



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 329 OF 2003

1. MEHUBA GELAN KELIL

2. ISHA AWO SHARIFF

3. TOWHIDA AWO SHARIFF

Administrator of the estate of

4. AWO SHARIFF MOHAMED.....APPLICANTS

VERSUS

1. ABDULKADIR SHARIFF ABDIRHIM

2. ECO BANK KENYA LTD

3. SASA GENERAL INVESTMENTS LTD

4. C.S. MAINA LAND REGISTRAR

5. KITONY MAINA KARANJA ADVOCATES.....RESPONDENTS

RULING

Preliminary Objection: court has no jurisdiction

1. I will first provide the background of the Objection herein. The Applicants filed an application dated 16/07/14 seeking the following Orders;

a. Spent

b. That pending hearing and determination of the application inter parties Respondents or any of them be restrained from selling transferring, charging or howsoever dealing with the title No. IR 15855 LR No. 37/262/3 or selling or transferring the charge thereon entry number 24 of 5th November 2008 or howsoever dealing therewith in any manner prejudicial to the Applicants' rights under the prohibitory order of 22nd September, 2008 entry number 24 of 24th September,

2008 on the Register of the said Title.

c. That pursuant to leave granted herein on 15th July, 2014 the Respondents be committed to jail for a maximum period of 6 months and in addition each of them to pay a fine of Kenya Shillings One Million (Kshs.1, 000,000/=) and their respective properties sold and out of proceeds thereof a sum the Honorable Court may think just paid to the Applicants as compensation.

d. That the 4th Respondent be compelled by a mandatory injunction to cancel the registration of the Charge dated 2nd July 2008 by the 1st Respondent to the 2nd Respondent entered and registered by the 4th Respondent on the Register of Title No. IR 15855LR No 37/262/3 on 5th November 2008 under memorial No. 24 on the Register of the said date and be further compelled to enter, re-enter, reinstate and or register the Applicants' transaction under entry No. 24 of 24th September 2008 and the memorial thereunder of the Prohibitory Order issued in HCCC No. 329 of 2003 Milimani Commercial Court prohibiting the 1st Respondent from selling transferring or charging the said Title No. IR 15855 LR No. 37/262/3 and prohibiting all persons included therein the 2nd, 3rd, 4th and 5th Respondent from receiving the said property by sale, purchase, gift, security charge or otherwise engaging howsoever in any transaction prejudicial to the Applicants' decree and their rights vested by the said prohibitory order and an order for the sale of the title IR No. 15855 LR No. 37/262/3 in execution of the decree herein.

e. That the Honourable Court be pleased to make further or other orders for the ends of justice.

f. That the Applicant be awarded costs occasioned hereby.

2. This application is based on several grounds. But, the major gravamen emanates from the Court order made on 22nd September 2008. It was a prohibitory order attaching the 1st Respondent's right of title and interest in Title I.R No. 15855 L.R No. 37/262/3. The Applicants stated that the said order was subsequently presented to the 4th Respondent for registration on 24th September, 2008 and it was booked under entry number 2538. They further alleged that the particulars of the prohibitory order were duly entered against Title I.R No. 15855 L.R No. 37/262/3, but the 4th Respondent failed to sign the entry of the prohibitory order on the aforesaid Title and Register.

3. The Applicants contended that, despite the above facts, the 4th Respondent proceeded to receive and register a charge on 5th November, 2008 in favour of the 2nd Respondent as security of debts owed by the 3rd Respondent. According to them, this was done in total disregard of the prohibitory order issued by the court on 22nd September, 2008. It was therefore the assertion of the Applicants that the Respondents herein should be cited for contempt as the registration of the Charge was done in disobedience of a court order. And, further, the 2nd Respondent has again gone ahead to schedule a public auction for the sale of the suit property. The Applicants therefore state that unless the preemptory orders of stay or injunction sought are granted to restrain the sale and transfer of the said Title and the charge thereon, the execution of the decree by the Applicants shall be rendered nugatory and the applicants will suffer irreparable loss.

Notice of Preliminary Objection

4. It is against the above factual situation that, on 28th July, 2014 the 2nd Respondent gave notice of Preliminary Objection to the Applicants application dated 23rd July, 2014. The tenor of the Objection by the 2nd Respondent is condensed into the following five points:-

a. That this court has no jurisdiction to hear and determine the Applicants' application dated 16th July, 2014 to the extent that it seeks relief against persons who were not parties in the original action herein;

b. There was no notice issued to the Registrar in terms of Order 52 Rule 2 of the Supreme Court

of England before filing of the application dated 14th July, 2014; and any leave granted pursuant to the said application is a nullity in law.

c. The order issued by the court on 22ND September, 2008 was not served upon the 2nd Respondent nor was there any penal notice endorsement on the said order to warrant the taking out of contempt proceedings.

d. The Plaintiffs are estopped from taking out proceedings in terms of the application dated 16th July, 2014 as that is a collateral attack on the orders issued herein by the Court of Appeal and the representations made therein to the aforesaid court.

e. That further this court being an execution court has no jurisdiction to issue an order that would quash and / or compel a public officer such as the Land Registrar to cancel an entry against a Title not subject to the Decree herein which is purely a money decree.

