



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVIL APPEAL NO 27 B OF 2020

SIMON NDUNGU NGANGA1ST APPELLANT

JOHN KARIUKI KURIA 2ND APPELLANT

PATRICK KANYIRI KARIUKI3RD APPELLANT

DANIEL GIKONYO MWANGI4TH APPELLANT

VERSUS

DANIEL NGANGA NJOROGE (Chairman)1ST RESPONDENT

AARON MILLA (Secretary)2ND RESPONDENT

ROSE WAIRIMU KIMANI (Treasurer)3RD RESPONDENT

(Being an Appeal from the Judgment of Thika Chief Magistrate Court - Honourable J M Nang'ea CM delivered on 29/4/2020 in MCLE No. 155 of 2019).

JUDGMENT

Background

1. Through a plaint dated 23/9/2019, the appellants sued the respondents in **Thika MCL & E Case No 155 of 2019**. They contended that they resided and/or operated business in **Murema Estate**. They were aggrieved by a decision taken by **Murema Residents Association** to erect a manned gate to the estate, to enhance security in the estate. They were further aggrieved by what they contended was the Association's decision to charge a fee of Kshs 200. Consequently, they sought restraining orders against the respondents. Further, they sought an order compelling the respondents to remove the gate. In paragraph 2 of the plaint, they described the respondents as "*adult Kenyans of sound mind trading in the manner and style of Murema Residents Associations*". (sic)
2. Together with the plaint, they filed a notice of motion dated 23/9/2019, seeking an interlocutory order restraining the respondents against denying them the right of entry and/or charging what they described as entry fee, and/or harassing, assaulting or mishandling them.
3. The respondents responded to the motion through a replying affidavit sworn by **Rose Wairimu Kimani** on 7/10/2019, in which she deposed, inter alia, that **Murema Estate Residents Association** was a society duly registered under the Societies Act. She added that the Association had duly registered office bearers (officials). Further, she deposed that none of the respondents sued in the said suit was an office bearer of the association. It was the case of the respondents that the suit was misconceived. She exhibited copies of the certificate of registration issued by the Registrar of Societies and a letter by the Registrar of Societies dated 1/7/2019, confirming that the following were the officer bearers of **Murema Estate Residents Association**: Chairman – Edward Kuria Mwangi; Vice Chairman – Mercy Ndumba Muriithi; Secretary – Grace Mukuhi Kamau; Assistant Secretary – Susan Wangui Njoroge; and Treasurer – Mary Wanjiru Njoroge.
4. Together with the affidavit responding to the application, the respondents filed a notice of preliminary objection inviting the court to strike out the suit *in limine* on the grounds that: (i) the suit was fatally defective; and (ii) the suit offended the provisions of the Societies Act which required that a society be sued through the names of its officials. Both the preliminary objection and the application were canvassed contemporaneously before Hon Nang'ea, Chief Magistrate. The learned magistrate subsequently rendered a ruling dated 29/4/2020 in which he held that, in so far as the defendants were not officials of Murema Estate Residents Association, they were non-suited. Consequently, he upheld the respondents' preliminary objection and struck out the suit.

Appeal

5. Aggrieved by the ruling of the Chief Magistrate dated 29/4/2020, the appellants brought this appeal through a memorandum of appeal dated 15/6/2020, urging the court to set aside the ruling of the Chief Magistrate Court and reinstate the suit in the Chief Magistrate Court. They advanced the following verbatim grounds of appeal:

1. ***That the learned magistrate erred in law by failing to find the preliminary objection raised by the respondent did not fit within the description set out in Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd (1968)EA 697.***
2. ***That the learned magistrate erred in law by failing to ascertain facts in contention as to whether the respondents were sued in their respective capacities as officials of Murema Residents Association as opposed to Murema Estate Residents Association.***
3. ***That the learned magistrate erred in law by failing to exercise his discretion properly and in this respect failed to give any effect to Article 159(2)(b) of the Constitution as read together with Section 1A and 1B of the Civil Procedure Act.***
4. ***That the learned magistrate erred by failing to give due consideration to the appellants' submissions.***
5. ***That the learned magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.***

