



REPUBLIC OF KENYA



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Kariuki v Harunani & another; Chief Land Registrar (Interested Party) (Environment & Land Miscellaneous Case E050 of 2022) [2022] KEELC 2775 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2775 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E050 OF 2022

EK WABWOTO, J

JUNE 30, 2022

BETWEEN

GEORGE NJOROGE KARIUKI APPLICANT

AND

SULEIMAN ABDULSHAKUR HARUNANI 1ST RESPONDENT

KARURA INVESTMENT LIMITED 2ND RESPONDENT

AND

CHIEF LAND REGISTRAR INTERESTED PARTY

RULING

1. This ruling is in respect to the interested party's Preliminary Objection dated 19th May 2022 and the Applicant's application seeking leave to amend the Motion as proposed in the Application dated 25th May 2022. The preliminary objection was based on the following grounds:-
 - i) The suit and the Notice of Motion Application offends Section 19 of the *Civil Procedure Act* CAP 21 of the Laws of Kenya.
 - ii) That the suit is time barred under the provisions of Section 4 of 7 of the *Limitation of Actions Act*.
 - iii) That the suit offends order 3 rule 1 of the *Civil Procedure Rules* on the mode of instituting a suit.
 - iv) That the application is otherwise an abuse of the process of this Honourable court.
2. Pursuant to the Courts directions that were issued on 25th May 2022. The court directed that the Preliminary Objection be canvassed simultaneously with the application for leave for amendment of the motion. Parties were directed to file and exchange their written submissions for consideration



during the hearing of the Preliminary Objection. The interested party filed written submissions dated 9th June 2022, while the 1st Respondent filed the written submissions dated 9th June 2022 through the firm of Taibjee Bhalla Advocates LLP and the 2nd Respondent filed their written submissions dated 7th June 2022 through the firm of Macharia- Mwangi & Njeru Advocates. The Interested party also filed its written submissions dated 9th June 2022 through Njoroge Allan Kamau, State Counsel. The Applicant never filed any written submissions but opted to submit orally in opposing the interested party's Preliminary Objection.

3. At the plenary hearing of the Preliminary Objection, Learned Counsel Mr. Allan Kamau appeared for the interested party, Mr. Elijah Mwangi Learned Counsel appeared for the 2nd Respondent, Mr. Ng'ang'a Learned Counsel appeared for the 1st Respondent while Learned Counsel Mr. Majimbo Georgiadis submitted on behalf of the Applicant.
4. In buttressing the Preliminary Objection, Mr. Kamau submitted that, the Motion had been brought pursuant to Sections 152 A, 152B, 152E and 152G of the Land (Amendment) Act No 28 of 2016. Counsel stated that those provisions are basically on the question of eviction and does not provide that an applicant can move this court by way of miscellaneous application.
5. It was also submitted that Section 19 of the *Civil Procedure Act* provides the procedure which ought to be complied with and the Applicant herein had failed to comply with the said provision. Counsel further submitted that the suit is defective for non-compliance with Order 3 rule 1 of the Civil Procedure Code since the same had been instituted without a plaint.
6. On the other limb of the Preliminary Objection, Counsel submitted that the same offends Section 4 and 7 of the Law of *Limitation of Actions Act* Cap 22. Counsel urged the court to look at paragraph 36 of the affidavit sworn in support of the motion to the effect that the court of Appeal had held that Karura Investments was the registered owner of the suit property since 25th October 1993 and they have been in possession for the last 24 years.
7. It was also submitted that the suit was a nonstarter and an abuse of the court process since it was premised on frivolity and recklessness and hence therefore the court should not entertain the same.
8. Learned Counsel, Mr. Mwangi supported the Preliminary Objection. Counsel submitted that the documentation fronted by the Applicant in support of the motion was so voluminous and substantive that can only be sustained with the filing of a plaint and or an originating summons. Counsel maintained that a miscellaneous application can't be sustained in the instant case. The same would only be applicable in the clearest of cases.
9. It was also argued that Section 152 of the *Land Act* deals with substantive matters of law.
10. On the application for amendment of the Motion, Counsel submitted that the same is an abuse of the court process since there is already a ruling on record showing that the 2nd Respondent is the owner of the suit property.
11. Learned Counsel, Mr. Ng'ang'a associated himself with oral submissions made by Mr. Allan Kamau and Mr. Elijah Mwangi in support of the Preliminary Objection. Counsel also relied on his written submissions dated 9th June 2022.
12. It was argued that the Applicant is seeking eviction orders yet the property is registered in the names of the 2nd Respondent who has been in occupation since October 1993.
13. Counsel also submitted that the suit was wrongly commenced by way of plaint and hence the orders sought could not be granted. In that regard, reference was made to the case of *Tatecho Housing and*



Co-op Sacco Limited –Vs- Qwetu Sacco Limited (2021) eKLR and Joseph Kibowen Chengo-Vs- William C. Kisera (2013) eKLR.

