



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1565 of 2000

LIVINGSTONE KUNINI NTUTU..... PLAINTIFF
VERSUS
COUNTY COUNCIL OF NAROK.....1ST DEFENDANT
OL KIOMBO LIMITED.....2ND DEFENDANT
THE ATTORNEY GENERAL3RD DEFENDANT

RULING

The ruling herein is on a preliminary objection by the 2nd Defendant dated 2nd November 2012. The 2nd Defendant had earlier on filed an application by way of Notice of Motion dated 18th October 2012, seeking orders that it be allowed to strike off the records the replying affidavit of one Tobiko Shunkur dated 30th September 2009 and submissions dated 21st February, 2011, and that it be granted leave to put in a fresh reply and submissions in place of those struck out. The documents sought to be struck off were filed by Ms J. Maritim & Company Advocates on the 2nd Defendant's behalf.

The Plaintiff filed a replying affidavit to the 2nd Defendant's application sworn on 26th October 2012 and filed on the same date. The 2nd Defendant thereupon filed a Notice of Preliminary Objection dated 2nd November 2012, objecting to the said replying affidavit, on the ground that the Plaintiff has no *locus standi* to reply to the 2nd Defendant's Notice of Motion dated 18th October 2012.

The hearing of the preliminary objection took place on 7th December 2012, and the parties made oral submissions. The 2nd Defendant's counsel submitted that its application deals with the representation of, and conduct of the suit by the 2nd Defendant. Further, that the key arguments made are that the 2nd Defendant's previous lawyer put in submissions that were not in its interests, and that the appointment of that lawyer was done by non-directors of the 2nd Defendant. It was submitted that these arguments are exclusively internal to the 2nd Defendant and do not affect the Plaintiff or other parties.

The 2nd Defendant's Counsel contended that the Plaintiff has no *locus standi* to comment on the Directors or internal workings of the 2nd Defendant, and that his Replying Affidavit therefore has no basis. Further, that it is for the court to verify the veracity of the 2nd Defendant's documents, and that the Plaintiff's Replying Affidavit should be struck out. He argued that while Order 51 of the Civil Procedure Rules entitles a party to respond to an application, the court has discretion to grant an order to strike out such pleadings. It was also submitted that the 2nd Defendant's right to a fair hearing under the Constitution entails its ability to present to the Court documents that reflect its proper position.

Counsel for the Plaintiff on his part submitted that there are several allegation made against the Plaintiff in the 2nd Defendant's Notice of Motion and its supporting affidavit to the effect that he is the one who procured the actions of the 2nd Defendant leading to the filing of the Affidavit sought to be recalled. The Counsel also referred the court to various paragraphs of the supporting affidavit in which the Plaintiff is adversely mentioned.

The Plaintiff's counsel submitted that under Order 51 Rule 3 of the Civil Procedure Rules, no motion shall be made without notice to the parties affected hereby. Further, that Order 51 Rule 14 (1) (b) of the said Rules allows any respondent who wishes to oppose an application to file a Replying affidavit. He averred that the 2nd Defendant served the application on the firm of Kilukumi & Company Advocates, and that the Plaintiff has on the notice of that application filed a Replying affidavit on 26th October 2011.

It was the Plaintiff's Counsel's further submission that the 2nd Defendant's objection is not a proper preliminary objection, for the reason that the issues as to whether or not the 2nd Defendant appointed Maritim & Co Advocates to act for it, and whether or not the Plaintiff colluded in this decision are matters of fact. Further, that these facts have been contested by both the plaintiff and 2nd Defendant. The Counsel relied on the decision in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** that a preliminary objection cannot be taken when it relates to disputed issues of fact.

The Plaintiff' Counsel further argued that even if the court were to find that this is a proper preliminary objection, the Plaintiff has *locus standi* to reply to the 2nd Defendant's Notice of Motion. The reason put forward by the Counsel was that the 2nd Defendant's Notice of Motion seeks to withdraw an affidavit that was responding to a Notice of Motion brought by the 1st Defendant dated 12th March 2009, that seeks to set aside a decree made by consent on 24th December 2005. Further, that the decree gave the Plaintiff, the 1st Defendant and 2nd Defendant certain rights over the suit property after representation made by all the three parties, and that the Plaintiff will be prejudiced by any attempt to withdraw any affidavit relating to that decree or to set aside the decree.

The Plaintiff's Counsel concluded by stating that Article 50 (1) of the Constitution entitles every person the right to have any dispute decided in a fair and public hearing. Further, that Article 159(2) of the Constitution entitles parties to justice without undue regard to procedural technicalities, and that what the court was being asked to do is to deny the Plaintiff his right to a fair hearing.

The 1st and 3rd Defendants counsel supported the preliminary objection and arguments made by the 2nd Defendant.

I have read and carefully considered the submissions by the parties to this application. The main issue before this court is whether the objection raised by the 2nd Defendant is on a point of law, and if so whether it has merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it washeld that

“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 **Black's Law Dictionary, Ninth Edition**, defines *locus standi* as the “right to bring an action or to be heard in a given forum”. *Locus standi* is therefore a point of law that can be properly raised in a preliminary objection. The only outstanding issue for determination therefore is whether the 2nd Defendant's preliminary objection on the Plaintiff's *locus standi* has merit.

I note that The Plaintiff's *locus standi* to institute the suit herein is not disputed, and the parties including the 2nd Defendant have been participating in the proceedings herein. This suit is thus properly before this court. What is being disputed is the Plaintiff's right to be heard in relation to the 2nd Defendant's Notice

of Motion dated 18th October 2012, on the ground that the issues raised in the said application do not concern him.

It is difficult to find merit in that argument, as the Plaintiff having instituted the suit herein and having thereby demonstrated his interest, has the right to participate and be heard in all proceedings brought in the suit. Article 50 (1) of the Constitution provides as follows in this regard:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

The elements of a fair hearing under the rules of natural justice are well established, and include the rule that a party be given an opportunity to be heard in any dispute that is likely to affect his or her interests, unless there are justifiable reasons for a court to act *ex parte*.

This right is also specifically provided with regard to applications brought by way of Notice of Motion under the Civil Procedure Act, such as that of the 2nd Defendant. Order 51 Rule 14 of the Civil Procedure Rules provides as follows:

“14. (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents:

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard *ex parte*.”

It is therefore the finding of this Court that the Plaintiff has a right in law to be heard in relation to the 2nd Defendant’s Notice of Motion. The arguments raised by the parties as to why the Plaintiff should or should not be heard in the circumstances of the said Notice of Motion entail a foray into the arena of contested facts, and are not the province of a preliminary objection. The 2nd Defendant’s preliminary objection therefore fails for the foregoing reasons.

The 2nd Defendant shall meet the costs of the preliminary objection.

Dated, signed and delivered in open court at Nairobi this ___25th___ day of ___February___, 2013.

P. NYAMWEYA
JUDGE