



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 126 OF 2019**

**HABIBA ALI MURSAL.....1<sup>ST</sup> PLAINTIFF**

**ABDIAZIZ MOHAMED ADDAWA &**

**ASHA MOHAMUD ADHAWA Suing as the**

**Administrator of the Estate of**

**AMINA SHEIKH AHMED.....2<sup>ND</sup> PLAINTIFF**

**KALI MOHAMED HASSAN OMAR.....3<sup>RD</sup> PLAINTIFF**

**MUHUBA SHEIKH OMAR.....4<sup>TH</sup> PLAINTIFF**

**MALYUN AHMED AMIR.....5<sup>TH</sup> PLAINTIFF**

**-VERSUS-**

**MARIAM NOOR ABDI.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The subject matter herein was fixed and/or listed for hearing on the 3<sup>rd</sup> March 2022, and when the matter was called out during the call over, counsel for the Defendant informed the court that same has since filed and served a Notice of Preliminary Objection. In this regard, counsel for the Defendant therefore sought to have the Notice of Preliminary Objection addressed and/or adjudicate upon beforehand.
2. For clarity, the Notice of Preliminary Objection dated the **2<sup>nd</sup> March 2022**, is premised on the following grounds;
  - a. *The suit be struck out as being null and void and an abuse of the court process.*
  - b. *The Plaintiffs did not sign and file a written authority accompanying the Verifying Affidavit in support of their suit. The suit is therefore null and void.*
  - c. *The 2<sup>nd</sup> Plaintiffs have no authority to file suit for lack of a confirmed grant of letters of administration and are therefore not legal representatives of the alleged deceased Plaintiff.*
  - d. *The suit should therefore be struck out with costs to the Defendant.*
3. Following the filing of the Notice of Preliminary Objection, the court was obliged to issue directions towards and/or pertains the hearing and disposal thereof.
4. In this regard, it is worthy to note that counsel for the Plaintiff indicated that though same were served with the Notice of Preliminary objection on the 2<sup>nd</sup> March 2022, which was the day before, same was however ready to canvas the Preliminary Objection.
5. Pursuant to the foregoing, the court ordered and/or directed that the Preliminary Objection be canvased and/or be disposed of by way of

oral submissions and in this regard the parties tendered their submissions, for and in opposition thereto.

### **SUBMISSIONS BY THE PARTIES**

6. On his part, counsel for the Defendant commenced the submissions by conceding that grant of letters of administration had indeed been issued for and in respect of the estate of Amina Sheik Ahmed, deceased and in this regard, ground number 3 of the Preliminary Objection was rescinded.

7. However, counsel for the Defendant submitted that the suit before the court has been filed by and/or on behalf of five (5) Plaintiffs and despite the suit having been filed by and/or on behalf of 5 Plaintiffs, only the 3<sup>rd</sup> Plaintiff has signed and filed a Verifying Affidavit to the plaint herein.

8. It was further submitted that even though the 3<sup>rd</sup> Plaintiff alleges in the Verifying Affidavit that same has been sworn with the authority of the rest of the Plaintiffs, however no such authority has been executed and/or filed, either as required under Order 4 Rules 3 & 6, as well as Order 1 Rule 13 of the Civil Procedure Rules, 2010.

9. Owing to the foregoing, counsel for the Defendant further submitted that in the absence of the requisite/statutory authority signed by the rest of the Plaintiffs, the suit by and/or on behalf of the rest of the Plaintiffs was unverified.

10. Consequently, counsel for the Defendant submitted that the Plaint on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs were therefore incurably defective and thus ought to be struck out.

11. Finally, counsel for the Defendant submitted that even though the provisions Order 4 Rules 3 & 6 of the Civil Procedure Rules, 2010, give the court a discretion on whether or not to strike out a non-compliant plaint, such discretion, can only be exercised where an Application has been made and upon provision of sufficient explanation by the defaulter.

12. However, in respect of the subject matter, counsel submitted that no Application has since been made to warrant the exercise of discretion and neither has any attempt been made to explain the source and/or basis of the default.

13. On his part, counsel for the Plaintiffs opened his submissions by contending that what was touted as a Preliminary Objection is indeed not a Preliminary Objection, insofar as same raises mixed issues of facts and law. In this regard, counsel for the Plaintiffs sought to have the Preliminary Objection dismissed.

