REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 28 of 2007

ANDREA MWISUNJI MASINJILA :::::::::::::::::::::::::::::::::::: APPELLANT

V E R S U S

LABAN MASINJILA :: 1ST RESPONDENT

JOSEPH ALUBALA MASINJILA :::::::::::::::::::::::::::::: 2ND RESPONDENT

J U D G E M E N T

The appeal before me arises from an order made on 3rd May 2007, striking out the appellant's suit with costs. That order was made in a ruling on a preliminary objection, which had been lodged by the respondents herein.

The respondents had, in their Notice of Preliminary Objection, indicated that;

(a) *The suit and the application for an interlocutory injunction were re judicata;*

(b) *The plaintiff had deliberately misled the court in both the plaint and the verifying affidavit; and*

(c) *The magistrate's court had no jurisdiction to hear and determine the case.*

Having given consideration to the preliminary objection, the learned magistrate struck out the suit because;

(i) There was still a dispute as to who were the owners of the suit, and;

(ii) The certificate of official search indicated that the appellant (who was the plaintiff before the magistrate's court) was only one of 3 registered owners, whilst the certificate of confirmation of grant indicated that the appellant was not given any share of the suit land, L.R. NO.IDAKHO/SHIKUKULU/735.

In those circumstances, the learned magistrate held as follows:-

"It is thus clear that the plaintiff has failed to meet the standards for injunctive orders since he lacks locus to sue over the suit land. If this court grants the plaintiff's prayer, it will amount to opening of wounds that had been cured by the High Court vide Probate & Administration Cause No.605/95. The

plaintiff's claim therefore lacks any basis and the same is struck our with costs to the defendants."

In challenging that decision Mrs. W. Osodo, the learned advocate for the appellant submitted that the court had erred by admitting evidence on the preliminary objection. It was her submission that preliminary objections were supposed to be based solely on matters of law.

Secondly, the appellant said that at the stage when the learned magistrate was determining the preliminary objection, the court was only handling an application for an injunction. Therefore, in the appellant's view, the court should not have made a ruling which disposed of the entire suit.

By making the decision to strike out the suit, the court is said to have determined the issue of the ownership of the suit land, without having received any evidence on the issue.

The appellant's view was that the issue of ownership could only be determined after evidence was received by the court, when dealing with the substantive suit, as approved to the application for an interlocutory injunction.

In any event, the appellant believes that the issue of an injunction could not have been res judicata, because it is a matter which was not within the scope of a Succession Cause, such as the one in which the suit land was distributed to beneficiaries other than the appellant.

It was also argued that whether or not the appellant had obtained the requisite consent for the transfer of the suit land from his mother to the persons shown to be the registered owners, was a matter of evidence.

Similarly, if the appellant had obtained the consent of his co-owners, to sue in respect of the suit land, was a matter of evidence.

In any event, the appellant's position was that he had filed the suit on his own behalf. He therefore did not need to obtain the consent of the other persons who are said to be his co-owners; so submitted the appellant.

At the time the preliminary objection was being canvassed, the respondents herein had argued that the magistrate's court did not have jurisdiction to hear and determine the issues raised in the suit. The respondents had contended that the issue ought to have been heard and determined by the Land Disputes Tribunal. But the appellant submitted, before me, that the Land Disputes Tribunal had no jurisdiction to hear and determine issues of injunctions.

For all those reasons, I was invited to allow the appeal, and to set aside the order dismissing the suit with costs. In effect, if the appeal was allowed, the suit would be reinstated, and so too, the application for an interlocutory injunction.

In answer to the appeal, Mr. Maube, learned advocate for the respondents, submitted that his clients did not adduce any evidence when they canvassed the preliminary objection. As far as he was concerned, the learned magistrate only dealt with issues of law.

But in the same breadth, the respondents pointed out that the appellant was cited as the first beneficiary in Succession Cause No.605/1995. That fact is said to be apparent in the certificate of confirmation of the grant of letters of administration in the estate of the late MERIDINA BUSHURU MASINJILA.

Assuming for a moment that the appellant was not given any portion of the suit land, as is indicated in the confirmed grant, that fact would not be consistent with the appellant's assertions, as set out in his plaint. I say so because the appellant's assertion was that he was one of the registered owners of the suit land, L.R. NO. IDAKHO/SHIKULU/735.

The appellant's position is that the respondents have no colour of right to interfere with his quiet and peaceful usage, occupation and possession of that property.

That position of the appellant is completely at variance with the "facts" spelt out in the confirmed grant. In the confirmed grant, the appellant was not given any portion of the suit land. Instead, he was given 2 acres of land, in L. R. IDAKHO/SHIKULU/808.

In order for the learned magistrate to have determined which of the two sets of "facts" was factually accurate, he had to consider other facts. Those other facts include the omission of the appellant's name from amongst the beneficiaries to the suit land; the absence of any documents to show that the grant was revoked; and that there were disputes as to who the real owners of the property were.

In WILLIE V. MUCHUKI & 2 OTHERS [2004] 2 KLR, Kimaru Ag. J. (as he then was) quoted with approval the following words from the celebrated decision of MUKISA BISCUIT MANUFACTURING CO. LTD. Vs. WEST END DISTRIBUTORS LTD. [1969] E.A.696, at page 701;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure paint 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."

If those principles are applied to the case before me, the learned trial magistrate ought to have deemed the respondents herein as having accepted the appellant's contentions;

(a) That he was the registered proprietor of the suit land, together with Lornah Isutsa Masinjila and Hezron Daniel Masinjila.

(b) That the suit land was transferred to the said registered proprietors by their mother, Meridina Bushuru, before she passed away in 1992.

(c) That the respondents herein had been trespassing upon the suit land, without any colour of right."

But, it is clear that the learned trial magistrate did not deem those facts, as pleaded by the appellant, to have been accepted by the respondents herein. Instead, the said court went on to make a finding that he was only granted parcel No. IDAKHO/SHIKULU/735 which is the suit land.

As soon as it became apparent that the respondents herein were challenging the factual pleadings of the appellant, it was no longer open to the respondents to do so by way of a preliminary objection. That is because the issue that would then be before the court would not be on a pure point of law. The issue would also involve facts, about which there were disputes. Indeed, the learned magistrate brought out the existence of the dispute on facts when he held as follows;

"It is thus clear that as per the record there is still a dispute as to who the real owners of the said parcel of land are."

That notwithstanding, the learned magistrate proceeded to find that the appellant lacked locus to sue over the suit land because he had only been allocated 2 acres of land on parcel No.808, but nothing on parcel No.735.

With all due respect to the learned magistrate, he purported to reach a determination on factual issues, of the stage of a preliminary objection; and in so doing, he violated governing preliminary objections; he did not assume that the facts pleaded by the appellant were correct. In so doing, the learned magistrate erred.

In the result, I find merit in the appeal, and do hereby allow it. I set aside the order striking out the appellant's substantive claim, and substitute it with an order overruling the preliminary objection.

In effect, the appellant's claim is reinstated, and so also his application for an interlocutory injunction.

The costs of the preliminary objection and also of this appeal are awarded to the appellant.

Finally, I wish to make it clear that I have consciously refrained from expressing any views on such issues as the merits of the application or of the suit, because those issues ought to be first considered substantively by the magistrate's court. If I were to express any views on any aspects of the application or of the main suit, I would have usurped the role of the court of first instance, or, at the very least, I would have imposed an unfair restriction on that court's discretion. That I decline to do.

Dated, Signed and Delivered at Kakamega, this 22nd day of January 2009

FRED A. OCHIENG

J U D G E