



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Case 165 of 2006

PRISCAH NYANCHAMA OKARU.....PLAINTIFF

(Suing as a personal and legal representative to estate of

FRANCIS OKARU GISEMBE (DECEASED)

VERSUS

1. PRISCAH NYANCHAMA OKARU)

2. COMMISSIONER FOR LANDS).....DEFENDANTS

3. DR. ANIL RATILAL TAYLOR)

4. KISII MUNICIPAL COUNCIL)

RULING

This suit was scheduled for hearing on 20th April, 2010. On that occasion however, **Mr. Masese** and **Mr. Bosire**, learned counsel for the 1st, 3rd and 4th defendants respectively intimated to the court that they had preliminary objections to the suit to raise. I allowed them to do so.

On his part, **Mr. Masese** submitted that what was averred in paragraph 19 of the plaintiff was incorrect. The averment in the said paragraph was to the effect that “*There is no other suit pending on (sic) the present cause of action and or hitherto filed between the parties herein...*” According to **Mr. Masese**, there had been a previous suit involving the same parties being HCCC.NO. 2 OF 2006 which was however withdrawn with costs to the defendants. Secondly, he submitted that

the prayers sought in the plaint were amorphous and culminated to deny the Government revenue. The foregoing then informed **Mr. Masese's** preliminary objection.

As for **Mr. Bosire**, he submitted that the suit was bad in law as the Attorney General had not been enjoined in the suit as required by Section 12 of the Government Proceedings Act. The 2nd defendant could not therefore stand on his own. The defect aforesaid was incurable. He submitted further that the claim based on fraud as in this suit ought to be filed within a year pursuant to the provisions of Section 3 of the Public Authorities limitation Act. Finally he submitted that there is no cause of action against the 4th defendant disclosed. It is only referred to in paragraph 8 & 18 of the plaint. There was also no specific prayer against it. The 4th defendant was a mere trustee and did not deal in or own land.

In response, **Mr. Okenye**, learned counsel for the plaintiff submitted that the suit should be allowed to proceed to hearing in the interest of justice. Technicalities should be avoided as land is a very sensitive matter in this part of the world. Though the prayers were amorphous, they can nonetheless be granted. He submitted further that this court had jurisdiction to order for payment of further court fees if deficiency was noted. With regard to fraud, counsel submitted that the same was discovered in the year 2005 and this suit was filed in 2006. Accordingly it was filed within time. He therefore prayed that this court find that the preliminary objections raised had no merit and dismiss them.

What is the essence of a preliminary objection? It was succinctly stated in the case of *Mukisa Biscuit Manufacturing Ltd V West End Distributors Ltd(1969) E.A. 697* thus:-

“..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...” I may add that when preliminary objections are raised they should be capable of disposing of the matter or suit at hand. Further in determining the preliminary objection the court need not resort to ascertaining the facts from elsewhere apart from looking at the pleadings on record. And as **Warsame.J** said in the case of *United insurance Company Ltd V Scholastica A. Odera Kisumu Civil Appeal Number 6 of 2005(UR)* a ***“Preliminary objection must be based on a***

point of law which is clear and beyond doubt and preliminary objections which is premised on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the court to say the facts are not contested or disputed...”. In a nutshell therefore a preliminary objection must stem from the pleadings and must be based on pure points of law and do not require the court to be called upon to ascertain disputed facts.

Applying the foregoing principles to the circumstances of this case, can it be said that the 1st, 3rd and 4th defendants in raising their so called preliminary objections have attained the threshold aforesaid? My answer is a resounding no. First and foremost the said preliminary objections were not based on pure points of law. The issue as to whether the averments in paragraph 19 of the plaint is correct or not cannot be a pure point of law. In any event the 1st and 3rd defendants admit that the said former suit was withdrawn. Nothing therefore turns on this preliminary objection. Nor is the allegation that the prayers in the plaint are amorphous and calculated to deny the Government revenue also a pure point of law. If anything, it is a question of fact much as it is presumptuous and speculative. In any event and as correctly submitted by **Mr. Okenye**, if the fees payable on the plaint is understated, this court has jurisdiction to order for payment of further court fees to bridge the deficiency and or difference.

Similarly, the issue with regard to failure to enjoin the Attorney General cannot be said to be a pure point of law. It is not in every case that a civil servant is sued, that the Attorney General must of necessity be enjoined in the suit. There are situations where such civil servants may be called upon to account personally for their malfeasance whilst in office. The court is aware of statutes or Acts of parliament which remove immunity from court action against civil servants who commit acts that amount to abuse of office. In such cases, such civil servants are held personally and individually to account. Take for instance Anti-corruption and Economic crimes Act, 2003. Thus there are situations where the civil servants can be left to stand on their own and that it is not in every case involving a civil servant that the Attorney General must be brought on board. Further in this case, that argument if at all ought to have been made or canvassed by the 2nd defendant and not the 4th defendant. Though served with the plaint, the 2nd defendant has neither entered appearance nor filed a defence. It is not open for the 4th defendant to advance the case of the 2nd defendant under the guise of a preliminary objection.

With regard to the question of fraud, the 4th defendant claims that a suit based on fraud ought to be filed within a year

pursuant to the provisions of Section 3 of the Public Authorities Limitation Act. Having failed to do so, this suit was time barred. On the other hand, it is the case for the plaintiff that time for purposes of limitation started to run when the fraud was discovered by the plaintiff in 2005. Upon such discovery he immediately lodged this suit. From the foregoing, it is clear that, the preliminary objection as raised is not again a clear point of law argued on the assumption that all the facts as pleaded are correct or agreed. The 4th defendant may be correct or wrong in its perception of the law. Similarly, the plaintiff may be equally wrong or right. A decision as to who among the two is correct cannot be made on the basis of the pleadings on record. It will have to wait perhaps for the evidence to be taken.

The other limb required for a successful preliminary objection, is that the same is be premised on facts which are agreed and or undisputed. This is not the case here. From the pleadings, most of the facts are disputed and or unascertained. The meaning of all this is that, this suit will have to go all the way to the wire. It will have to be heard, evidence taken and tested by cross-examination so that the facts may be ascertained. On the whole therefore this was not a fit and proper case to be determined by way of preliminary objections. I suspect that counsels for the defendants on record knew it. I have the distinct feeling that the preliminary objections were not made in good faith but as a means of scuttling the scheduled hearing of the case. I need to remind counsel that a good case is always one where the parties are given the opportunity of being heard on merit and not driven away from the seat of Justice on fancy and or flimsy grounds or preliminary objections. Counsel also need to reminded that and as stated in the case of *Mukisa(supra)* the improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse issues. Counsel should be advised that raising of frivolous preliminary objections may in future attract this court's sanctions against them in nature of having to order them to pay personally the resultant costs.

The pr raised were clearly misconceived. They are accordingly dismissed with costs to the plaintiff.

RULING DATED, SIGNED and DELIVERED at **KISII** this 14th day of May, 2010.

ASIKE-MAKHANDIA

JUDGE.

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