



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Case 115 of 2009**

ALLAN PETER KARANJA WATHIGO.....PLAINTIFF.

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT.

R U L I N G.

By a plaint dated 14th October, 2009, the applicant/plaintiff pleaded at paragraphs:-

4. At all times material to this suit, the plaintiff was in occupation of Plot No. F/CTA66A/458 (the suit property) having taken possession thereof in the year 1992 and having retained possession of the property until 18/4/2009.
5. The plaintiff entered upon the suit property pursuant to an agreement between himself and a third party, CHARLES M. SOU in which the third party transferred his interest in the suit property to the plaintiff.
6. The plaintiff immediately put the suit property together with an adjacent property No. F/CTA66A/344 into use by establishing a timber business.
7. In the year 2007, pursuant to a breach of contract by the named third party **CHARLES M. SOU**, the plaintiff herein filed a suit (**KITALE PMCCC No. 520 of 1997**) against the third party which resulted in a decree being issued in favour of the plaintiff and which decree ordered the defendant's Estate Manager to effect the assignment of

the suit property to the plaintiff.

8. The judgment of the court **in KITALE PMCC No. 520 of 1997** was appealed against in **KITALE HIGH COURT CIVIL APPEAL NO. 35 OF 2002**, but the said appeal was struck out on 23/5/2006, and the decree in KITALE PMCC No. 520 of 1997 remains in force
9. Pursuant to the decree in KITALE PMCCC No. 520 of 1997, the defendant herein moved to recognize the plaintiff as one of its allottees by incorporating him into its list of allottees.
10. In the year 2008, the defendant changed the user of the suit property to that of a bar, butchery and restaurant business, but retained possession of Plot No. F/CTA66A/344 where his machinery for the timber business remains to date.
11. On 18/4/2009, the defendant without notice and without justifiable cause, completely demolished the plaintiff's buildings on the suit property, totally destroyed the plaintiff's structures, stock-in-trade furniture and fittings.
12. It is the plaintiff's case that prior to the demolition that took place on 18/4/2009, he had complied with all legal requirements for the operations of his business and he did not owe the defendants any arrears of rent, and that the defendant was not entitled to carry out the demolition.
13. The value of the plaintiff's structures destroyed on 18/4/2009 was Ksh. 385,800/=; while that of the stock-in-trade was Ksh. 495,610/= thus making a total of Ksh. 881,410/= which the plaintiff now claims.
14. Prior to the demolition, the plaintiff was making profits of Ksh. 500,000/= per month, which profits he is now unable to make, due to the defendant's actions, and the plaintiff claims the same.
15. Subsequent to the demolition carried out on 18/4/2009, the defendant has invited and received applications from individuals with the intention of allotting several properties under its custody, including the suit property to new allottees.
16. It is the plaintiff's case that in view of the decree in Kitale

PMCCC No. 520 of 1997 and the defendant's wrongful demolition of his structures, the defendant is not entitled to allot the suit property to any person other than the plaintiff.

17. Notice of this suit as required by law has already been given to the defendant.

By a defence dated 9th November, 2009 the defendant pleaded at paragraphs :-

3. The defendants deny ever unlawfully demolishing any buildings or structures erected on the defendants land in Kitale and further deny that the plaintiff is entitled to compensation in the amount herein being Ksh. 881,410/= or any other sum and puts the plaintiff to strict proof thereof.
4. The defendants further state that they have never at any one time allotted and/or agreed to allot to the plaintiff plot No. F/CTA66A/458 either directly or to the plaintiff's agent. Therefore the defendants contend that if the plaintiffs entered upon the said parcel of land and made any developments thereon, the same was without the sanction of the defendants hence illegal.
5. The defendants further contend that they are strangers to the contents of paragraphs 4 and 5 of the plaint and puts the plaintiff to strict proof thereof. The defendants further state that they are not privy to the dealings between the plaintiff and the said Mr. Charles M. SOU and therefore cannot be held liable under the said agreement or in any other circumstances.
6. The defendants are strangers to the contents of paragraph 6 of the plaint and in response to paragraph 7, they state that since they were not parties to the suit between the plaintiff and CHARLES M. SOU (KTL PMCC NO. 520 OF 1997) orders could not issue against them in the said suit.
7. The defendants deny the contents of paragraph 8, 9, 10 and 11 of the plaint and put the plaintiff to strict proof thereof. The defendants further contend that at no time did they allot the plaintiff land either as alleged or at all.
8. The defendants state that since they did not allot any land or premises to the plaintiff for him to put any structures, the issue of the plaintiff's structures being destroyed without notice to him could not arise.
9. The defendants are strangers to paragraph 12, 13 and 14 of the plaint and put the

plaintiff to strict proof thereof.

10. In response to paragraphs 15 and 16 of the plaint, the defendants reiterate the contents of paragraph 7 and 8 above and add that plaintiff has absolutely no business with what the defendants do with their land.
11. The defendants state that the plaintiff's suit is premised on fatally defective pleadings and premature with no basis in law and contend that the same should be struck out with costs.
12. The defendants further contend that the plaintiff having not complied with the provisions of Section 87 of the Railway Corporation Act (Cap 397) (K), the suit is fatally defective. The defendants shall at the earliest instance raise a preliminary objection and pray that this suit be struck out.
13. The defendants deny ever being served with any notice either as stated or otherwise but admit the contents of paragraphs 18 and 19 of the plaint.