14. In opposition to the Preliminary Objection, Learned Counsel for the Applicant Mr. Majimbo submitted that what was before court was a miscellaneous application wherein the Applicant was the bonafide owner of the suit property and they were merely seeking orders/courts assistance in evicting the Respondents. Counsel further submitted that the application was proper since the same is contemplated under the Land Act. In this regard, reference was to the case of Julius L. Marter- Vs- Caleb Arap Rotich (2021) eKLR.
15. The Applicant further submitted that the Preliminary Objection was not merited since the Interested party and the Respondent had made reference to documents on record and this ventured into evidence, which position made the Preliminary Objection untenable.
16. In respect to the limitation of actions, Counsel submitted that, the application had been filed within time after the expiry of the lease between the Plaintiff and the 1st Respondent which lease expired last year hence they commenced the process of eviction. Counsel maintained that the voluminous documentation was meant to support the Applicants position as the legitimate owners of the land.
17. I have considered the Preliminary Objection and the submissions by Counsel. The two main issue for determination is whether the Preliminary Objection is merited and whether the Applicant should be allowed to amend his motion to include an eviction order against the 2nd Respondent.
18. 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...”

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]

19. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources and secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added].



20. The Applicant's motion was brought under sections 152A and 152E of the *Land Act*. On whether a suit can be instituted by a Motion. This suit was instituted pursuant to Section 152E of the *Land Act* seeking for various orders as outlined in that provision. From a reading of Sections 152A and 152E of the *Land Act* it is not clear how a party ought to approach the court for a relief. However regardless of the procedure that is adopted, what matters is that the affected party is accorded an opportunity to be heard. In view of the foregoing, the applicant cannot be faulted on the procedure adopted and neither can such be a reason to defeat the Application. On whether or not the suit could be instituted vide a notice of motion, I am guided by the case of *Abdi Abdulahi Sinko vs Ben Chikamai & 2 Others* (2016) eKLR where Gikonyo J. held that a suit can be properly instituted by way of a notice of motion more so where the specific procedure is not clearly stipulated. Hence therefore this limb of preliminary objection equally fails.
21. On the issue of limitation of time, Counsel for the interested party and the Respondents maintained that the suit was instituted way after the stipulated period since the 2nd Respondent had been in occupation from 23rd October 2003 while the Applicant maintained that the suit was filed after the expiry of the lease agreement between the Applicant and the 1st Respondent wherein the Applicant was seeking for orders to evict them being the registered owner of the suit property.
22. A Preliminary Objection is a pure point of law raised on undisputed facts from pleadings. I have perused the pleadings in the instant case and the annexures filed therein, the Applicant has annexed several voluminous documentations including a certificate of search dated 24th February 2022 which was annexed as annexure "JKN 24" at page 372 to show that he is the registered proprietor of the suit property. He also referred to the lease which expired on 15th October 2021 upon which he sought to evict the 1st Respondent from the same. As such he maintained that the cause of action arose when the lease was to be terminated being 14th October 2021 while the Respondents have maintained that there is a judgment on record which confirms that the 2nd Respondent has been the owner of the suit property from 23rd October 2003. The affidavits on record disclose different dates on when the cause of action arouse. Such a scenario clearly shows that the facts are disputed and it would not be prudent for the court to pronounce itself summarily at this moment. As has been rightly stated in the case of *Oraro vs Mbaja* (2007) 141 KLR, a preliminary objection must not be blurred with factual details liable to be contested. The Interested party who raised the Preliminary Objection being the custodian of the land's record has equally not filed a response signaling the fact that they either agree or disagree with the facts presented herein. It is therefore not tenable for the court to proceed on the assumption that all the facts pleaded are correct. In the circumstances and for the interest of substantive justice, its only fair that the application be heard on its merit. It is therefore my finding that the preliminary objection herein doesn't meet the threshold set in the Mukisa Biscuit's case and the same is hereby dismissed with no orders as to costs.
23. The Applicant has also sought leave of this court to amend the Motion as proposed in the Application dated 25th May 2022 with a view of including the prayers of eviction against the 2nd Respondent who had been joined to these proceedings. Being guided by the case of *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:
- a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings;



d that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;

24. The above mentioned parameters are not exhaustive as far as the grant of leave for amendment is concerned. What that means is that the court has a very wide berth in granting leave to amend. In view of the foregoing and considering the facts herein, I hereby grant leave to the Applicant for the amendment of his Notice of Motion application as proposed in the application dated 25th May 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022

E. K. WABWOTO

JUDGE

In the Presence of:-

Mr. Majimbo for the Applicant.

Mr. Ng'ang'a for the 1st Respondent.

Mr. Mwangi for the 2nd Respondent.

Mr. Allan Kamau for the Interested Party.

E. K. WABWOTO

JUDGE

