



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 135 of 2009
MIRRIAM WANGARE KASSIM (Also known as

MIRIAM KASSIM MALAMBU PLAINTIFF/APPLICANT

VERSUS

SAMUEL MUCIRI W'NJUGUNA 1ST DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL 2ND DEFENDANT/RESPONDENT

RULING

1. Before me are Preliminary Objections by the Defendants in this case. The one by the 2nd Defendant is that the whole suit herein is defective and ought to be struck out for being in contravention of Section 13 A and 16 of the Government Proceedings Act. Section 13A aforesaid provides as follows:

“13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars-

a. The full names, description and place of residence of the proposed plaintiff;

b. The date upon which the cause of action is alleged to have accrued;

c. The name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

d. A concise statement of the facts on which it is alleged that the liability of the Government and

of any such servant or agent has arisen;

e. The relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.”

2. There is no response to the objection and I have had the benefit of reading the Ruling of Visram J in James Orengo vs A – G and another H.C.C.C 207/2002 where he quoted with approval the words of Ringera J in Walimbwa vs AG H.C.C.C2714/1986 where the Judge stated thus;

“Section 13 A of the Government Proceedings Act is in clear mandatory terms that do not admit any excuses or exceptions. Its plain meaning to my mind is that no proceedings against the Government under the Government Proceedings Act can lie or be instituted before the Statutory Notice has been given and expired”.

3. In this case, it is admitted at paragraph 5 of the Plaintiff that “the notice to the 2nd Defendant could not be obtained within the required time...”

4. That being the case and there being no notice as required, the suit against the Attorney General cannot lie and the same is struck off with no order as to costs.

5. What of the suit against the 1st Defendant? It is submitted that the suit and the Application for injunction in that;

1. “The application is incompetent, frivolous, vexatious, scandalous and an abuse of the process of the Honourable court. (sic).

2. The Affidavit in support is totally defective and ought to be struck out in that:

i. Paragraphs 2, 7, 8 contain falsehoods and the annexure MWK “1” ought to be expunged from the record as being irrelevant.

ii. It does not show the Applicants residential or physical address.

iii. It does not disclose the sources of the information.

iv. It is speculative and argumentative.

v. It contradicts averments in her affidavit sworn on 3rd September, 2008.

3. Paragraphs 4, 7, 2 and 5 of the Plaintiff are false and the verifying affidavit is equally false and ought to be struck out and expunged from the record.

4. The Plaintiff is incompetent for failing to comply with the mandatory provisions of the Governments Proceedings Act.”

6. I listened to submissions by Mr Kamere for the 1st Defendant and sadly the issues raised in 2 (i), (iv) and (v) are all matters of fact which cannot be pure points of law to be raised by way of a Preliminary Objection. Whether or not the Plaintiff has title to the suit land is a matter of fact; whether or not the 1st Defendant has also acquired title is also a matter of fact; whether the land in issue is jointly owned with Hassan Kinaiya Malambu is a matter of fact; whether paragraphs 4 and 7 of the Plaintiff contain false assertions is a matter of fact and whether facts in the affidavits on record contradict each other are all matters of fact. As Sir Newbold stated in **Mukisa Biscuits vs West End Distributors Ltd (1969) E.A 696;**

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

7. That is the law that our courts have consistently followed and therefore where no pure point of law is raised, the objection cannot be upheld even if ultimately the issues raised are found to be true and therefore upheld at the hearing.

8. Further, when facts and matters of law are mixed up in an objection, the same cannot succeed. That is the case here but I will say this as regards issue no. 2 (ii) and (iii); I am aware of the ambivalent position taken by the High Court where a party fails to state his place of abode. I have been referred to the decision of Seron J in **Francis Ekutu & Another vs Vincent Sambulia & Another (2005) EKLR** where the learned judge struck off an affidavit where the party failed to state the source of his information and where the Commissioner of oaths failed to disclose where the Affidavit was sworn. Those are issues to be addressed when the substantive issues are argued and not by way of a Preliminary Objection and I hold the view that failure to state a place of abode cannot invalidate the whole affidavit.

9. These issues are important but cannot be the basis for striking out of either the suit or the Application for interlocutory orders.

10. In the event, I decline to strike out the suit as against the 1st Defendant but the suit against the 2nd Defendant is struck off with no order as to costs.

Dated and delivered at Machakos this **9th** day of **October** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Kamere for Respondent**

Mr Ngolya h/b for Mr Kinuthia for Applicant

ISAAC LENAOLA

JUDGE