Appellants' Submissions

6. The appeal was canvassed through written submissions dated 1/11/2021, filed through the firm of *Makuno Gacoya & Associates*. Counsel for the appellants condensed grounds 1 and 5 into one ground - that the learned magistrate erred in failing to find that the point raised in the preliminary objection did not meet the threshold of a preliminary objection as defined in *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] EA 696*. Outlining the definition of a preliminary objection in the words of **Charles Newbold JA**, counsel submitted that the pleadings by the parties raised contentious factual issues which required evidence. Counsel contended that the points raised in the preliminary objection could not be determined by the magistrate without referring to evidence.

7. Counsel for the appellants similarly condensed grounds 2 and 4 into a single ground - that the learned magistrate erred by failing to ascertain facts in contention as to whether the defendants were sued in their capacity as officials of **Murema Residents Association** as opposed to **Murema Estate Residents Association** and by failing to give due consideration to the appellants' submissions. Counsel contended that the respondents had challenged the capacity in which they had been sued and they had alleged that they were not officials of Murema Estate Residents Association. Counsel submitted that this was a factual issue that could only have been determined through examination of documentary evidence. Counsel added that in the plaint dated 23/9/2019, the appellants sued the respondents as officials of **Murema Residents Association** and not as officials of **Murema Estate Residents Association**. It was the position of counsel that the distinction between the two associations was a factual issue in dispute that could only have been determined by examination of evidence and not as a preliminary issue disposable without affording the plaintiffs the opportunity to prove their allegations. Counsel made reference to the annexures to the respondents' replying affidavit and submitted that the plaintiffs had properly sued the respondents.

8. On ground number 3 - that the learned magistrate erred in failing to afford the plaintiffs the opportunity to amend the plaint and bring on board the proper defendants, counsel cited **Article 159(2)** of the Constitution and **Order 3(2)** of the Civil Procedure Rules and submitted that the learned magistrate should have exercised his discretion in such a way as to render justice to all the parties to the suit. Counsel urged the court to allow the appeal.

Respondents' Submissions

9. The respondents opposed the appeal through written submissions dated 13/1/2022, filed through the firm of *Farrah Munoko & Company Advocates*. Counsel identified the following as the three issues falling for determination in the appeal: (i) Whether the respondents were correctly sued as defendants in the trial court; (ii) Whether the preliminary objection was correctly upheld; and (iii) Who should bear the costs of this appeal.

10. On whether the respondents were correctly sued as defendants in the trial court, counsel submitted that the respondents were not officials of the association and the appellants had the opportunity to demonstrate otherwise. Counsel cited various decisions by the superior courts and submitted that it was trite law that a society sues or is sued through the names of its office bearers. Counsel contended that the respondent could not be sued as officials of the association because they were not. It was the view of counsel for the respondents that the suit in the magistrate court was fatally defective and could not be cured under the oxygen principle nor under Article 159(2) of the Constitution.

11. On whether the preliminary objection was correctly upheld, counsel made reference to the definition of a preliminary objection as proffered by the Court of Appeal in *Mukisa Biscuits Manufacturing company Limited v West End Distributors Ltd [1969] 696* and to the letter from the Registrar of Societies and submitted that it was clear from the said letter that none of the respondents was an official of the association, hence they had been wrongly sued. Counsel contended that, in the circumstances, the preliminary objection was properly upheld.

12. On costs, counsel cited **Section 27** of the Civil Procedure Act and submitted that the unsuccessful party should bear costs of the appeal.

Analysis and Determination

13. I have perused and considered the entire record of the trial court alongside the record of appeal filed in this court. I have also considered the parties' respective submissions in this appeal. Further, I have considered the relevant legal frameworks and jurisprudence on the issues falling for determination in this appeal. The appellants itemized five (5) grounds of appeal. Their counsel subsequently condensed the five grounds of appeal into three issues. I will make brief sequential analysis and pronouncements on the three issues that were identified by counsel for the appellants.