14. Secondly, counsel for the Plaintiffs further submitted that the Defendant herein is in the habit of filing various frivolous objections, whose purport is to defeat the hearing and determination of the suit. Consequently, the court was asked to tame the conduct of the Defendant and refrain her from abusing the due process of the court.

15. Thirdly, counsel for the Plaintiffs submitted that though it is true that only the 3<sup>rd</sup> Plaintiff has filed a Verifying Affidavit, however the failure to file the Verifying Affidavits, was a mistake of counsel and such a mistake ought not to be visited on the Plaintiffs.

16. Finally, counsel for the Plaintiff submitted that the court has a discretion on the matter and that given the nature of the suit and the amount of money involved, the court should exercise restraint from striking out the suit and thereby driving the plaintiffs away from the seat of justice.

17. In a nutshell, counsel for the Plaintiffs contended that striking out is a draconian process and/or procedure and hence same should be used sparingly and with necessary circumspection.

18. Consequently, counsel for the Plaintiffs made a fervent appeal to the court to save the Plaintiffs suit from being struck out.

### **ISSUES FOR DETERMINATION**

19. Having reviewed the Notice of Preliminary Objection dated the 2<sup>nd</sup> March 2022, and having similarly considered the oral submissions, which were tendered by and/or behalf of the parties, the following issues are germane for determination;

*a. Whether the Preliminary Objection herein raises pure points of law, which can be argued and ventilated in-Limine.*

*b. Whether the Plaintiffs suit complies with the provision of Order 4 Rules 3 & 6, as well as Order 1 Rule 13 of the Civil Procedure Rules, 2010.*

*c. Whether the default to file the requisite Verifying Affidavit of the authority or the executed authority is fatal.*

### **ANALYSIS AND DETERMINATION**

#### **ISSUE NUMBER 1**

***Whether the Preliminary Objection herein raises pure points of law, which can be argued and ventilated in-Limine.***

20. In his opening remarks, the Plaintiffs' counsel submitted that what had been filed by and/or on behalf of the Defendant and thereafter ventilated by counsel, did not amount to a Preliminary Objection, whatsoever and howsoever.

21. According to counsel for the Plaintiffs, the document called Notice of Preliminary Objection, touched on and/or concerns issues of facts, which needed to be interrogated and/or investigated and hence the disputed facts took the matter out of the purview of Preliminary Objection.

22. Essentially, the Plaintiffs' counsel sought to have the Preliminary Objection, dismissed without the merits thereof, if any, being addressed.

23. Before delving into and addressing this Preliminary argument by counsel for the Plaintiffs, it is appropriate to take cognizance of the decision in the case of **Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Limited (1969) EA. 696** in which **Sir Charles Newbold P** observed as follows:-

***“ ..... The first matter related 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 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 issues. This improper practice should stop.”***

24. From the foregoing decision, it is evident and/or apparent that a Preliminary Objection is argued and/or premised on the assumption that the fact of the pleadings by the adverse party are correct as presented to the court and there is no factual dispute.

25. On the other hand, a Preliminary Objection is similarly argued, where the issue beforehand does not relate to exercise of discretion. For clarity, the issue in question, must touch on and or concern exposition of law and/or a provision of statute.

26. Perhaps, it is also worthy to take note of the decision in the case of **Oraro v Mbaja [2005] eKLR**, where the court observed as hereunder;

***I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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, and 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. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.***

27. Having taken note of the foregoing decisions, I must now point out that the issues that forms the gravamen of the Preliminary Objection herein is two-fold,

*a. Whether all the Plaintiffs have filed the requisite Verifying Affidavit.*

*b. Whether the authority allowing the 3<sup>rd</sup> Plaintiff to swear Verifying Affidavit on behalf of the rest has been duly filed.*

28. To my mind, the foregoing issues are pure issues of law and same can be argued and/or ventilated without delving into any factual controversy or at all.

29. Consequently, my short answer to the Preliminary argument by counsel for the Plaintiffs is that the Preliminary objection canvassed by the Defendant fits within the four corners of what was defined and elaborated upon in the decision of Mukisa Biscuits Ltd v Westend End Distributor Ltd (Supra).

