



Ntiyeine v Machanje & another (Environment & Land Miscellaneous Case E047 of 2022) [2022] KEELC 12719 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KEELC 12719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E047 OF 2022**

EK WABWOTO, J

MAY 13, 2022

BETWEEN

JOSEPH SENTEU NTIYEINE APPLICANT

AND

EDWIN ANDATI MACHANJE 1ST RESPONDENT

JEREMIAH OKUMU 2ND RESPONDENT

RULING

1. The Applicant filed a miscellaneous application dated 10th March 2022 wherein he sought for the following prayers: -
 - 1) Spent.
 - 2) That pending hearing and determination of the suit, this Honourable court be pleased to issue a permanent injunction restraining the defendant, its servants/ agents or anybody acting on the instruction of the defendant/respondents from dispensing sewerage into the land known as Ngong/ngong 44415 owned by Joseph Senteu Ntiyeine.
 - 3) That the respondents with immediate effect repair his plot no Ngong/ngong 44414 walls in attempt to stop sewerage discharge to my land.
 - 4) That the respondent pays for damages including refund over KSH 35,000/- used in trying to repair his porous plot walls which is intentionally meant to dispense sewage into my plot.
 - 5) That the respondent to remove excess loam soil he dumped into my plot during construction of his plot no Ngong/ngong 44414.



2. The application was also premised on 6 grounds appearing on the face of the application. The said application was supported by an affidavit sworn by the Applicant on 10th March 2022.
3. The Respondents upon being served objected to the application and filed a notice of preliminary objection dated 16th March 2022. In the said preliminary objection, the Respondents raised the following objections.
 - a) That the application is fatally defective for being filed contrary to the mandatory provision of section 19 of the *Civil Procedure Act* and order 3 rule 1 of the *Civil Procedure Rule* 2010, whereby the applicant is seeking permanent injunctive reliefs and damages vide miscellaneous application which is contrary to the clear provisions of the law.
 - b) That the application is fatally defective as it does not raise any justiciable issues and the same amounts to abuse of the court process.
4. On 11th July 2022 during the hearing of the preliminary objection, Mr. Sudi, learned Counsel for the Respondents reiterated the grounds in support of the preliminary objection.
5. Counsel submitted that, the application was fatally defective since the prayers sought ought to have been instituted through a Plaint. He also submitted that the Applicant was seeking permanent injunctive orders without the existence of any plaint on record.
6. It was also submitted that the Applicant was also seeking liquidated damages of Kshs. 35,000/- which claim ought to have been filed before the lower court. Counsel concluded his submissions by stating that the suit could not be saved even by Article 159 of *the Constitution* of Kenya.
7. The Applicant Joseph Senteu Ntiyeine was acting in person and in brief response to the preliminary objection stated that he should be allowed to amend his pleadings and file a plaint.
8. I have considered the preliminary objection together with the submissions from the parties and the main issue for determination is whether the notice of preliminary objection is merited.
9. The case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection 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...”

This statement of the law has been echoed time and again by the courts: see for example, *Oraro v Mbaja* [2007] KLR 141.

In *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that

.... 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”. [emphasis added]
10. In the case of *Morris and Co. Ltd v Kenya Commercial Bank* [2003] 2 EA 605 and *Kihara v Barclays bank of Kenya* [2001] eKLR (Justice Ringera as he then was) in both matters held that unless an



application for temporary injunction contains a prayer for a permanent injunction in the Plaintiff, the application is incompetent and the application is ripe for striking out on that point alone.

11. It was also submitted that Article 159(2)(d) of *the Constitution* is not a panacea to procedural errors occasioned by parties and the same cannot also be used to cure the defective application.
12. I note that the Applicant pleaded with the court to be allowed to amend his pleadings and file a Plaintiff. I wish to state that in the instant case, the amendment cannot be an option since the entire pleadings are faulty. They are pleadings not known in law, the application is defective, improper, unprocedural and an abuse of the court process and the said request cannot be accommodated by the court.
13. In conclusion, I find that the preliminary objection is merited and I hereby proceed to strike out the application with an order that each party bear their own costs of the proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2022.

E.K WABWOTO

JUDGE

In the Virtual Presence of:-

Mr. Joseph Senteu Ntiyeine the Applicant.

Mr. Sudi for the Respondents.

Court Assistant: Caroline