By an application by way of Notice of Motion dated 14th October, 2009, pursuant to the provisions of Order XXXIX, Rules 1, 2 and 3 of the Civil Procedure Rules, sections 3, 3A and 63 (e) of the Civil Procedure Act, the applicant sought orders:-

1. **THAT**, this application be certified as urgent and service thereof be dispensed with in the first instance.
2. **THAT**, the defendant herein be restrained from allotting Plot No. F/CTA66A/458 within Kitale Municipality to any person save the plaintiff pending the hearing and determination of this application.
3. **THAT**, an order of mandatory injunction do issue compelling the defendant herein to reinstate the plaintiff herein to possession of Plot No. F/CTA66A/458 within Kitale Municipality pending the hearing and determination of this suit.
4. **THAT**, costs of this application be provided for:-

The application is based on the grounds:-

1. **THAT**, the plaintiff has been in occupation of Plot No. F/CTA66A/458 (the suit property) since 1992 when he took it over from

one CHARLES M. SOU after having bought the interest of the said CHARLES M. SOU in the suit property.

2. **THAT**, the plaintiff retained possession of the suit property from 1992 to 18/4/2009, and has been running various businesses thereon.
3. **THAT**, pursuant to a suit filed in Kitale PM's Court (No. 520 of 1997) the defendant's Estate Manager was directed to effect assignment of the suit property to the plaintiff as allottee.
4. **THAT**, the judgment in **KITALE PMCCC No. 520 of 1997** is still in force, the appeal against it (KITALE HCCA NO. 35 OF 2002) having been struck out on 23/5/2006.
5. **THAT**, the defendant even complied with the decree in **KITALE PMCC No. 520 of 1997** by incorporating the plaintiff into its list of allottees.
6. **THAT**, on 18/4/2009 the defendant without any justifiable cause and without notice entered upon the suit property and demolished the plaintiff's buildings and destroyed assorted goods thereon.
7. **THAT**, the defendant had no cause to demolish the plaintiffs building as the plaintiff had complied with all legal requirements, and he did not owe the defendant any arrears.
8. **THAT**, the defendant now intends to allot the suit property along with other plots it holds within Kitale Municipality to other persons on 16/10/2009.
9. **THAT**, the defendant shall suffer irreparable loss and damage should the suit property be allotted to any other person.
10. **THAT**, the plaintiff has been on the property and engaged in business thereon for a period of about 18 years and this has been his principal source of income.
11. **THAT**, in view of the decree in **KITALE PMCCC No. 520 of 1997**, the plaintiff has a prima facie case with good chances of success.
12. **THAT**, if the planned allotment is made to some person other than the plaintiff, this application and the main suit shall be rendered nugatory.

13. **THAT**, the defendant shall not suffer any prejudice if the orders sought are granted as the plaintiff would pay to it any fees, rates, rent that it may require, in the same manner as any other allottee.

14. **THAT**, the circumstance of this case and the interests of justice are in favour of granting the orders sought.

The application is supported by the annexed affidavit of Allan Peter Karanja Wathigo sworn on the 14th of October, 2009.

At the hearing of the said application the defendant/respondent raised a preliminary objection on a point of law in the manner following:-

(1) That the applicant/plaintiff's suit offends the provisions of section 87 of Kenya Railway Corporation Act (Cap 297) Laws of Kenya and should be struck out.

The application was served on the firm of Mwangi Wahome & Co. advocates for the applicant/plaintiff. A hearing date for the preliminary objection was taken by consent on 16th November, 2009. On the hearing day the defendant/respondent counsel failed to attend court. On application, I granted the applicant/plaintiff leave to proceed ex-parte.

It was contended on behalf of the applicant/plaintiff that the preliminary objection is devoid of merit. It is premised on an averment of the defendant/respondent that section 87 of the Kenya Railway Corporation Act was not complied with before the suit was filed. At paragraph 12 of the defence it is averred by the respondent/defendant that no notice was given before the suit was instituted in violation of the provisions of section 87 of the Kenya Railway Corporation Act. There is no reply to the defence as at the time of the hearing of this preliminary point of law.

Order VI Rule 10 of the Civil Procedure Rules provides thus:-

“ (1) If there is no reply to a defence, there is a joinder of issue on that defence.

(2) Subject to subrule (3) –

(a) there is at the close of pleadings a joinder of issue on the pleading last filed; and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

(3) There can be no joinder of issue on a plaint or counterclaim.

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of

issue unless, in the case of an express joinder, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

In this case there is a joinder of issue on that defence. Accordingly that issue will have to be resolved by the court at the hearing when evidence shall be called in support of the pleadings.

In this regard, I call in aid the *obiter dicta* of Law JA in **MUKISA BISCUIT MANUFACTURING CO LTD.. VS. WEST END. DISTRIBUTORS LTD. [1969] E.A. 696 at page 700 where the learned Judge heard this to say in part;**

“.....So far as I am aware a preliminary objection consists a point of law which has been pleaded on which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are on 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 vein, I refer equally to the *obiter dicta* of Sir Charles Newbold P. in the same case. The learned Judge had this to say:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises pure points 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 facts has to be ascertained or if what is sought is the exercise of judicial discretion”

Having heard the arguments on the part of both the applicant/plaintiff; and the defendant/respondents, I am persuaded, by reason of order VI Rule 10, that there is a joinder of issues on the defence. Hence it is too early to conclude that section 89 of the Railway Corporation Act (Cap 397) Laws of Kenya was complied with or not.

Accordingly, the preliminary objection on a point of law fails and is dismissed. Costs shall be in the cause.

Dated and delivered at Kitale this 29th day of June, 2010.

N.R.O. OMBIJA.

JUDGE.

N/A for Applicant.

N/A for Defendant.