



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBSA

ELC NO. 96 OF 2020

BRYSON KIROMBO SAMBOJA.....PLAINTIFF

- VERSUS -

HUSSEIN HASSAN MOHAMED..... 1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

LAND REGISTRAR MOMBASA.....3RD DEFENDANT

SHIMAKA LEONARD NECHEZA

T/A MARENDE NECHEZA & CO. ADVOCATE.....4TH DEFENDANT

RULING

I. PRELIMINARY

1. The 1st Defendant raised a Notice of Preliminary Objection dated 18th November 2020 and filed in Court on 20th November, 2020. The said preliminary Objection raises a legal issue to the effect that this Honorable Court has no jurisdiction to entertain this suit. It holds that the pecuniary value of the subject matter herein is for a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1,200,000/=) Contrary to the provision of under Section 7 of the Magistrate Court Act 2015.

II. The Submissions

2. On 7th February, 2021 when the matter came up for mention, the Learned Counsel for the 1st Defendant Mr. Abdullahi orally raised the issue of the Preliminary Objection. He indicated that by the matter being handled before this Court would deny his client the right of an appeal on matters emanating from the sub – ordinate court. In the given circumstances, he urged court to consider transferring the matter to be adjudicated before the Sub-ordinate Court.

3. In a brief response, the Learned Counsel M/s. Baraza holding brief for Mr. Weloba for the Plaintiff stated taking that the Preliminary objection had been filed a long time ago she had assumed that the Defendant had actually abandoned it. In saying so, she argued that the more reason they had even pushed the case to the level of case management through compliance and Pre-Trial Conference of the of the matter.

Nonetheless, she opined that the 1st Defendant still had a chance of appeal their case at the court of Appeal in the unfortunate event that they were not successful before this court. She contended that this court was clothed with the unlimited and original jurisdiction under the Provisions of Article 162 2(b) of Constitution of Kenya.

4. On his part, the Learned Counsel Mr. Makuto for the 2nd and 3rd Defendants held that the Preliminary Objection was only regarding an issue of preliminary jurisdiction.

He fully supported the position taken by the Plaintiff and argued that this Court had unlimited jurisdiction and original. Under Article 162 (2) (b) of the Constitution of Kenya. In other words, it could comfortably hear and determine the matter before hand. Nonetheless, he opined that should the 1st Defendant strongly feel it was better for the matter to be transferred to be adjudicated before the Sub – ordinate court from the reasons adduced thereof, he would not be having any objection to it whatsoever.

5. The Learned Counsel, Mr. Ondieki also stressed that the court had original and unlimited jurisdiction to hear and determine this matter. But in event the court found that it had no pecuniary jurisdiction as a first instance they would be comfortable in handling it at that level.

III. Analysis and Determination

6. Having heard all the submissions on the Preliminary objection raised by the 1st Defendant and considered all the relevant provisions of the law, in order to arrive at an informed decision the Honorable Court has framed these two (2) issues for consideration. These are:-

(a) Whether the Preliminary Objection dated 18th November, 2020 by the 1st Defendant meets the threshold of an objection as set out in law and precedents.

(b) Who will bear the costs of the Preliminary Objection.

ISSUE NO. a) Whether the Preliminary Objection dated 18th November, 2020 by the 1st Defendant meets the threshold of an objection as set out in law and precedents.

7. Briefly, the facts of this case are that the Plaintiff herein claims to be the legal and absolute registered proprietor to all that property known as Land Reference Numbers, Plot No. Mombasa/Mwembelegeza/1019 measuring 0.04 hectares and whose value was estimated at the market rate to be a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1, 200, 000.00). He alleges that on diverse dates of March, 2018 upon carrying out an official search at the Land Registry he found out the property had been illegally and wrongfully transferred to the 1st Defendant acting in collusion with the 3rd Defendant. He averred that all these were efforts to deprive and dispossess him of his rightfully owned and acquired property. Thus, on 30th July, 2020 he instituted this suit against the 1st, 2nd and 3rd Defendants seeking for a declaration that the suit land is legally his and not for the 1st Defendant as claimed and that the said transferred to the 1st Defendant to be declared illegal, null and void.

According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of ***Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696***. Where Lord ***Charles Newbold P.*** held ***that a proper preliminary objection constitutes a pure points of law***. The Learned Judge then held 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 demurer 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 in 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. The improper practice should stop”

8. Verbatim, I have cited the case of ***Attorney General & Another –Versus - Andrew Mwaura Githinji & another [2016] eKLR:-*** as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

9. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.

10. Be that as it may, the objection though elicited some reaction from the Plaintiff, the 2nd and 3rd Defendants and the third party particularly on the aspect of this court being clothed with the unlimited and original jurisdiction bestowed on it under the provisions of Article 162 (2) (b) of the Constitution of Kenya, by and large it received there seem to be some consensus on the transferring of the matter to be adjudicated before the Chief Magistrate Court based on the reasons adduced by the 1st Defendant’s Counsel. For these reasons, therefore, I find that the objection raised by the 1st Defendant was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to ***Mukisa Biscuits Manufacturing Co. Ltd (Supra)***.

Suffice it to say, the matter falls squarely on all fours and within the pecuniary jurisdiction of the Magistrate court as provided for under Section 7 (1) of the Magistrate Act. Under this sub heading, therefore the Preliminary objection must succeed.

ISSUE NO. b) Who will bear the costs of the Preliminary Objection.

11. The provision of Section 27 (1) of the Civil Procedure Act, Cap 21, holds that costs follow the events. In this case the results of the Preliminary Objection is that it has been successful. Thus, costs should be in the cause.

IV. Determination

12. Based on the above analysis, this Honorable Court has considered all the issues raised and finally decided that the Preliminary Objection dated 18th November 2020 by the 1st Defendant has merit and the same is allowed under the following directions:

(a) THAT the suit filed before this Honorable Court to be transferred Pursuant to the Provisions of Section 1, 1A, 3, 3A, 18 1(a) of the Civil procedure Act Cap 21, Sections 13(1) and 19(1) of the Environment Act No. 19 of 2012 Sections 150 of The Land Act No. 6 of 2012 and Section 101 of the Land Registration Act No. 3 of 2012 to the Executive Officer of the Chief Magistrate's Court, Civil Division on or before 28th February, 2022 for allocation

(b) THAT the matter be mentioned before the Chief Magistrate on 15th March, 2022 for directions.

(c) THAT the costs to be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2022

HON. JUSTICE L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the Presence of:-

- a) M/s. Yumnah Hassan, the Court Assistant
- b) Mr. Weloba Advocate for the Plaintiff.
- c) Mr. Abdullahi Advocate for the 1st Defendant.
- d) Mr. Makuto for the 2nd and 3rd Defendants.
- e) Mr. Ondieki for the 3rd Party.