



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 38 of 2003

DINAH NASIKE TULIENGE.....1ST PLAINTIFF

LOICE NASIMIYU TULIENGE.....2ND PLAINTIFF

MAGDALINE MAJUMA TULIENGE(all suing as Administratrix of the estate of

The late JOHNSON TULIENGE WALELA.....3RD PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA.....1ST DEFENDANT

JONE BROOKS CONSULTING LIMITED.....2ND DEFENDANT

FLAKONA WAFULA.....3RD DEFENDANT

RULING

There are 2 Preliminary Objections for determination one by the 1st Defendant and the other by the 3rd Defendant. The 2 Preliminary Objections were argued together on the 28.7.2006, I will deal with the Preliminary Objection of the 3rd Defendant first.

By Notice of Preliminary Objection dated 5th October 2004 the advocate for the 3rd Defendant has applied for the striking out of the Plaintiffs' suit as against the 3rd Defendant on the following grounds:

- 1. That this suit is incompetent and constitutes an abuse of the due process of the law for failing to take out summonses to enter appearance to accompany the Plaintiff and the period of validity for summonses having expired contrary to Orders IV and V of the Civil Procedure Rules.**
- 2. The Plaintiff have no *locus standi* in law and in fact to institute and maintain this suit whose purport is to protect and enforce the rights and interests of One John Tulienge Walela (deceased) in parcel No. KAKAMEGA/NZOIA 10/24 in the absence of Letters of Administration issued in favour of the Plaintiffs in respect of his Estate.**
- 3. The 3rd Defendant shall rely on the grounds set out in the 1st Defendant's Notice of preliminary objection dated 28.4.03 and its chamber summons application dated 28.4.2003 as part**

of this preliminary objection.

Mr. Ingosi holding brief for the firm of Ochieng, Onyango, Kibet & Ohaga said that his instructions are to proceed with the Preliminary Objection dated 28.4.2003

Mr. Mwetich holding brief for Mrs Munialo for the Plaintiff said that his instructions were to take a hearing date for the application, that it was already 6.30 pm and Mrs Munialo had to go since she has a young child.

The court directed that the preliminary objection be heard on the 28.7.2006 at 11 am.

On the 28.7.2006 Mr. Ragot for the 3rd Defendant said he was ready to proceed to arguing ground 1 of the preliminary objection.

Mr. Njoroge holding brief for Mrs. Munialo said that his instructions were that Mrs Munialo will be available at 2pm and he applies for adjournment.

The Court refused the adjournment and ordered that the matter proceeds.

Mr. Ragot submitted that no summons to enter appearance was issued or prepared by the plaintiffs as required by order 4 sub-rule 5 of the Civil Procedure rules. That it is mandatory that a suit commenced by way of Plaint must be accompanied by Summons. He submitted that in any event where there are no valid summons the court can dismiss the suit on its own motion.

Counsel argued that the 3rd Defendant did not file Memorandum of appearance of Defence. They only filed notice of Appointment.

Counsel in support of the application cited the authority in the case of **UDAY KUMAR CHANDALAL RAJANI & OTHERS VS. CHARLES THATHI CIVIL APPEAL NO. 85 OF 1996** at page 4 and 5.

He submitted that where there are no summons the suit should be dismissed with costs. Counsel also cited the authority of **RAHMAT KHAN KHERDIN & CO VS STANDARD CHARTERED BANK LTD HCCC NO. 231 OF 1998.** In this case Justice B. K Tanui (as he then was) dismissed the Plaintiff's suit because no summons were taken out and held that the suit was incompetent.

Learned Counsel Mr. Shivaji holding brief for the firm of Ochieng, Onyango, Kibet & Ohaga submitted that he associated himself with the arguments of the Counsel for the 3rd Defendant.

