



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL SUIT NO. 46 OF 2003

JOHN WEPUKHULU}
JOHN TANUI}
SUSAN TANUI} PLAINTIFF

VERSUS

PETER MWEGA}
MWIRERI GICHERU} DEFENDANT

RULING

When this matter came up for hearing on 11/06/2013, Mr. Bundi indicated to Court that he had filed a Preliminary Objection which he wished to be disposed off first. His Preliminary Objection dated 10/06/2013 and filed in Court on 11/06/2013 was then set down for hearing on 02/07/2013. The Preliminary Objection was not argued on 02/07/2013. It was finally argued on 31/07/2013. The Preliminary Objection was based on three grounds namely:-

1. *The suit stands dismissed as per the order issued on 17/10/2011.*
2. *The Honourable Court lacks jurisdiction to preside over the proceedings herein.*
3. *The suit is an abuse of the process of Court.*

At the hearing Mr. Bundi for the Defendants argued that the suit herein stood dismissed as per the Order of Court of 17/10/2011. He therefore argued that the Court had no jurisdiction. He argued that the order was issued by Justice Muketi in the presence of all Counsel for the parties and that the Order was to the effect that a hearing date was to be fixed within the next three months failing which the suit was to stand dismissed. He contended that no date was fixed for the next three months and that the orders have never been set aside and that any proceedings after 24/01/2012 are null and void and as such the Court has no jurisdiction to entertain the matter.

Mr. Samba opposed the Preliminary Objection on grounds that there were no proceedings on 17/10/2011. He however went on to state that the judge referring to the late Justice Muketi, had made many other similar Orders in other files but she unfortunately died and there was no judge before whom a date could be fixed. He urged the Court to save the proceedings herein under Article 159 of the Constitution.

In response, Mr. Bundi argued that the fact that Justice Muketi had passed on did not mean that

parties could not take hearing dates. He argued that Article 159 of the Constitution cannot be invoked to save the proceedings herein.

I have gone through the record as it is in the Court file and do not see any Order made by Justice Muketi on 17/10/2011. The only proceedings by Justice Muketi relate to proceedings of 24/10/2011. Ground one of the Preliminary Objection therefore does not have any basis. It follows therefore that even ground two of the Preliminary Objection is baseless. It cannot be said that the Court lacks jurisdiction when there is no basis for that argument. The Defendant Advocate has not even attempted to show how the suit herein is an abuse of the process of Court as alleged in ground three. This disposes off the Preliminary Objection by the Defendants which I find has no merits. I will however make a few observations regarding this case. Before the firm of Samba & Co. Advocates came on record for the Plaintiffs, the Plaintiffs were represented by the firm of J. M. Wafula & Co. Advocates. On 28/02/2011, a representative of J. M. Wafula & Co. Advocates took a hearing date at the registry. The case was fixed for hearing on 24/10/2011. When the matter was called out on 24/10/2011, Mr. Wafula who was present informed the Court that he was not aware of the matter. This then prompted the judge to make an order that the case be fixed for hearing at the registry on priority basis within the next three months failing which it will stand dismissed. On 17/10/2010, the first Defendant applied for proceedings of 24/10/2010 and extraction of the Court's orders. The Court's order was extracted on the day of request but was wrongly dated 17th October, 2011. It will appear that the Defendants Counsel picked 17/10/2010 as the date the order was given based on the extracted order which was signed and sealed by the Deputy Registrar of the Court. There was lack of due diligence from the clerk of J. M. Wafula failing to inform the Advocate of the date for hearing, through to the extraction of the Court Order and the Defendants Counsel who never bothered to confirm the date when the Court Order was given.

The Preliminary Objection herein fails and the same is dismissed with costs to the Plaintiffs.

It is so ordered.

Dated, signed and delivered in Open Court on this 22nd day of August, 2013.

E. OBAGA

JUDGE

In the absence of parties.

Court Clerk: Lobolia.

E. OBAGA

JUDGE

22/08/2013