



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 851 OF 2004

WILFRED KORIR.....PLAINTIFF

VERSUS

FARIDUN SULEIMAN ABDALLA.....1ST DEFENDANT

P C JOSEPHAT MURIUKI.....2ND DEFENDANT

IP GEORGE NGUMBAO.....3RD DEFENDANT

THE COMMISSIONER OF POLICE.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

R U L I N G

By a notice of preliminary objection dated 16th March 2007 and filed in this Court on 19th March 2007, the 2nd, 3rd, 4th, and 5th defendants have raised the following issues:

- 1. The suit is fatally defective for offending the mandatory provision (sic) of Order 18 of the Civil Procedure Rules and Cap 15 Laws of Kenya.**
- 2. That the suit is an abuse of the process and bad in law.**
- 3. The suit is based on illegality and hence a nullity.**

On 23rd April 2012, the Court directed the plaintiff to file and serve his submissions in respect of the said

preliminary objection within 14 days and the matter was stood over to 15th May, 2012. By the time of the said directions the 2nd to 5th defendants in this objection had already filed their submissions dated 28th March 2012 on 30th March 2012, while the 1st defendant's submissions in support of the 3rd to 5th defendants' submissions dated 18th April 2012 were filed on 19th April 2012. However, on 15th May 2012, the date the matter was scheduled for further orders, I was not in the station and the matter was placed before **Waweru, J** who directed, in the presence of counsel for the parties that the same be mentioned before me on 30th May 2012. Accordingly, when the matter came before me on the said date, only the plaintiff was represented and his counsel asked for a further period of 7 days within which to file the submissions. The matter was, hence stood over to 11th June 2012. On that date, however, only the said 3rd to 5th defendants were represented and as there were as yet no submissions filed by the plaintiff, I fixed the matter for delivery of ruling on the said objection. This ruling is therefore in respect of the said objections.

In their written submissions, the 3rd to 5th defendants have basically raised two issues. The first issue is that whereas the plaint herein is dated 3rd August 2004, the verifying affidavit was sworn on 30th July 2004. According to the defendants, the verifying affidavit filed herein could not possibly have been sworn to verify the plaint herein since at the time the same was sworn, the instant plaint did not exist. It is therefore their submission that in so far as the verifying affidavit herein purports to verify the plaint herein it amount to perjury and an abuse of the Court process. This, according to the defendants is contrary to Order 4 rule 2 of the Civil Procedure Rules.

The second issue taken by these defendants is that although section 13A(1) of the Government Proceedings Act Chapter 40 Laws of Kenya provides that no proceedings against the Government shall lie or be instituted until after the expiry of a period of 30 days after a notice in writing has been served on the Government in relation to those proceedings, the Plaintiff never served the 2nd, 3rd, 4th or 5th Defendants with the said notice. It is further submitted that if the document relied upon by the plaintiff as constituting the notice is the document appearing at page 56 of the list of documents, the notice was never served on the Attorney General. It is further submitted that the alleged notice does not comply with the said provisions of the law since the last two paragraphs thereof only stipulates a period of 14 days. It is further submitted that according to the plaint the plaintiff was acquitted on 23rd May 2001, yet the said notice is allegedly dated 1st March 2001 long before the said acquittal, which acquittal is the basis for the claim for malicious prosecution.

On behalf of the 1st defendant it is submitted that this suit is fatally defective for failure to comply with section 27 of the Limitation of Actions Act in that in obtaining leave to institute this suit out of time the plaintiff invoked the provisions of repealed Order 49 rule 5 (now Order 50 rule 6) of the Civil Procedure Rules. Leave to institute these proceedings should have been under the Limitation of Actions Act since the said provisions of the Civil Procedure Rules only apply to enlargement of time to comply with actions or the taking of proceedings under the Civil Procedure Rules. Accordingly, the said rules were inapplicable.

I have considered the objections and the submissions herein. The first issue for determination is the circumstances under which a preliminary objection can be entertained. In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696, 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”.

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”.

The reason why it is necessary to plead a preliminary objection is to put the other side on notice. It is therefore, necessary that the particulars of the objection be stated in sufficient details to enable the other side properly comprehend the exact nature of the objection intended to be raised. Vague, hazy and generalised objections should therefore not be entertained. It is therefore my view that the manner in which the objections herein were crafted does not meet the threshold of what is expected from a party pleading a preliminary objection.

