



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 115 of 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY ISSAC GATHUNGU WANJOHI AND ISIAH WAMBUGU MUTONYI FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF LOCAL GOVERNMENT ACT CAP. 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT CAP 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REVOCATION OF AUTHORITY FOR GRAVELLING AND CEDAR POST BARBED WIRE FENCING ON PLOT LR. NO 209/12052 ALONG MOMBASA ROAD NAIROBI.

BETWEEN

ISAAC GATHUNGU WANJOHI1ST APPLICANT

ISIAH KITINDI WAMBUGU MUTONYI2ND APPLICANT

VERSUS

DIRECTOR OF CITY PLANNING, CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

1.This ruling is in respect of a preliminary objection filed on 29th November 2012 in which the following grounds were raised.

1. That the Ex parte have endorsed on their documents a fictitious law firm by the name **Munyu Waiganjo & Company Advocates** contrary to Section 35 (1) of the Advocates Act.
2. That Mr Samuel Wamutu waiganjo Advocate be cited for contempt of court for knowingly endorsing documents with a fictitious law firm by the name **Munyu Waiganjo & Company Advocates** contrary to section 35 (1) of the Advocates Act.
3. That all documents purportedly drawn and filed by the said fictitious firm of **Munyu Waiganjo & company Advocate** on behalf of the Ex parte applicants be struck out.
4. That Mr Samuel Wamutu Waiganjo be compelled to personally bear the Interested Party's costs.

2. On 10th February 2013, the 1st *ex parte* applicant filed a further affidavit sworn on 18th February 2013 in which he deposed that this case was filed by his advocates trading under the firm name "**Munyu Waiganjo and Company Advocates**" on 23.12.2008 and that the case has not been finalized and is continuing. However, the firm "**Munyu Waiganjo and Company Advocates**" ceased to carry on business under the same name and were issued with a "Notice of Cessation of Business" as from 31.12.2009 save for the purposes of winding up the said business in accordance with section 42 of the **Partnership Act**. According to him, the Advocate then and now handling the case is **Samuel W. Waiganjo** who is in the roll of Advocates. Contrary to what is deposed by the interested party, the deponent states that LR No. 209/12052 is two decimal nought three seven (2.037) hectares parcel of land (5.0415) and that it is only a small portion of the said LR No. 209/12052 which has been encroached upon by the state. She, however, reiterates that in the ruling in Petition 154 of 2011 the **Honourable Justice D. S Majanja** stated that the Applicants are the owners of L.R. No 209/12052 who are entitled to the protection of their rights and privileges given in the constitution. It is therefore his view that as his case was filed before cessation of business trading under the firm "**Munyu Waiganjo and Company Advocates**" and the law allows continuation of the use of business name for the purposes of winding up.

3. Further in opposition to the preliminary objection by the interested party the applicants on 19th February 2013, filed the following grounds of opposition:

- 1 That the preliminary objection is misconceived, is an abuse of the process of court, frivolous, incompetent and vexatious and should accordingly be struck out with costs.
- 2 That the interested party has not shown the particular documents which have been endorsed by a fictitious law firm contrary to section 35 (1) of the Advocates Act.
- 3 That English pocked dictionary defines fictitious as imaginary, unreal and not genuine and the Interested party has not submitted evidence that the firm of **Munyu, Waiganjo and Company** was imaginary, unreal and not genuine when they filed documents related to this case or when they were issued with a Notice of Cessation of Business.
- 4 That the Notice of cessation of Business issued by the Registrar of Business Names is specific on the business which can be carried on by a firm which has been issued with a NOTICE OF CESSATION OF BUSINESS. Further Section 42 of the partnership Act provides for the rights and obligation of partners to continue notwithstanding the dissolution of partnership, so far as it may be necessary to wind up the affairs of the partnership and to complete transaction begun but unfinished at the time of dissolution.
- 5 That Samuel W. Waiganjo practicing in the partnership of **Munyu Waiganjo and Company Advocates** prepared Chamber Summons application dated 22.12.2008 and this Honourable court issued orders on 30th December granting leave to the applicant to apply by way of judicial review for orders of Certiorari to remove to the High Court and quash the decision of the Director of City Planning and issue a prohibition to the Director of city Planning not to interfere with the gravelling and cedar post fencing on L. R. No. 209/12052 Nairobi situate along Mombasa road which belong to

the applicants.

6 That further Samuel W. Waiganjo prepared and signed the Notice of Motion dated 15th January, 2009 which is yet to be heard and determined.

4. In my view, the said grounds were totally unnecessary. A party who intends to oppose a preliminary objection is not obliged to file grounds of opposition in respect thereof. The filing of grounds of opposition to a preliminary objection, in my view, has the effect of unnecessarily clogging the proceedings and may at times confuse issues.

5. As if that was not enough a replying affidavit was sworn and filed in opposition to the preliminary objection. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** I expressed myself, *inter alia*, as follows:

“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court’s task would be to determine what are the agreed facts contained therein whether expressly or by legal implication.”

6. In arriving at that decision, I relied on the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**. In that case Law, JA was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an 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.”

7. As for Newbold, P:

“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.

8. I also cited **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** where it was held that:

“The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of

judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

9. Dealing with the same issue, **Ojwang, J**(as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** expressed himself as follows:

"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 an 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. The first matter relates to 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 opposite side are correct. It cannot be raised if any fact is 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 and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"... The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

10. In my view where a defendant has purported to raise preliminary points of law which the plaintiff believes do not meet the threshold for preliminary points of law, the option available to the plaintiff is not to swear an affidavit in response to the said issues as the plaintiff did in this case. What the plaintiff is expected to do is to oppose the said objections on the very grounds that the same do not strictly speaking amount to preliminary points of law.

11. In the present case what is purported to be the basis of a preliminary objection is the allegation that the *ex parte* applicant's documents are endorsed by a fictitious law firm. Whether or not a firm which endorsed the documents on record is fictitious is a factual matter. Evidence is required to prove that the firm in question does not exist in fact. It is only then that the Court can proceed to make a decision on the legal effect of the non-existence of the firm. Therefore unless the facts are agreed, a preliminary objection ought not to be raised where the facts relied upon are disputed.

12. In this case, it is the applicants' case that at the time of the filing of the documents in question the firm was in existence and had not been dissolved.

13. It follows that the preliminary objection raised herein is utterly misconceived and ought not to have been taken at all. It has had the effect of unnecessarily delaying these proceedings. That practice was

deplored by the Court way back on 31st July 1969, the court cautioned litigants from the improper raising of preliminary objections as to do so does nothing but unnecessarily increase costs and, on occasion, confuse the issues. That practice, the Court directed, should stop. If that advice from the Court had been taken seriously, the present objection would not have been raised.

14. Accordingly, the objections raised herein are misconceived and are dismissed and to show the Court's displeasure at the said unwarranted step the costs of this objection are awarded to the *ex parte* applicants. The *ex parte* applicants are at liberty to file their bill arising from the said objection and tax the same for payment forthwith.

Dated at Nairobi this day 26th day of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Waiganjo for the applicant and Mr Abidha for the Respondent.