REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 381 OF 2011

PALACE INVESTMENT LIMITED.....……..…..…...1ST PLAINTIFF

GEORGE GIKUBU MBUTHIA …….2ND PLAINTIFF

VERSUS

PENINA ACHIENG OYUGI…….1ST DEFENDANT

JANET RUTH OYUGI……..……..……2ND DEFENDANT

NORMAN WILSON OMONDE OYUGI……....…….3RD DEFENDANT

MOHAMED GULF……..……..4TH DEFENDANT

BARON NANGALAMA t/a HEBROS TRADERS.….5TH DEFENDANT

THE ATTORNEY GENERAL…….……..….6TH DEFENDANT

R U L I N G

Before me are two Notices of Preliminary Objection. The first one is dated 7th February 2012 and amended on 20th February 2012 filed on behalf of the 1st, 2nd, 3rd and 4th defendants seeking an order that the Honourable Court strikes out the application and the entire suit. The points relied upon are expressed to be the following:

a. The Applicant is challenging the orders of a subordinate court using the wrong procedure.

b. To the extent that the eviction orders of the subordinate court have not been set aside or appealed against the suit herein

c. Both plaintiffs have no locus to file this suit

d. There is no authority to file a suit by the First Plaintiff who is under receivership

e. There is no proper suit filed by the First Plaintiff and the suit purportedly filed by the said plaintiff should be struck out.

f. That first, second, third and fourth defendants are wrongly sued in this matter

g. The plaintiffs have not established a cause of action against the defendants

The second Notice is dated 18th January 2012 by the 6th defendant and it raises the following points:

1. That the plaint contravenes Section 6 of the Judicature Act Cap 8 Laws of Kenya regarding the protection of judges and judicial officers.

2. The suit is misconceived and bad in law as the plaintiffs should have filed a constitutional petition or applied for judicial review against the 6th Defendant.

3. The plaintiffs are guilty of material non-disclosure as there is an ongoing matter on the suit property that is yet to be determined.

In prosecution the 1st, 2nd and 3rd respondent's said objections, **Mr. Kiplagat** learned counsel, submitted that plaintiff has adopted the wrong procedure in approaching this court since the plaintiffs were evicted vide a court order of the lower court which order has not been challenged. The fact that the suit is a claim for damages, it is contended, does not entitle the Court, as it were, to review the decision of the lower court unless the matter is on appeal. It is further submitted that the plaintiffs have no locus to bring this suit having been removed from the suit property and hence have not demonstrated that they have a cause of action. Further, it is submitted that the 1st plaintiff is a company under receivership and there is no authority to sue. Without locus, it is submitted that under Order 2 rule 15 (1)(c) and (d) the suit is vexatious. On his part the 6th defendant through **Ms. Ndengeri**, submitted that the suit contravenes the provisions of section 6 of the Judicature Act since the person on whose behalf the 6th defendant is sued, **Mr. Okato**, is a judicial officer sued in his personal capacity. According to learned counsel, the plaintiff, if aggrieved by the said decision, should have come by way of judicial review and hence the suit should be dismissed with costs.

In response to the said objections, the 2nd plaintiff, **Mr. Mbuthia**, who also appeared on behalf of the 1st plaintiff, submitted in opposition to the two objections that the facts as pleaded in the plaint are controverted by the 1st to 5th defendants. Those allegations, it is contended have a major bearing on the application for example the allegation of receivership and hence requires evidence. He submitted that under Article 159(2)(d) of the Constitution, justice must be administered without undue regard to procedural technicalities and relied on **Kantaria Investment Ltd vs. The Attorney General Civil Appeal No. 249 of 2003** while submitting that the objection must fail.

I have now considered the objections and the submissions made. In Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J (as he then was) 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".

It is in light of the foregoing that I now wish to consider the issues raised herein. The first issue is the incompetency of the suit in light of the allegations that the suit is challenging the decision of the subordinate court. According to the plaint, the plaintiff claims that he was evicted on the basis of a null and void court order. A preliminary objection, as already indicated above raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct.Assuming, without deciding, that the facts pleaded by the plaintiff are correct that the court order which gave rise to his eviction is null and void, what would be the consequences of such an order? If an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. But if an act is only voidable, then it is not automatically void as is only an irregularity, which may be waived and is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has the discretion whether to set it aside or not and it will do so if the justice of the Court demands and not otherwise meanwhile it remains good and a support for all that has been done under it. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993** and **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

Since here it is alleged that the decision was null and void, going by the above decisions there is no need for an order of the court to set it aside. Whether or not the plaintiffs will succeed in proving that the said order is null and void is a matter which must await the trial.

The second issue raised is that the first plaintiff is under receivership and that that fact is admitted in the grounds of opposition. I have perused the court file herein but I have regrettably failed to find anywhere where it is alleged that the 1st plaintiff is under receivership less still any such admission. Without evidence of the said receivership and as the matter is disputed, it cannot, properly be the subject of a preliminary objection.

With respect to the 6th defendant's objection, it is contended that the suit is filed against **Mr. Okato** who is protected under section 6 of the Judicature Act. The said section provides as follows:

No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.

From the scanty material on record one cannot state with certainty that the conditions enumerated by the above provision have been fulfilled. The objection would have carried more weight if it was made in an application under Order 2 rule 15 of the Civil Procedure Rules in which case evidence would have been availed in form of affidavit to show the exact position of the matter. In the absence of such evidence to make findings favourable to the preliminary objection would be speculative. In Hayo vs. Attorney General & 2 Others Kisumu HCCC No. 80 of 1985 [1992] KLR 200 Khamoni, J stated inter alia:

"The provisions of section 4(5) of the Government Proceedings Act (Cap 40) Laws of Kenya do not shield the defendants respecting the acts or omissions the plaintiff is complaining about in this case. In the same way section 6 of the Judicature Act (Cap 8) does not shield the defendants in this case…To begin with section 6 of the Judicature Act, it states clearly that the officers referred to are protected when "acting judicially". Those are Judge, magistrate or justice of peace and any other person acting judicially and who at the time of acting he acted in good faith believing he had jurisdiction to act. The section then goes on to protect other officers of the Court or other person who are bound to execute the lawful warrants, orders or other process of any judge or such person. That means when a Judge, for example, acting judicially does something which is outside his jurisdiction but does it in good faith believing that he has jurisdiction, he is protected under section 6 of the Judicature Act. If an Executive Officer of the Court or any other person like a Court Broker who is bound to execute the lawful warrants, orders or other process of the judge, does such execution in a situation where the Judge acted without jurisdiction as stated above, that Executive Officer or Court Broker is protected under section 6 of the Judicature Act".

In other words, whereas I am not holding that immunity is inapplicable, my view is that at this stage, based on the material placed before me I cannot conclusively find that the conditions necessary for the invocation of the said immunity have been satisfied.

In conclusion, the issues raised herein are not matters which should have formed a basis for a preliminary objection. No wonder, in his submission **Mr. Kiplagat** sought refuge under the provisions of Order 2 rule 15(1)(c) and (d). However, an application under those provisions is required to be made by way of Notice of Motion as mandated under Order 51 rule 1 of the Civil Procedure Rules. May be if the defendants had come to court via that route they might have has a more formidable objection since they would have been at liberty to provide the facts which is the missing link in the preliminary objections raised herein.

In the result the preliminary objections raised herein have no merit and the same are dismissed with costs to the plaintiffs.

Ruling read, signed and delivered in Court this 24th day of May 2012.

G.V. ODUNGA

JUDGE

In the presence of:

The plaintiff in person

No appearance for the 1st defendant

No appearance for the 2nd defendant