Having said that, and as the plaintiff never submitted, I will proceed to determine the said objections on merit. The plaint herein is dated 3rd of August 2004 and was filed the same day. The verifying affidavit on the other hand is dated 30th July 2004 which was a few days before the date of the plaint. On the face of it one may be justified in concluding that the affidavit was sworn before the date of the plaint since the presumption is that the plaint was drawn on the date it bears. That presumption is, however, rebuttable, depending on the facts of each case. The question that arises then is whether, in cases where there is a presumption which is rebuttable that, without the facts being admitted, can be the basis of a preliminary objection. In this case since the defendants have opted to attack the competency of the suit, they have denied the plaintiff the opportunity of proffering an explanation with respect to the discrepancy assuming there is one since a preliminary objection is based on the assumption that the facts as pleaded are correct. Here there are two factual scenarios. The first one is that the plaintiff avers that he did read the plaint. If that is taken to be correct, the only conclusion one would have to arrive at is that the plaint must have been in existence. From that point of view, the preliminary objection would have to fail. On the other hand, going by the dates appearing on the plaint and the affidavit, one may conclude that the plaint was not in existence at the time the affidavit was sworn. It is therefore clear that in the instant case there may be two ways of looking at the matter one of which may sustain the suit. That being the position, it is my view that it may not be safe to allow the objection based on the said ground.

However, even if I were to agree with the defendants that the verifying affidavit was sworn before the suit was filed what then would be the consequences thereof? Since the advent of the overriding objective, the Courts are now more than ever reluctant to summarily terminate proceedings unless the defect complained of is so fundamental that there is no alternative cure to it. In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

“the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act..The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”.

Therefore before I can adopt the more draconian option of striking out the suit, I must ask myself whether there are alternatives available to striking out. In **Galeb Gulam & Another vs. Cyrus Shakhhalaga Kwah Jirongo Nairobi (Milimani) HCCC No. 393 of 2003 [2004] 1 KLR 158** Ringera, J (as he then was) was of the view, a view which I associate myself with, that the court has a discretion not to strike out a plaint which is accompanied by a defective verifying affidavit as the affected party may make an oral

application for the exercise of discretion and the Court should exercise its discretion as appropriate in light of the circumstances. It is therefore clear that to strike out or not to strike out a suit for failure to accompany the plaint with verifying affidavit, which would be the consequences of allowing the first objection, is an exercise of judicial discretion. That, it is old hat, cannot be a basis of a preliminary objection since it is trite that a preliminary objection will not be sustained when what is sought is an exercise of the Court's discretion.

Therefore when faced with such a scenario, the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, the Court of Appeal held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

The same Court in Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

In the foregoing premises, the first ground of objection cannot be sustained.

With respect to the second ground, it is correct that under section 13A(1) of the Government Proceedings Act it is mandatory that for legal proceedings to lie against the Government, a 30 day period notice must be given. How then does no prove that a notice was given? In my view, a preliminary objection is not the appropriate procedure to adopt when it is alleged that a statutory notice was not served since to controvert the same would necessarily require the opposite party to adduce evidence of service. Where it is alleged that no such notice was served, it is prudent that a formal application supported by an affidavit be made unless it is admitted that no such notice was actually served. It is further alleged that the notice which appears at page 56 of the plaintiff's list of documents did not comply with the requirements of the provisions of section 13A foreshad. It is true that the letter appearing at page 56 aforesaid does not strictly comply with the aforesaid provisions. It is also true that the contents of the said letter would lend credence to the accusation that the same are speculative and hence its authenticity doubtful. However, at this stage the Court cannot find with finality and certainty that that is the only notice that was sent by the plaintiff.

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".

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. However, as things stand now the defendants embarked on a journey with the right destination in mind but boarded the wrong vehicle. This vehicle (the preliminary objection) is, unfortunately, unable to take them to their destination. I accordingly, cannot find for the defendants on this objection as well.

With respect to the 1st defendant's objection suffice it to state that there is no notice of preliminary objection by the 1st defendant. The submissions filed on behalf of the 1st defendant while purporting to be in support of the 2nd to 5th defendant's objection raises a totally new point. To make matters worse the new issue raised does not appear anywhere in the 1st defendant's defence. In other words since the issue is not pleaded, it cannot properly be the subject of a preliminary objection. In any case it is trite that a challenge to extension of time to file a suit can only be taken at the hearing of the suit. In Yunes K. Oruta & Another vs. Samwel Muge Nyamato Civil Appeal No. 96 of 1984 [1988] KLR 590, the Court of Appeal held that an objection to extension of time can only be taken at the time of hearing and not by a preliminary point of law or review.

In conclusion whereas I agree that the verifying affidavit herein is incompetent I am not convinced that the said defect warrant the striking out of the suit. Accordingly the verifying affidavit sworn herein is struck out with leave to the plaintiff to file a competent verifying affidavit within 10 days in default of which the suit herein will stand struck out with costs to the defendants. Save for the foregoing the preliminary objections are disallowed but with no order as to costs.

Ruling read and delivered in court this 26th day of June 2012

G.V. ODUNGA

JUDGE

In the presence of:

No appearance for the plaintiff

Miss Owino for the 1st defendant

Miss Ndeda for 2nd to 5th defendants