## **ISSUE NUMBER 2**

**Whether the Plaintiffs suit complies with the provision of Order 4 Rules 3 & 6, as well as Order 1 Rule 13 of the Civil Procedure Rules, 2010.**

30. Having dealt with the Preliminary argument raised by counsel for the Plaintiffs, it is now appropriate to address the issue as to whether or not the impugned documents were indeed filed or otherwise.

31. Firstly, where there are many Plaintiffs, more than one, like in the instant case, the provision of Order 4 Rule 1(2) of the Civil Procedure Rules 2010, require that each Plaintiff shall file a Verifying Affidavit verifying the correctness of the Plaintiff.

32. On the other hand, where there are more Plaintiffs than one the rest of the Plaintiffs and/or parties are at liberty to authorize any one or more of them to swear such Affidavit on their behalf. However, in the event, that any one Plaintiff is so authorized, the authority, to that effect, is required under the law to be duly executed and same must be filed before the court.

33. For the avoidance of doubt, the centrality of the requirement that the authority must be executed and filed in court, is underscored by the provisions of **Order 1 rule 13 of the Civil Procedure Rules, 2010** which provides as hereunder;

**13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]**

*(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.*

*(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.*

34. I must point out that during the submissions by and/or on behalf of counsel by the Plaintiffs, same conceded that only the 3<sup>rd</sup> Plaintiff had signed and/or executed a Verifying Affidavit.

35. On the other hand, the Plaintiffs' counsel further conceded that the rest of the Plaintiffs had not filed the requisite Verifying Affidavits and neither same had execute the written authority, to mandate and/or authorize the Plaintiff to act on their behalf.

36. Based on the concession by counsel for the Plaintiffs, I cannot belabor the point, save as to observe that the impugned documents were neither executed nor filed.

37. In a nutshell, the fact that same were neither executed nor filed is not a factual controversy that would require interrogation of evidence before arriving at a conclusion.

38. In my humble view, the conclusion obtains in the concession that they were not filed and hence they are not there.

**ISSUE NUMBER 3**

**Whether the default to file the requisite Verifying Affidavit of the authority or the executed authority is fatal.**

39. It is trite law that any Plaintiff wishes to file and/or files a suit before a court of law, is enjoined to sign and file a Verifying Affidavit. See Order 4 Rule 1 (2) of the Civil Procedure Rules, 2010.

40. On the other hand, such a Plaintiff is also obliged to sign, execute and/or authorize any other Plaintiff, where they are more than one to act on his/her behalf.

41. However, in the event one is authorized to act on behalf of another, the person donating the authority must sign and cause same to be filed and only then shall it be deemed that the authority was legally donated.

42. From the foregoing, it is worthy to state that it is a requirement of the law that the foregoing documents must not only executed but must be duly filed in court. For clarity, the operative word that is used is shall, which denotes the peremptoriness of the documents in the cause of legal proceedings.

43. The question then that arises, is what happens if the said mandatory documents are neither executed nor filed I accordance with the law or at all.

44. In my humble view, the law makes it mandatory for the said documents to be filed. However, in a situation where any such documents is not filed, the defaulting party is at liberty to apply to court and upon due justification, the court is obliged to consider whether or not to extent time to enable the defaulting party to comply.

45. However, before a court of law can engage with and/or indulge in an Application for extension of time to do an act, it is incumbent upon the claimant to place an Application of sought accompanied by an Affidavit explaining the reasons for default or better still justifying the basis upon which discretion ought to be granted.

46. In support of the foregoing observation, it is appropriate to take note in the decision in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, where the court distilled the principals to be considered for extension of time as hereunder;

*1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*

*2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*

*3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*

*4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*

*5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*

*6. Whether the Application has been brought without undue delay; and*

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

47. At any rate, the point that the court has a discretion on whether or not to strike out a suit where the requisite Affidavits have not been filed, was also discussed in the decision in the case **RESEARCH INTERNATIONAL EAST AFRICA LTD v JULIUS ARISI & 213 OTHERS [2007] eKLR**, where the court of appeal observed as hereunder;

*In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.*

*Moreover, the Grace Ndegwa's case (supra) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.*

*Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.*

*The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.*

48. As pertains to the subject matter, one would have expected the Plaintiffs' counsel to file an Application seeking for extension of time, duly supported by the requisite Affidavits and explaining the reason for non-compliance or otherwise.

