



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 105 OF 2010

VANISHING AFRICA LTDPLAINTIFF

VERSUS

WELFARE GORUP (SWG)

ALI MBARACK – CHIEF CO-ODINATOR

ALIM ABDULJABBAR – VICE CHAIRMAN

MOAHMED ABDALLA – VICE CHAIRMAN

SALIM MOSSOUD – SECRETARY

& 12 OTHERSRESPONDENTS

SHELLA

AZHAR

ABDUL

HAMID

ATWAA

R U L I N G

The applicant’s counsel Mr. Abedi, has filed a Preliminary Objection dated 16-09-10 which raises two points of law.

- (a) Plaintiff’s lack of locus to file suit
- (b) The suit is an abuse of court process.

Mr. Jiwaji represents the respondent.

At the hearing of the Preliminary Objection Mr. Abedi submitted that plaintiff seeks to litigate on behalf of NEMA and LAMU COUNTY COUNCIL yet the cause of action pleaded clearly shows that the same is not within the plaintiff’s domain. Mr. Abedi points out that the plaintiff’s cause are really within the Attorney General’s domain and supports his arguments with the decision in **MASLOW AGENCIES LTD V TOB COHE HCCC NO. 646 OF 2006 page 3** where the court held that the plaintiff lacked locus to institute a suit based on public nuisance and that he should have addressed his grievances to the relevant bodies.

Secondly, Mr. Abedi submits that the suit is an abuse of the court process because the plaint at paragraph 5 refers to dumping rubble and building a sea wall – the nuisance is NOT on the plaintiff’s plot, but in front of the plaintiff’s plot and further that although the complaint is about dumping rubble and

commencing construction, there is no prayer for eviction, although trespass is alleged.

Also that although the application seeks orders of injunction, the main suit has no such prayer nor is it specified what should be stopped or done.

Thirdly, the verifying affidavit is faulted by Mr. Abedi on grounds that it is defective and offends provisions of Order XVIII rule 4 which requires that affidavits must state the place of abode yet the present affidavit is silent on that.

It is on these basis that Mr. Abedi urges this court to uphold the Preliminary Objection and dismiss the entire suit.

The preliminary objection is opposed, Mr. Jiwaji's submission is that the Preliminary Objection is brought two months and ten days from the date the matter was filed, yet there is no statement of defence filed. He argues that this Preliminary Objection does not meet the threshold advanced by Newbold as to what constitutes a preliminary objection in the infamous case of **Mukhisa Bisuits v Westend Distributions Ltd (1969) EA pg 76.**

Mr. Jiwaji also urges this court to consider the decision in **Karen Anne Charles v AG and others HCCC 31 of 2002 at page 10 and Shivji Natha Patel v Seifee Spares HCCC 265 of 1999 at page R4** saying that in the absence of any affidavit or pleadings for counsel to expound legal issues on, then the preliminary objection is misplaced.

With regard to the verifying affidavit Mr. Jiwaji's contention is that the affidavit refers to the respondent's address as being in Lamu, and that discloses the deponent's place of abode.

On the question of locus, he submits that the plaintiff discloses the plaintiffs are the owners of the plots near the sea and the activities of the defendants are at the sea front well which activities grieves the plaintiffs so its not a question of action being filed on behalf of Lamu County Council or NEMA. He urges this court to dismiss the Preliminary Objection.

Does what is raised here constitute a Preliminary Objection? In the **Mukhisa Biscuit Case**, Newbold P. Stated at page 701, that:

“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 discreto”

In the present instance, there is no statement of defence filed – meaning there is no way of ascertaining whether what Mr. Abedi submits regarding where the dumping and construction is correct, and whether that is the defence being raised by the defendant. It means that this would have to be ascertained. I concur with Mr. Jiwaji, that this does not properly constitute a preliminary objection as it becomes difficult to ascertain from only one set of pleadings whether the nuisance raised falls within the docket of Lamu County council, NEMA, or whether it is actually a private nuisance as pleaded by the plaintiff.

This then deals a blow to the issue as to whether or not plaintiff has locus to file this suit, because I don't know what the statement of defence will eventually contain and the issues raised by Mr. Abedi are not the kind to simply be addressed by way of submission from the bar – at best he ought to have filed an application seeking to strike out the suit and have an affidavit accompanying the same. He did not do so.

As a consequence then, the case of **Maslow Agencies Ltd** cited by the plaintiff's counsel does not come to defendant's aid as this court cannot determine the status of the plaintiff's complaint simply on the strength of evidence by defence from the bar.

With regard to the verifying affidavit Order XVIII Rule 4 provides that:

“Every affidavit shall state the description, true place of abode, and postal address of the deponent, and if the deponent is a minor, shall state his age”

I have perused the verifying affidavit sworn by Bernard Spoerry dated 6th September 2010 – it is correct that it does not specify his place of abode, a postal address given as Lamu is not the place of residence – he certainly cannot be living in the post office box – it is also possible for one to have a postal address for purposes of mail delivery, in one place, and reside in a totally different place – so it is incorrect for Mr. Jiwaji to say that because the postal address is given as Lamu, then that ought to be construed as the true place of abode. However the question is, does this omission cause any prejudice and injustice to any of the parties? Will it affect the fair and quick disposal of the suit?

Three provisions come to the plaintiff’s aid;

(1) Order XVIII Rule 7 provides that;

“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof”

To my mind, this is an irregularity in form which does not affect the substantive issue in this matter.

(2) Section 1A of the Civil Procedure Act provides:

“The overriding objective of this Act and the rules made herewith is to facilitate the just, expeditious proportionate and affordable resolution of the civil disputes governed by the Act”

My view is that the omission is not one which would defeat the just resolution of the dispute and in fact were the affidavit to be struck out simply on that ground, it would only contribute to delaying the quick and efficient disposal of the matter because the plaintiff would then have to file a complaint affidavit and this would also impact on the cost of litigation for both parties especially bearing in mind that although both counsel practice in Malindi, their offices are actually in Mombasa.

(3) Section 159(d) of the Constitution of Kenya now provides that:

“Justice shall be administered without undue regard to procedural technicalities”

The issue raised about the verifying affidavit is a simple procedural technicality whose omission will not prejudice either party. Due to the foregoing, then I find no merit in the preliminary objection and the same is dismissed.

The defendant shall bear the costs.

Delivered and dated this 28th day of February 2011 at Malindi.

Mr. Mwadilo holding brief for Abeid for respondent
Mr. Mouko holding brief Jiwaji for applicant

H. A. OMONDI
JUDGE

