



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H.C.C. NO. 2 OF 2014

DAVID GACHURA RICHARD MAKUNU (Suing as the administrator of the Estate of

PETER WACHIRA GACHURA.....PLAINTIFF/APPLICANT

VERSUS

JAKCLINE MBITHE.....DEFENDANT/RESPONDENT

R U L I N G

1. The plaintiff filed a plaint dated 28th January, 2014 simultaneously with a Notice of Motion dated the same day. The plaintiff in his plaint sought the following orders:-
 - a. ***A declaration that the purported family agreement of 14.01.2014 is unlawful ab initio, unenforceable, null and void for all intents and purposes;***
 - b. ***A permanent injunction restraining the defendant, her family members, representatives, employees, servants, agents and anybody else acting or claiming for, through or on her behalf or at her direction, instructions or behest, from accessing, receiving and/or appropriating any benefits such as, but not limited to KENYA POLICE SACCO shares, NSSF benefits, gratuity, pension and or other benefit(s) or property(ies) whether movable or immovable, comprising the intestate estate of the late PETER WACHIRA GACHURA, who died on 11.01.2014***
2. In the notice of motion dated 28th January, 2014 the plaintiff sought orders of injunction and service of the same for compliance.
3. The defendant upon service with summons to enter appearance appeared through the firm of M/S Ndetto & Co. Advocates and filed notice of preliminary objection on a point of law to wit the plaintiff's application of 28th January, 2014, be struck out with costs on the basis that the said application offends express provision of Section 11 to 18 of the Civil Procedure Act(Cap.21) of the Laws of Kenya.
4. The sections referred to thus Sections 11 to 18 of the Civil Procedure Act refers to the place of instituting suits and more specifically in subordinate courts. Section 15(a) (b) and (c) of the Civil Procedure Act provides:-

15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

(a) the defendant or each of the defendants (where there are more than one) at the

time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

5. The plaintiff/applicant filed affidavit to the notice of preliminary objection on 11th February, 2014 averring inter alia; that when he met the defendant for the first time on 14/1/2014 she informed him that she resides at Gitimbine area which is about 1 kilometre from Meru Town; and does business within Meru Town; that his application does not contravene Sections 11-18 of the Civil Procedure Act or any other law, statute or case law and the purported preliminary objection is not a point of law and the defendant is relying on technicalities since she has no plausible response to plaintiff's application.
6. That on 12th May, 2014 both Counsel agreed that both the application dated 28/1/214 and preliminary objection dated 11th February, 2014 be disposed of through written submissions. The plaintiff/applicant filed his submissions on 4th July, 2014 together with list of authorities whereas the defendant/respondent filed her submissions on 5th June, 214. The issue for consideration in the application and preliminary objection can be summed up as follows:-
 - i. *Whether the plaintiff/applicants application dated 28th January, 2014 offends the express provisions of Section 11 to 18 of the Civil Procedure Act (Cap.21) of the Laws of Kenya?*
 - ii. *Whether the plaintiff/applicant's application dated 28th January, 2014 satisfied the condition for an injunction to be granted?*
7. The defendant's case is that she resided with the deceased at Kajiado and still resides at Kajiado County and that the instant suit is wholly premised on the death of the deceased and that in the essence the said death is the cause of action in the suit herein. It is the defendant's contention that the plaintiff's suit is therefore misplaced, bad in law and manifestly a gross abuse of the court process having offended the provisions of Section 11-18 of Civil Procedure Act and more particularly Section 15 of the Civil Procedure Act which is couched in a mandatory terms.
8. The plaintiff on the other hand contended that his application does not contravene Section 11-18 of the Civil Procedure Act and further the purported preliminary objection is not a pure point of law.
9. The plaintiff in paragraph 2 of the amended plaint averred that the defendant is an adult female who was at the time of filing this suit residing at Gitimbine area within the outskirts of Meru Town. The defendant on the other hand vehemently denied the contents of the said paragraph stating she has never resided in any place within Meru Town or its outskirts or otherwise, and that at all material times relating to this suit she was a resident of Kajiado County where she resided with her husband and their minor child.
10. The law on preliminary objection is well settled. The same was clearly amplified in the case of **MUKISA BISCUIT MANUFACTURING CO.LTD V WESTEND DISTRIBUTORS(1969) EA 696** where the court of appeal rendered itself thus:-

“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 unnecessary increase costs and on occasion, confuse the issues. This improper practice should stop.”