On his part he argued the preliminary objection dated 28th April 2003. The preliminary objection is on the following grounds:

There is also a 2nd notice of Preliminary objection by the 1st Defendant dated 28.4.2003 on the following grounds:

- 1. That there is no privity of contract between the Plaintiffs and the 1st Defendant, the Co-operative bank of Kenya Limited and no cause of action can lie against the 1st Defendant which is a stranger to the Plaintiffs claim. This preliminary objection is based on the fact that the suit property was charged to Co-operative Merchant bank Limited which is different legal entity from the 1st Defendant herein.**
- 2. That the plaintiffs have already brought another suit being High Court case no. 938 of 2001 (milimani commercial court) which suit is still pending before the said court and concerns the suit property herein. The present suit cannot therefore proceed in view of section 6 of the Civil Procedure Act, Chapter 21.**

3. **That the suit property having already been sold and transferred to the Plaintiffs' only remedy lies in damages and the application for injunction is unsustainable in view of the provisions of section 77 (3) of the Registered Land Act, Chapter 300.**

On the 26.7.2006 Mr. Ragot Learned counsel for the 3rd Defendant submitted that he will withhold his application seeking to dismiss the suit for want of prosecution to await the outcome of the preliminary objection. He stated he will only argue ground no. 1 of the preliminary objection and has abandoned the two other grounds.

Counsel argued only ground no. 1 of the preliminary objection, that there was no cause of action against the 1st Defendant. That the legal charge was executed by Co-operative Finance Limited. The entity changed its name to Co-operative Merchant bank limited. He argued that this is completely different from the Defendant. That Co-operative Merchant Bank advertised the property for sale, he referred the Court to DNT 1. He submitted that there was no privity of contract between the deceased and the 1st Defendant. That the 1st Defendant did not file any defence, they only filed notice of appointment.

Mr. Njoroge holding brief for Mrs. Munialo for the plaintiff said that he had no instructions.

I have considered the submissions of counsel.

In deciding whether to uphold the preliminary objections the court is guided by the land mark decision of **Mukisa Biscuits Manufacturing Ltd Vs. West End Distributors Ltd (1969) E.A 696** where the court held that preliminary objection consist of point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection may dispose of the suit. The court further held that a preliminary objection would normally be argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any facts have to be ascertained or if what is sought is judicial discretion.

On the preliminary objection raised by the 1st Defendant that there was no privity of contract between the Plaintiff and the first Defendant, I am not convinced that this is a pure point of law which can be determined without calling for evidence. The fact that the 1st Defendant is different from Co-operative Merchant Bank Ltd is a matter that will require to be argued through an application to allow the Plaintiff an opportunity to reply. The court will also be in a position to after submission of evidence decide whether the 1st Defendant is the wrong party to be sued.

I therefore hold that the preliminary objection dated 28.4.2003 fails and is dismissed with costs to the Plaintiffs.

On the first Preliminary Objection counsel for the 3rd Defendant argued that the Plaintiffs never took out summons. He submitted that this makes the suit a nullity. The plaint herein was filed on the 27th March 2003 and an Amended plaint filed on 17th April 2003.

Under Order IV rule 3 (1) of the civil procedure rules provide that when a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein. Under sub rule (3) every summons shall be accompanied by a copy of the Plaint. Under Order VI Rule 1 of the Civil Procedure rules summons (other than concurrent summons) shall be valid in the first instance for twelve months beginning the date of its issue. Under sub-rule 2 the court may extend the validity of summons from time to time if satisfied it is just to do so. Under sub-rule 7 where no application has been made under sub-rule 2 the court may without notice dismiss the suit at the expiry of Twenty-four Months from the date of the original summons.

Applying the principles in the case of **Mukisa Biscuits Manufacturing Ltd** cited above, does this preliminary objection comply? The failure to take out the summons can be fatal to the suit I hold this is a point of law which if argued can dispose of the suit.

The 1st and 3rd Defendant submitted that they have not filed Memorandum of Appearance or defence. I have not seen any memorandum of appearance of defence by the 2nd Defendant. As I have stated above this is a suit filed more than 3 years at the time the preliminary objection was argued. It is way beyond any extinction of time to issue summons. I have confirmed from the court records that no summonses were taken out and no summons can be taken out at this stage. I am convinced that the Preliminary objection dated 5th October 2004 has merit and I uphold the same.

Consequently I dismiss the suit herein with costs to the Defendants.

Dated and SIGNED t Nairobi on this 22nd day of august 2012

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 26th day of September 2012.

ABIGAIL MSHILA
Judge

In the presence of: N/A by any of the parties

Read in the absence of parties