



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT KISII
CIVIL APPEAL 100 OF 2008**
**(Being an appeal from the ruling and decision of Hon. Mrs. S. Wewa (RM) in a preliminary
objection made on 20th June 2008 in Kisii CMCC No. 350 of 2008)**

BETWEEN

CHARLES ORANGO NYAMBETA APPELLANT

VERSUS

JERUSA NYABOKE MATARA RESPONDENT

JUDGMENT

On 13th June 2008, the appellant filed a suit against the respondent stating that he was the beneficial owner of a parcel of land known as **West Mugirango/Bosamaro East/1204**, hereinafter referred to the “**the suit property**”, having purchased the same in 1992. He claimed that the respondent wanted to bury the body of her deceased husband, **Samuel Matara Ondieki**, hereinafter referred to as “**the deceased**”, on the suit land without his consent and/or authority. He sought an order of a permanent injunction to restrain her from so doing.

Together with the plaint, the appellant filed an application seeking temporary orders to restrain the respondent from burying the deceased on the suit land pending hearing and determination of the suit.

In his affidavit in support of the application, the appellant

stated that he purchased the suit land measuring 30ft by 200ft from the deceased who was a beneficiary of the estate of **Onyango Onderi**. Thereafter the deceased moved to another parcel of land. Since then the appellant has been in quiet and peaceful possession of the suit land.

The respondent filed a replying affidavit and stated, *inter alia*, that the alleged transaction between the appellant and the deceased was subject to the provisions of the **Land Control Act, Chapter 302** of the Laws of Kenya. Since no consent had been obtained from the area Land Control Board, the purported transaction was null and void for all purposes, she argued.

When the application came up for hearing, the respondent's counsel sought to raise a preliminary objection regarding the validity of the suit, saying that since the provisions of **section 6 (1)** of the **Land Control Act** had not been complied with the suit was unsustainable. The respondent had neither filed a statement of defence nor a notice of a preliminary objection.

The appellant's counsel objected, saying that the preliminary objection was improper because no notice had been given and no defence had been filed. He further submitted that the provisions of **order VI rule 7** of the **Civil Procedure Rules** permit a party to raise a point of law in his pleadings but since no statement of defence

had been filed it was improper to argue a preliminary objection based on a point of law without adequate notice.

The trial court allowed the preliminary objection to be argued, upheld the same and proceeded to strike out the suit. It is that ruling that triggered the present appeal.

The appellant raised five grounds of appeal as hereunder:

- “1. That the learned trial magistrate erred in law and fact in striking out the plaintiff’s suit on a preliminary objection without taking into account that there were issues raised which ought to have been determined at a full hearing.**
- 2. That the learned trial magistrate erred in law and fact by holding that the plaintiff did not obtain consent from the Land Control Board by virtue of section 6 (1) and 7 of the Land Control Act Cap 302 Laws of Kenya and yet the vendors had since passed on and there was no administrator to the estate.**
- 3. That the learned trial magistrate erred in law and fact when she failed to determine the capacity of the respondent in the suit.**
- 4. That the learned trial magistrate grossly misdirected herself in reaching at such a decision without taking into account that the respondent was a stranger and therefore had no *locus standi* to claim the appellant’s land.**
- 5. That the learned trial magistrate erred in law and fact in interpreting the law and making a decision whimsically and capriciously based on her emotional plea without taking into account the appellant’s submissions and pleadings before the court.”**

During the hearing of the appeal, Mr. Nyambati for the appellant and Mr. Kaikai for the respondent made brief submissions which I have duly considered.

In **MUKISA BISCUIT MANUFACTURING CO. LTD. -VS- WESTEND**

DISTRIBUTORS LTD. [1969] E.A. 696, Law, J.A. stated as follows:

“So far as I am aware, 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.”

In the same decision, Sir Charles Newbold, P. held as follows:

“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 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.”

From the various affidavits that were filed by the parties, it is evident that there were several issues that were not clear at the time when the learned trial magistrate heard the preliminary objection. The first issue related to ownership of the suit land. The appellant alleged to have purchased the same from the deceased although the suit land actually belonged to the deceased's father. The respondent had not obtained any letters of administration in respect of the estate of the deceased's father. It was therefore doubtful whether she had ***locus standi*** to lay any claim over the suit land. Secondly, the issue of consent of the area Land Control Board was also unclear. The same had not been raised in the plaint and no statement of defence had been filed. As was held in **MUKISA BISCUIT MANUFACTURING CO. LTD. -VS- WESTEND CO. LTD.** (supra), a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded are correct. A preliminary objection cannot be raised if any fact has to be ascertained by evidence. The learned trial magistrate held that **“the consent from the Land Control Board has not been**

exhibited.” That holding presupposed that the appellant ought to have adduced evidence that he had obtained the requisite consent. However, that could only have been done in a full hearing. An affidavit is not a pleading, it is evidence.

Having considered the nature of the preliminary objection in light of the plaint on record, I am of the view that this is an issue that ought to have been dealt with during the hearing of the suit so that appropriate evidence can be adduced. Consequently, I allow this appeal and set aside the orders made on 30th June 2008 striking out the appellant’s suit. The suit should proceed to hearing on its merits. The respondent shall bear the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF APRIL, 2010.

**D. MUSINGA
JUDGE.**

15/4/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Nyambati for the Appellant

Mr. Bosire HB for Mr. Kaikai for the Respondent

Court: Judgment delivered in open court on 15th April, 2010.

**D. MUSINGA
JUDGE.**