5. When the matter came up for hearing on 9th October, 2014, the Court directed that the Preliminary Objection be heard first. The Preliminary Objection was canvassed by way of written submissions. The 2nd Respondent together with the 1st Respondents filed their submissions on 22/10/14. The 5th Respondent associated itself with these submissions while the 3rd Respondent filed its respective submissions on 18/11/14. The Applicants filed their submissions 17/11/14. Having considered the submissions of counsel and authorities presented the Court takes the following view of the matter.

DETERMINATION

6. I need not re-invent the wheel. It is trite law that a preliminary objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain. See the opinion by **Law JA** on this point in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** when he rendered himself thus:

“So far as I’m aware, 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.”

7. Similarly **Sir Charles Newbold** in the same case stated that:

“The first matter relates to the 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

8. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows on preliminary objections:

“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....."

9. This is the test in determining whether an objection raised by parties is a true objection in the sense of the law. Does the 2nd Respondent's preliminary objection satisfy the requirements set out above? I have meticulously looked at and considered the five points which have been raised in the Preliminary Objection. It contests the jurisdiction of this court to hear the application dated 16th July, 2014 to the extent that the reliefs sought are against persons not party to the suit. It again argues that this court also lacks jurisdiction to issue an order that would quash and/or compel a public officer such as the Land Register to cancel an entry against a Title that is not subject to the Decree. The other objections are that; there was no Notice issued to the Registrar in terms of Order 52 Rule 2 of the Supreme Court of England before filing of the Application dated 14th July, 2014; and there was no service upon Eco bank Limited of any order issued by the Court on 22nd September to warrant the taking out of the contempt proceedings. That is not all; they have raised an objection based on estoppel, for the application dated 16th July, 2013 is a collateral attack on Orders issued by the Court of Appeal and the representations made to the said Court.

10. These objections are a mix of facts and law. They are not free from and are indeed entangled in factual details. They require much probing of evidence in order to determine them. The fact that a person was not a party in the initial proceedings may look very powerful, and a false impression may be created that it is simple and straight forward matter. But wait until you fathom that the law of contempt captures even persons who are not parties in the suit. And that brings to bear one important reality; that the court has to evaluate the entire circumstances under which such party is accused of contempt; whether the person had been served with or had knowledge of the order in question. All these endeavours involve probing of evidence and factual details in the matter. The moment that is course of things, the objection loses the character of a true preliminary objection and rends itself to be tried in the trial. The issue of Notice to the Registrar inasmuch is a legal requirement, the fact of actual giving or service of the Notice is a factual matter which will need to be established through evidence. The same position applies to the objection that the Application dated 16th July, 2014 by the Applicants is a collateral attack on the orders that were issued by the Court of Appeal. The said Orders must be presented to this court and arguments must be made by parties in order for the court to determine whether the application is a collateral attack as alleged. Further on the issue of whether the Court has jurisdiction or not to issue an Order to compel the 4th Respondent to cancel an entry against a Title not subject to the Decree is a contested issue and is tied to allegations that Registrar of Lands was aware of the entry of the prohibitory order which was already entered in the title documents except that the Registrar fraudulently decided to sign it and later on ignored its presence and ramifications in registering the charge. In those circumstances, the issue stops being as simple and clear as suggested by the 2nd Respondent. It will need the careful examination and analysis of facts and evidence to unravel and this is possible only after hearing the application.

11. Clearly, all the issues raised by the 2nd Respondent in the Preliminary Objection are contested by the Applicants and are blurred with factual details and evidence. They will require intense investigation by the court through the plenary inquiry based on normal rules of evidence in the hearing of the application. And, therefore, they are not true preliminary objections. Accordingly, I dismiss the preliminary objection

and direct that the application dated 16th July, 2014 be heard on merits. The points raised in the Preliminary Objection by the 2nd Respondent, will be canvassed within the application dated 16th July, 2014. I will not condemn the 2nd Respondent to costs as the points were raised in the honest belief that they were preliminary objections.

Dated, signed and delivered in court at Nairobi this 16th day of February 2015

F. GIKONYO

JUDGE