



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCC NO.108 OF 2013**

**HESBON PANDE**

**NYAIDHO.....PLAINTIFF**

**VERSUS**

**JOEL OKUDO ONDU.....1ST  
DEFENDANT**

**GEORGE AUMA ASOLA.....2ND  
DEFENDANT**

**MESHACK OWINO ONDU.....3RD  
DEFENDANT**

**MARY ACHIENG .....4TH  
DEFENDANT**

**EDWARD KENNETH OLANDO WAMBIA.....5TH  
DEFENDANT**

**RULING**

1. Two preliminary objections are the subject of this ruling Viz: One filed on 15/12/2014 by Counsel for 2nd, 3rd and 4th defendants and another one filed on 23/10/2014 by Counsel for 1st and 5th defendants. The objections are generally similar, hence one ruling for both of them.
2. The thrust of the objections is that the plaintiff, who was allowed by the lower court to bring his suit as a pauper, is a man of means. He should therefore be dis-paupered and made to pay the costs of the suit. The defendants alleged they are related to the plaintiff, live in the same neighbourhood, and are aware that he is well endowed. Allowing him therefore to sue as a pauper, with the accompanying denial of costs, is said to be unjust, unfair, and an abuse of due process.
3. I heard arguments from both sides on 24/2/2015. From the defendants, I heard that the plaintiff has children in primary and Secondary Schools. Another of his children is at Maseno University. He pays school fees for them. At home, the plaintiff has three semi-permanent houses, possibly owns and cultivates a parcel of land, and should therefore not be treated as a pauper.
4. It was also said that the lower court did not afford a hearing to the defendants before allowing the plaintiff to sue as a pauper. According to the defendants, the procedure, particularly order 33 rules 6 and 7 of Civil Procedure Rules, was not followed. The decided case of **KASIYANE SEWALO VS SOUTH BRITISH INSURANCE CO LTD & Another: Court of Appeal for Eastern**

**Africa, Civil Appeal No.9 of 1942; at page 38, was availed as a guide.**

5. The plaintiff responded by asking the court to visit his home to see that what defendants were alleging is not true. He said he only has one house and a kitchen, not three as alleged by defendants. And yes, his children are in school but fees is paid through bursaries and money from constituency Development Fund. He even has had occasion to conduct fund raising for school fees. He availed a book showing such fund raising.
6. The plaintiff also talked of a previous suit – **C.A. NO.28/03** – where he was allowed to sue as a pauper.
7. I have considered the material laid before me, including the rival arguments. The defendants argued that the plaintiff has children in school and he pays school fees for them, but no evidence of payment was forthcoming. I expected that it would be demonstrated that such payments are made. To me, the plaintiff explained himself well. He showed a book for past fundraising. He also talked of money coming from bursary and Constituency Development fund. The defendants are the ones who alleged that the plaintiff pays school fees. They should have proved that allegation.
8. It was also alleged that the procedure applicable was breached. One thing is clear; the lower court record or proceedings were not availed. Without such proceedings how would I know that the procedure was not followed?

It behoved the defendants to avail the lower court's records. The records would show clearly whether the defendants were afforded a hearing or not.

9. As things stand, I am supposed to agree with the defendants that they were never given a hearing yet the lower court record to back their allegation was not availed. I am not ready to believe the defendants. The omission to avail the lower court's record works against them.
10. I also doubt if the issue should have been raised as a preliminary objection. A Preliminary objection raises a pure point of law. Such point of law is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection can not be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion (please see the decided cases of **MUIRURI V KIMEMIA (2002) 2 KLR 677** and **SIRMA V KIPRONO (2005) 1 KLR 197**).
11. In this case, there is no assumption that the facts pleaded by the other side are correct. If anything, everything is disputed. The defendants do not admit any crucial fact. And order 33 of Civil Procedure Rules, 2010, involves the exercise of Judicial discretion.
12. But there is still more. Some of the issues raised, like saying the defendant is a man of means, are not pure points of law. They are factual points and require evidence to prove them. A preliminary objection is not normally about such issues.
13. Lastly, I wonder why the issue was not raised with the court that issued the order. The normal and usual thing is to challenge the orders in the courts that issues them. But the defendants decided to come here and while doing so failed to avail lower court Proceedings. These are the proceedings I would have used to authenticate some of their averments.
14. The upshot, in light of the foregoing, is that the preliminary objections fail and are hereby dismissed with costs.

**A.K. KANIARU**

**ENVIRONMENT & LAND - JUDGE**

20/8/2015