



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMNAI LAW COURTS

ELC JR MISC CIVIL CASE NO. 253 OF 2012

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR

ORDER SO JUDICIAL REVIEW OF MANDAMUS AND PROHIBITION

AGAINST THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR

AND THE COMMISSIONER OF LANDS

IN THE MATTER OF THE LAND REGISTRATION ACT 2012 SECTIONS 107

AND 108, ARTICLES 10, 73 AND 159 OF THE CONSTITUTION

IN THE MATTER OF LAND REFERENCE NUMBER 8747 THIKA

REPUBLIC.....APPLICANT

VERSUS

1. THE ATTORNEY GENERAL [SUED FOR AND ON

BEHALF OF THE MINISTRY OF LANDS]..1ST RESPONDENT

2. THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

3. THE COMMISSIONER OF LANDS.....3RD RESPONDENT

AND

THUGI RIVER ESTATE LIMITED.....INTERESTED PARTY

EX PARTE SOUTH AND CENTRAL [THIKA] INVESTMENTS LIMITED

RULING

1. By a Notice of Motion dated 7th March, 2016, the Interested Party herein, **Thugi River Estate Limited**, seeks an order that the order issued herein on 18th July, 2014 be set aside and the interested party be granted an unconditional leave to defend these proceedings. It further seeks that the ex parte applicant herein be ordered to surrender the title document to the suit property.

2. By its judgement dated 25th day of March 2014, this Court granted an order of grant is an order of *mandamus* compelling the Respondents to consider the applicant's application for registration as the proprietors of the suit property and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, the Respondent an order of *mandamus* was to issue compelling the Respondents to register the said transfer.

3. It would seem that the said timelines did lapse as a result of which the transfer was registered.

4. By an application dated 3rd February, 2015, the interested party herein applied to be joined to these proceedings which application was allowed on 28th day of July, 2015. The joinder of the interested party to these proceedings therefore paved the way for the interested party to institute the current proceedings.

5. However before the application was heard the ex parte applicant herein raised the following preliminary objections to the application:

1. This Honourable Court is *functus officio* having rendered a judgement on this matter after hearing the contesting parties.

2. The application is based upon a perjured, false and misleading affidavit.

3. The orders sought by the interested party area smokescreen intended to review orders made by Honourable Lady Justice Gacheru in another suit namely ELC 525 of 2008 and preempt the fair and just hearing of contested issues in that suit.

4. The multiplicity of applications by the interested party intended to lead to different rulings ad/or orders over the subject suit title pending full adjudication of the pending case.

6. According to **Mr. Gatheru**, learned counsel for the ex parte applicant, the interested party herein applied to join these proceedings belatedly after judgement had been entered. He also disclosed that there exist other legal proceedings relating to the same property in the Environment and Land Division in which certain conservatory orders have been made. It was the submission of the learned counsel that in light of the said proceedings, the interested party cannot seek the orders sought in these proceedings and the proper Court that is seized of the matter is the said ELC.

7. It was therefore submitted that the present application is a gross abuse of the court process.

8. On his part, **Mr. Mureithi**, learned counsel for the interested party submitted that the matters raised herein were properly speaking not matters which ought to have been raised by way of preliminary objection since they did not meet the threshold of a preliminary objection. In his view, the Court has residual powers to address issues which were not disclosed at the time of the hearing. It was therefore his view that the issues which were raised herein were premature at this stage.

9. The submissions of **Mr. Mureithi** were supported by **Mr. Munene**, learned counsel for the respondent.

Determination

10. I have considered the foregoing.

11. According to the interested party, the decision it seeks to review was arrived at without it being afforded a hearing and in the process certain material facts were not disclosed to the Court. In **Aneriko M Simiyu vs. Redempta Simati Civil Appeal No. 227 of 2004**, the Court of Appeal held that it cannot be correct that a court of law would be said to be *functus officio* when moved to correct a mistake or mistakes on the face of the record because the ultimate result would be injustice. As to whether this Court has the power to review its decisions, the same Court in **Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR** held that the superior court in the matter before it has the residual

power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction. In my view where a mistake has been brought to the attention of the Court which is capable of being remedied, be it by review or otherwise, I do not see any bar to the Court invoking its inherent powers to do so, the nature of the proceedings in question notwithstanding. As to whether that is the position will have to await the hearing of the application on its merits.

12. In support of its preliminary objection the ex parte applicant filed a list of bundle of documents incorporating not only Court orders but a copy of a title document. In his submissions **Mr. Gatheru** dwelt extensively on the facts giving rise to the said Court orders.

13. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** this Court expressed itself, *inter alia*, as follows:

“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court’s task would be to determine what are the agreed facts contained therein whether expressly or by legal implication.”

14. In arriving at that decision, the Court relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case **Law, JA** was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point 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.”

15. As for **Newbold, P**:

“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

16. Also cited was the decision in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

“The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is

forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.”

17. Dealing with the same issue, **Ojwang, J** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”...The applicant's “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”

18. In my view, preliminary objections which have the effect of inviting the Court to make a determination on conflicting factual averments ought not to be entertained. Where a party intends to rely on certain documents, he can only be permitted to do so in arguing the preliminary objection where the factual contents of the said documents are not in dispute. However where the same are disputed, the application or the suit ought to be allowed to proceed in the usual manner as to raise a preliminary objection based thereon not only leads to confusion but unnecessarily prolongs proceedings.

19. In the present case what is purported to be the basis of a preliminary objection is the allegation that the contents of the affidavit in support of the application are perjured, false and misleading. In order for this Court to make a finding along those lines, the Court will have to juxtapose the averments made by the ex parte applicant with those of the interested party and make a factual determination thereon. That, with due respect is not a resolution which can be arrived at on a preliminary objection.

20. It follows that the preliminary objection raised herein is misconceived. The same is dismissed with

costs.

Dated at Nairobi this day 24th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Gatheru Gathemia for the applicant

Miss Mathenge for the interested party

Cc Mutisya