14. The first issue [which flows from grounds 1 and 5] is whether the learned magistrate erred in failing to find that the preliminary objection raised by the respondents did not fit within the description set out in the East African Court of Appeal decision in the case of **Mukisa Biscuits Manufacturing Co. Ltd** (supra). It is settled law that a preliminary objection is founded and canvassed on the basis of the law and the pleadings before the court. The essence of a preliminary objection was outlined by **Law JA** in the *locus classicus* case of **Mukisa Biscuits Manufacturing Co. Ltd v West End distributors [1969] EA 696** at page 700 in the following words:

“..... 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 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. **Sir Charles Newbold P** rendered himself on the same subject in the same case in the following words:

“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.”

16. The position of the appellant is that the point raised in the notice of preliminary objection leading to the impugned ruling did not meet the threshold of a preliminary objection. They contend that the point required ascertainment of facts. On their part, the respondents contend that the point properly met the threshold of a preliminary objection.

17. The tenor and import of the preliminary objection leading to the impugned ruling was that the respondents were unsuited because they had been sued as officials of an association known as **Murema Residents Association** yet they were not officials of the said association.

18. The question to be answered in the said preliminary objection was whether the respondents were officials of Murema Residents Association. This was, without doubt, a factual question that required ascertainment through either affidavit evidence or oral evidence. Put differently, the point raised in the preliminary objection was one that needed to be canvassed either on the platform of a formal notice of motion supported with an affidavit or through normal trial where oral evidence would be led. The appellants would be expected to tender evidence to controvert the evidence of the respondents. A notice of preliminary objection was certainly not the appropriate platform on which to canvass the point. To that extent, this court entirely agrees with the appellants that the learned magistrate erred in failing to find that the preliminary objection raised by the respondents did not satisfy the threshold spelt out in the **Mukisa Biscuits Case** [supra].

19. The second issue [which flows from grounds 2 and 4] is whether the learned magistrate erred in failing to ascertain facts in contention as to whether the respondents were sued in their capacity as officials of **Murema Residents Associations** as opposed to **Murema Estate Residents Association**. I have made a finding to the effect that the preliminary objection was not the proper platform on which to ascertain the factual question as to whether the respondents were officials of any association. Secondly, it is clear from the impugned ruling that the learned magistrate did not make any finding on the merits of the notice of motion through which the appellants sought injunctive orders. He struck out the notice of motion after erroneously upholding the preliminary objection. In my view, to the extent that the preliminary objection was not the appropriate platform on which to ascertain facts relating to the question as to whether the respondents were suited, the finding of this court on the second issue is that, as at the point of disposing the preliminary objection, there was no proper platform availed to the learned magistrate on which to pronounce himself on the question as to whether the respondents were office bearers of either of the two alleged associations.

20. This appeal has succeeded principally on the ground that the point raised in the preliminary objection did not meet the threshold of a preliminary objection. The question as to whether the respondents are suited remains to be answered by the trial court either on the platform of a formal notice of motion or during trial. Consequently, it would be prejudicial if this court pronounces itself on issue number 3. Pronouncing myself on issue number 3 would be tantamount to directing the trial court on how to answer that question once it is ultimately raised

on a proper platform.

21. For the above reasons, this appeal is allowed in the following terms:

a) The ruling of the Chief Magistrate rendered on 29/4/2020 in Thika MCL & E Case No. 155 of 2019 is set aside.

b) The preliminary objection dated 4/10/2019 is struck out but the defendants in the said suit shall be at liberty to canvass their objection through a formal notice of motion to be filed in the suit.

c) The trial court shall be at liberty to dispose the notice of motion dated 23/9/2019 as it may deem appropriate.

d) Because the error leading to this appeal was made by the trial magistrate, parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF MARCH 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR GACHIMO FOR THE APPELLANTS

MR FARAH FOR THE RESPONDENTS

COURT ASSISTANT: LUCY MUTHONI