriment of the appellant.

5. **THAT** in totality, the appellants herein were never accorded fair hearing.”

2. The Appellant asked this Court to set aside the Ruling delivered on 26th January 2021, and to order that the suit be heard by a different magistrate.

3. The Preliminary Objection which was the genesis of the Ruling being contested through this appeal, is dated 9th January 2021. It raises the following 2 issues;

“1. **The Plaintiff's application and suit are fundamentally flawed and incompetent for want of locus standi.**

2. **Sub judice is pleaded.”**

4. On the basis of those 2 issues, the Defendant asked the court to strike out both the suit and the application dated 6th January 2021.

5. The suit had prayed for a Permanent Injunction to bar the Defendants from removing the body of **FABIANUS ODONGO AYAGO** from the Ahero Sub-District Hospital Mortuary. Secondly, the suit sought orders that would permit the Plaintiff to take the body of **FABIANUS ODONGO AYAGO** for the purposes of giving it a decent burial.

6. The Plaintiff, **JOSEPH OCHELE OJANGO** described himself as the uncle of the deceased.

7. His complaint was that the Defendants, **MAURICE OCHIENG LAJI** and **ANASTASIA LAJI** had;

“..... taken the body to the Ahero sub-district hospital mortuary and have secretly performed postmortem.”

8. He expressed apprehension that the Defendants wanted to bury the deceased without the knowledge of the immediate family members.

9. He asserted that unless the Defendants were stopped, the nephews of the Plaintiff would be deprived of the opportunity to give a decent burial to the deceased.

10. In support of the Plaintiff, the Plaintiff filed a Witness Statement dated 6th January 2021. In the said Witness Statement, the Plaintiff described himself as the Nephew to the deceased.

11. But in the Certificate of Urgency, the Plaintiff was described as “*the uncle*” to the deceased. In effect, the contents of the certificate of urgency echoed the contents of paragraph 3 of the Plaintiff.

12. In the Notice of Motion dated 6th January 2021, and also in the affidavit supporting that application, the Plaintiff said that he is the Uncle of the deceased.

13. In addition to the said description, the Plaintiff also stated, as follows in the grounds on the face of the application dated 6th January 2021;

“d) That the actions of the defendants/ Respondents shall occasion irreparable loss to the Plaintiff/ Applicant nephew.”

14. It is within that context that the Defendants lodged the Preliminary Objection.

15. The record of proceedings shows that on 7th January 2021, the Application dated 6th January 2021 was placed before the trial court.

16. The trial court certified the application as urgent, and also proceeded to grant an interim injunction, *ex parte*.

17. On 11th January 2021 the Defendants filed the Notice of Preliminary Objection. When the matter was next in court on 12th January 2021, the Plaintiff’s application was scheduled for hearing.

18. However, at the request of the Plaintiff’s advocate, the matter was placed aside until 11.00a.m, so as to allow the parties an opportunity to hold discussions.

19. When the matter was called out again, at 11.00a.m, the parties informed the court that they had agreed to first deal with the Preliminary Objection, as the discussions between them had not been fruitful.

20. The record shows that the parties had decided to canvass the Preliminary Objection by way of written submissions.

21. On 19th January 2021, the Plaintiff informed the court that he had been served with the Defendants’ submissions, albeit late.

He said;

“It is for mention to confirm filing of submissions. They served us yesterday evening. Yet it had been agreed that they serve us by Friday. This is an attempt to delay the matter thus increasing the agony of the family members. I have looked at the submissions. The issues raised are issues of fact that don’t amount to preliminary objection; should be issues of law.

Pray for time to respond and a ruling date.”

22. The trial court allowed the Plaintiff time to file submissions. And the court set the Ruling date as 26th January 2021.

23. On the said 26th January 2021 the trial court delivered its Ruling, in which it held as follows;

“Having read the submissions on file, and considering the nature of the dispute at hand, I find that both parties have a common intention of according the deceased a decent send-off. I uphold the Preliminary Objection solely on the basis of the family relationships and the close proximity the Defendants had, taking care of him for the last 5 years of ill- health. This is a tandem with overriding objective under Sections 1A, 1B and 3A of the Civil Procedure Act.

I therefore uphold the preliminary objection.”

24. The Defendants have submitted that the trial court was right to have upheld the preliminary objection, because the Plaintiff failed to demonstrate whether he was the Uncle or the Nephew of the deceased.

25. Whereas the issue of kinship may give rise to the questions about who would have the right to bury the deceased, the trial court did not peg its decision upon the multiple descriptions which the Plaintiff put forward to explain the connection he had with the deceased.

26. The failure by the Plaintiff to demonstrate his interest, with a fair degree of exactitude and precision, is a matter of fact and evidence.

27. Whether or not the inconsistent multiple descriptions of the Plaintiff’s relationship to the deceased constitute false testimony, would be a matter of fact, about which the court would have made a determination after receiving evidence.

28. On his part, the Plaintiff submitted that the trial court fell into the trap, in which it;

“..... inadvertently relied on facts that are contested to allow a preliminary objection, without hearing the appellant.”

29. Although I have found that the trial court had based its decision on matters of fact, I find that the said facts were not contested, as asserted by the Appellant.

30. It is the Appellant alone who gave inconsistent facts concerning his relationship with the deceased. He said that he was an uncle to the deceased, and then also said that he was a nephew.

Plaintiff’s Submissions

31. According to the Appellant, he had filed submissions before the trial court delivered its Ruling. However, the trial court expressly stated that the Plaintiff had not filed submissions.

32. At page 54 of the Record of proceedings, I found the Plaintiff’s submissions on the Preliminary Objection. The said submissions bear the date-stamp of the Nyando Law Courts, with the date of 21st January 2021.

33. On a prima facie basis it appears that the submissions were filed about 5 days before the court delivered its Ruling.

34. Secondly, there is a date-stamp endorsed by the Law Firm of **ADISO & COMPANY ADVOCATES**, on 21st January 2021.

35. That would imply that the Defendants’ advocates had also been served with the submissions, about 5 days before the Ruling.

36. Accordingly, on the basis of that document, I find that the learned trial magistrate ought to have given consideration to the Plaintiff’s submissions.

37. As the trial court did not give consideration to the Plaintiff’s submissions, the Plaintiff was prejudiced, as his case was not accorded appropriate attention by the court.

38. I also find that in reaching his determination the learned trial magistrate delved into the substance of the application and evaluated the evidence tendered by the parties in that regard.

39. With all the respect to the learned magistrate, he went beyond the scope of the Preliminary Objection, when he was supposed to have limited his decision to the said Preliminary Objection.

40. Meanwhile, the Plaintiff was wrong to have asserted that his his submissions were on record as at the date when the court gave a date for Ruling in respect to the Preliminary Objection.

41. The date for Ruling was set on 19th January 2021, whilst the submissions appear to have been filed on 21st January 2021.

Therefore, it was incorrect to assert that when the Plaintiff asked the court for a date of Ruling, the Plaintiff’s submissions were already on the court file. By asserting otherwise, the Appellant was deliberately attempting to mislead this Court.

42. However, I have already found that there is more than one reason to warrant the setting aside of the Ruling in question.

Therefore, the appeal is allowed, the Preliminary Objection dated 9th January 2021 is overruled.

43. I direct that the application dated 7th January 2021 be canvassed on merits.

44. As the Appellant has sought to mislead this Court on one aspect of the case, I find that although the appeal is successful, he is undeserving of an order for costs.

45. Accordingly, each party will meet his or her own costs of the appeal.

46. I also find no reason to order that the case be heard by another Magistrate.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE