



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEALS DIVISION
CIVIL APPEAL NO 66 OF 2009

Local Authorities Provident Fund.....Appellant

Versus

Joseph Njogu Gathu.....1st Respondent

The County Council of Nyeri.....2nd Respondent

RULING

On 10th July 2015 **Ngaah J** dismissed the appellants appeal with costs to the first Respondent. No appeal or review has been preferred against the said decision. Further, no application to stay the said judgement has been filed.

The first Respondent filed his bill of costs on 22nd July 2015 and served a notice of taxation upon the appellants advocates on 3rd September 2015.

The appellants through their advocates filed a notice of preliminary objection against the taxation of the said bill citing the following grounds:-

- i. That no costs can be due from the appellant herewith.*
- ii. That the applicant is not a legal entity and neither is it recognized in law and as such no costs can be due from the appellant in law and in fact.*
- iii. That the said bill and taxation process is contrary to the provisions of Section 5 of the Local Authorities Provident Act.[\[1\]](#)*
- iv. That the said bill or any costs arising out of the same are unenforceable in law.*
- v. That the court lacks the jurisdiction to entertain and tax the said bill as courts do not act in vain and as such, the said bill ought to be struck out forthwith.*

Counsel for the first Respondent filed grounds of opposition to the said preliminary objection on 3rd November 2015 and put forward the following grounds, namely:-

- i. That the preliminary objection lacks merit, is misconceived and an abuse of the court process.
- ii. Section 5 of the Local Authorities Provident Fund Act is silent on the taxation and or unenforceability of a bill of costs against the appellant.
- iii. The appellant's appeal was dismissed on 10th July 2015 with costs to the first respondent.
- iv. There has been no appeal lodged against the order to costs granted.
- v. The appellant is simply being dishonest by alleging that costs should not be taxed against it.
- v. The preliminary objection ought to fail and be dismissed with costs.

On 10th December 2015 both advocates appeared before me and informed the court that they preferred to argue the preliminary objection by way of written submissions. I granted the parties 14 days to file their respective submissions and scheduled the matter for mention on 25th January 2015 to confirm compliance. On the said date, counsel for the appellant did not attend court nor had he filed his submissions. On 4th February 2016 I had finalized writing the Ruling and I directed the registry to issue notice of delivery of the ruling for 8th February 2016.

However, on Friday 5th February 2016 counsel for the Appellant filed their submissions and the same were brought to my attention in morning of 8th February 2016 when I was about to deliver the ruling. I adjourned the ruling for interests of justice to enable me to consider the said submissions though filed late.

As observed earlier, the appellant never preferred an appeal against the judgement delivered on 10th July 2015 nor has the appellant applied for stay of the said judgement. To me, that would have been the proper course of action. The effect is that the said judgement remains in force.

It's not clear what the appellant means by stating that the applicant is not a legal entity. I do not agree with the appellants contention. Section 4 (8) of the Local Authorities Provident Fund Act^[2] provides as follows:-

"The board shall be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and may, for and in connection with the purposes of this Act, purchase, hold, manage and dispose of land and other property and enter into such contracts as it may consider to be necessary or expedient"

The above section effectively addresses the said issue. I have nothing useful to add.

In my view, a preliminary objection can be raised on any of the following grounds:-

- i. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- ii. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- iii. Insufficient specificity in a pleading;
- iv. Legal insufficiency of a pleading (demurrer);
- v. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; and
- vi. Pendency of a prior action or agreement for alternative dispute resolution.

It is now beyond argument that because the issue of jurisdiction is regarded as a threshold issue and a lifeline for continuing any proceedings, objection to it ought to be taken at the earliest opportunity as was done in the present case if there are sufficient materials before the Court to consider it and a decision reached on it before any other step in the proceedings is taken because if there is no jurisdiction, the entire proceedings are a nullity no matter how well conducted.[3] In *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd*[4] Belgore J.S.C. put it plainly thus: -

“Jurisdiction is the very basis on which any Tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; afortiori the Court can suo motu raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but once it is apparent to any party that the Court may not have jurisdiction, it can be raised even viva voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity”.

I find no basis at all in the ground that this court has no jurisdiction to entertain this matter. The high court has wide powers and there is no material before me to suggest that this matter falls outside the jurisdiction of this court.

Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*[5] said:-

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

In the words of Sir Charles Nwebold P at page 701, B:-

“...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 the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

I have already dealt with the ground on the issue of jurisdiction. I have also considered the ground that the applicant is not a legal entity. None of the other grounds raised by the appellant in my view qualify to be regarded as preliminary points of law.

The first ground is that no costs can be due from the appellant herewith. I fail to comprehend the said ground but I am clear in my mind that it cannot qualify to be a point of law. The appellant also states that the said bill and taxation process is contrary to the provisions of Section 5 of the Local Authorities Provident Act.[6]I find nothing before me to suggest how the said section has been violated. The other ground is that the said bill or any costs arising out of the same are unenforceable in law. I find nothing to back the said ground.

I have examined the authorities cited by counsel for the appellant. With tremendous respect I find the said authorities totally unhelpful in the facts of this case hence irrelevant. The upshot is that the preliminary objection has no merit both in law and in substance and the same is hereby dismissed with costs to the first Respondent.

Orders accordingly

Right of appeal 30 days

Dated at Nyeri this 17Th day of February 2016

John M. Mativo

Judge

[1] Cap 272, Laws of Kenya

[2] Cap 272, Laws of Kenya

[3] See *Ndaeyo v. Ogunnaya* (1977) 1 SC 11; *Chacharos v. Ekimpex Ltd.* (1988) 1 NWLR (Pt.68) 88; *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508; *Bakere v. Attorney General of the Federation* (1990) 5 NWLR (Pt. 152) 516 and *Jeric (Nigeria) Ltd v. Union Bank of Nigeria Plc.* (2000) 15 NWLR (Pt. 691) 447.

[4] (1992) 5 NWLR (Pt. 244) 675 at 693,

[5] {1969} E.A 696 AT PAGE 700

[6] Cap 272, Laws of Kenya Editor, Bryan A. Garner,