49. However, up to and including when the Preliminary Objection was fully canvassed, no Application was placed before the court and neither was an adjournment sought, to enable any Application to be placed before the court, for purposes of consideration and where appropriate exercise of discretion.

50. I must also point out, that discretion of a court of law must be exercised on the basis of reason, explanation and due justification and not on the basis of sympathy, empathy and/or personal prejudices.

51. In respect of the subject matter, no justifiable explanation, has been tendered and/or availed for the evident failure, neglect and/or otherwise omission to comply with the law.

52. Owing to the absence of any justifiable ground and/or explanation, I am left with no option but to find and hold that the breach, infringement and/or otherwise non-compliance was a deliberate and/or intentional in action, which constitute flagrant disregard of the law.

53. To my mind, where a party disregard and/or fails to comply with the law, such deliberate disregard, ought not to be cured vide invocation and reliance of the Provision of Articles 159 2(d) of the Constitution 2010.

54. To fortify the foregoing observation, I can do no better than to adopt and rely on the decision in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR**, where the court of appeal observed as hereunder;

*A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of **MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** Civil Appeal No. 290 of 2012 as follows;*

*“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”*

55. Other than the foregoing decision, where the Honourable court of Appeal spoke to and/or addressed frequent breach, violation and/or disregard of the rules of procedure, it is also important to take note of the decision in the case of **Nicholas Kiptoo Arap Salat v Independence Electoral and Boundaries Commission & 6 Others (2013) eKLR**, where the court stated as hereunder;

*This Court, differently constituted, has spoken on numerous occasions post-2010 on the need for parties to respect rules and not to imagine that they can flout them with impunity. In **HUNTER TRADING COMPANY LTD Vs. ELF OIL KENYA LTD** Civil Appl. Nai 6 of 2010, the Court reiterated the need to guard against arbitrariness and uncertainty when applying the O2 principle and insisted that rules and precedents that are O2 compliant must be fully complied with to maintain consistency and certainty. It warned that “if improperly invoked the O2 principle could easily become an unruly horse”. It is our duty to tame it by application of sound judicial principles.*

*In **RAMJI DEVJI VEKARIA Vs. JOSEPH OYULA**, Eldoret Civil Appeal (Application) No. 154 of 2010, this Court (Waki, Onyango Otieno and Visram JJA) rejected an invitation by counsel to invoke their Section 3A and 3B discretion to save an incompetent appeal as follows;*

*“This is an omission that goes to the root of the Rules i.e. whether a party can file an appeal out of time and without leave of the*

**court. To invoke the provision of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that.” (My emphasis)**

56. Having made the foregoing observation, it is now appropriate to address the issue as to whether the failure to file the Verifying Affidavit and/or authority to act is fatal and, in this regard, I beg to adopt the decision in the case of **Andrew Ireri Njeru - Embu Nyangi Ndiiri Proposed Society Chairman & others v Daniel Nganga Kangi & another [2015] eKLR**, where the court observed as hereunder;

***The plaintiffs herein sue in their capacity as the representative of the proposed Nyangi Ndiiri Society members. The authority to sue signed by the members has not been annexed to the plaint as required by the law.***

57. Based on the foregoing it is my finding and holding that failure to execute and file the requisite Verifying Affidavits and/or the necessary authority under the law renders the impugned documents a nullity ab-initio, unless leave is procured and/or obtained to remedy the situation.

58. In a nutshell, it is my finding and holding that the claim by and/or on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs are not duly verified in accordance of the law and same is therefore incompetent.

**final disposition**

59. In conclusion, the orders that commend themselves to me are as hereunder;

***a. The claims by and/or on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs are incompetent, premature and legally untenable.***

***b. The suit by and/or on behalf of the same 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs be and are hereby struck out.***

***c. Costs of the struck-out claims be are hereby awarded to the Defendant.***

60. However, the suit by and/or on behalf of the 3<sup>rd</sup> Plaintiff is duly verified and same is therefore legitimate. Consequently same shall have to proceed for hearing on merits.

61. In a nutshell, the Notice of Preliminary Objection dated the **2<sup>nd</sup> of March 2022**, be and is hereby allowed, in terms of the orders enumerated in paragraph 59 hereof.

62. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>th</sup> DAY OF MARCH 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula     Court Assistant**

**Mr. Cohen Amanyanya alongside Miss Khadija for the Plaintiffs**

**Mr. Amos Wandago for the Defendant**