11. The gist of the defendant’s notice as framed and as per counsel submissions stems from her place of residence. In my view and understanding the defendant’s preliminary objection on the point cannot be termed to be a pure point of law which can be argued on assumption that all the facts pleaded by the other side are acceptable as correct and cannot be raised if any facts has to be ascertained or are subject of determination. The nature of a preliminary objection in my view is that it goes to the root of the matter and disposes of the suit. The circumstances where a preliminary objection can be successfully pleaded includes issues such as jurisdiction or limitation of actions but not on disputed facts.
12. As regards the defendants contention that the plaintiff’s application offends the provisions of Section 15 of the Civil Procedure Act in that the said Section is couched in a mandatory terms, this court is guided by **Article 165(3),(a) of the Constitution of Kenya, 2010** which Article provides:-

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

The Constitution is the Supreme law of the land and provides that the High Court shall have unlimited original jurisdiction in criminal and civil matters. Section 15 of the Civil Procedure Act in my view cannot overrule the provisions of the Constitution.

13. In the case of **FRANCIS NDICHU GATHOGO V KITAZI ONDAZA CIVIL APPEAL NO. 287 OF 2002** which authority has been relied upon by the plaintiff, the Court of Appeal while adopting the decision in **RIDDLESBURGER & ANOTHER V ROBSON & ANOTHER(1958) EA 375** the court stated **Section 15 of the Civil Procedure ordinance applies only to subordinate courts.(the underlining is mine)** The said decision is binding upon this court and apart from the said decision the jurisdiction of the High Court is donated by the Constitution which is the Supreme Law of the land. The High Court has unlimited jurisdiction in both civil and criminal matters. Section 15 of the Civil Procedure Act do not apply to the High Court nor can it limit the High court jurisdiction as given by the Constitution.
14. The defendant referred to the case of **OWNERS OF MOTOR VESSEL “LILIANS” V CALTEX OIL(K) LTD (1989) KLR 1 (CAK)** on page 14 where Nyarangi ,J.A as he then was stated:-

“Jurisdiction is everything without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. I agree with the decision of the Superior court which is binding on this court, however, the defendant has not demonstrated that this court lacks jurisdiction. I have indeed found this court has jurisdiction to deal with this matter irrespective of where the defendant had been residing, which issue is contentious as per the pleadings; and in view such finding I hold that this matter is properly before this court.
16. I have considered the pleadings in support and in opposition of the application dated 28th January, 2014. The defendant has not denied the plaintiff’s contention that the plaintiff is father to the deceased, nor has she denied passing herself as the widow of the deceased nor has she attached any form of letters of administration empowering her to receive financial benefits accruing to the estate of the deceased; the plaintiff on the other hand has attached an order enabling him to file

this suit; he has annexed documents on deceased marital status; the applicant is seeking to challenge the agreement entered between himself and the defendant and the plaintiff has filed HCSC No.10 of 2014.

17. In the case of **GIELLA V CASSMAN BROWN & CO. LTD(1973) EA 358** the conditions to be satisfied in granting of injunction orders has been settled, in that for a party to succeed he or she must show the following:-

- i. ***An applicant must show a prima facie case with a probability of success***
- ii. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;***
- iii. ***When the court is in doubt, it will decide the application on the balance of convenience.***

18. Having considered the parties pleadings and submissions I am satisfied that the plaintiff has demonstrated that he has a prima facie case with probability of success, that if injunction is not granted the plaintiff will suffer irreparable loss and damage which cannot be adequately compensated by way of damages and that on balance of convenience the application ought to be granted.

19. The orders sought by the plaintiff are intended to preserve the deceased estate and maintain the status quo pending hearing and determination of this suit. The purpose of this application at this stage I believe is to ensure that the suit is not rendered nugatory as allowing the defendant and her agents or any party in this matter to access, receive and/or appropriate any benefits will distort the very subtraction of the case. I am satisfied that the deceased estate should be protected from intermeddling till the matters in issue are properly determined by court of law.

20. The upshot of the matter is that the notice of preliminary objection is unmeritorious and is struck out and the application dated 28th January, 2014 is allowed. I therefore make the following orders:-

- i. ***Notice of preliminary objection dated 11th February, 2014 be and is hereby struck out.***
- ii. ***That the High court has unlimited original jurisdiction in both civil and criminal matters and sections 15 of the Civil Procedure Act do not apply to the High Court.***
- iii. ***That temporary orders of injunction do issue restraining the defendant/respondent, her family members, representatives, employees, servants, agents and anybody acting or claiming for, through or on her behalf or at her direction, instructions or behest from accessing, recovering and/or apportioning any benefits as, but not limited to Kenya Police Sacco shares, NSSF benefit(s), gratuity, pension and any other benefits or property(ies) whether movable or immovable comprising the estate of late Peter Wachira Gachura who died on 11/01/2014 pending hearing and determination of this case.***
- iv. ***Costs of this application be in the cause.***

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF APRIL, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. ***MR. C. Mbaabu for plaintiff- absent***
2. ***Mr. Ndetto for the defendant- absent***
3. ***Parties – absent***
4. ***c/clerk Penina***

J. A. MAKAU

JUDGE