



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1 of 2007**

**JAMES KAMANGU NDIMU..... PLAINTIFF**

**VERSUS**

**MARGARET WANJIRU NDIMU alias**

**MARGARET WANJIRU KARIUKI..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MATJEKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

This matter came up before me for the first time on 13.03.07. The cause list showed it was for preliminary objections to the suit.

The plaintiff was represented by learned counsel, Mr. C.N. Kihara assisted by learned counsel, Mr. L.W. Kamau. The 1<sup>st</sup> defendant was represented by learned counsel, Mr F. Ojiambo assisted by learned counsel, Mrs J. Thongori, Mr M. Kamau and Mr J. Kitheka. The 2<sup>nd</sup> defendant was represented by learned counsel, Mr. E. Ongaya.

The court was informed that the plaintiff was also present in court but not the defendants.

Mr. Ojiambo referred to the plaintiff's chamber summons dated 30.01.07 and filed on 31.01.07, *inter alia*, seeking, at prayer 2, an interim restraining order against an intended statutory marriage between the defendants, pending the hearing and determination of the sit herein. Mr Ojiambo added that an interim restraining order was issued by the High Court (Dulu, J) in terms of prayer 2. He (Mr. Ojiambo) proceeded to tell the court that the defendants had filed identical but separate notices of preliminary objection to the chamber summons and that he wanted to embark on arguing the 1<sup>st</sup> defendants' preliminary objection. Mr. Ongoya was to argue the 2<sup>nd</sup> defendant's preliminary objection.

At this juncture the court drew attention to the existence in the court file of grounds of opposition filed by the defendants in addition to their notices of preliminary objection and sought to know if the preliminary objections and the grounds of opposition are the same. Mr Ojiambo stated that the grounds of opposition are separate; that the defendants filed the grounds of opposition under Order L rule 16 (1) of the Civil Procedure Rules in order to be heard in opposition to the chamber summons; but that what the defendants wanted to pursue are the preliminary objections. He added that the defendants filed the notices of preliminary objection in order not to ambush the plaintiff. Mr. Ojiambo acknowledged that the plaintiff had in turn filed grounds of objection to the defendants' preliminary objections.

After giving the above outline of the day's business before the court, Mr Ojiambo pointed out that the subject of the proceedings before court is an alleged Kikuyu customary law marriage between the plaintiff and the first defendant and that the purpose of the preliminary objections is to demonstrate that the plaintiff's chamber summons is incompetent and does not lie as a matter of law; that the chamber summons is embarrassing to the process of law and the court process and that the court has no jurisdiction to entertain the chamber summons or indeed the suit.

At this juncture Mr Kihara for the plaintiff asked that the plaintiff be afforded a chance to give the court the gist of his objection to the defendants' preliminary objections. It was Mr Kihara's contention that if the court accorded the plaintiff the first opportunity to give the gist of the plaintiff's objection to the defendants' preliminary objections and the court agreed with the plaintiff's objection, that may put an early end to the defendants' preliminary objections.

Mr Ojiambo's response was essentially that there is no provision for the procedure proposed by Mr Kihara for the plaintiff to be heard first; that the preliminary objections go to jurisdiction of the court to deal with the matter before court as currently framed; and that when an issue of jurisdiction is raised, it must be dealt with first. In support of this contention, he cited Owners of the Motor Vessel "Lillian S" - vs- Caltex Oil (Kenya) Ltd [1989] KLR 1 for the statement at page 14 by Nyarangi, J A (as he then was) that:

**'...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it ....'**

The case of "Lillian S" was decided by the Kenya Court of Appeal. Mr Ojiambo urged this court to hear the defendants' preliminary objections first and that if the plaintiff wishes to oppose the defendants' preliminary objections, he can do so in reply.

In response, Mr Kamau for the plaintiff re-echoed that the plaintiff be allowed to give the gist of the plaintiff's opposition to defendants' preliminary objections first. He drew the court's attention to section 3A of the Civil Procedure Act, Cap. 21 providing that nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. He added that the plaintiff's opposition to the defendants' preliminary objections seeks to question whether the preliminary objections raise precise points of law for the determination of the court, i.e. do questions of law pleaded by defendants lay a basis for the court to form an opinion? He said the issue of jurisdiction was not raised in the defendants' notices of preliminary objection and that it came up in defences filed by the defendants subsequently. I understood Mr. Kamau to contend that if the issue of jurisdiction was not raised in the defendants' notices of preliminary objection, then it cannot be raised now.

To the above submissions of Mr Kamau, Mr Kihara the lead counsel for the plaintiff added that the defendants' preliminary objections should have come by chamber summons if they allege that the suit is embarrassing. He pointed out that the passage in the case of "Lillian S" cited by Mr Ojiambo also states:

**'If the Jurisdiction of an inferior court ... depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction.'**

It was Mr Kihara's contention that if you inquire into facts, you are outside the ambit of a preliminary objection. He referred to Court of Appeal Civil Appeal No.99 of 1994, John Mwangi King'ori & 4 others -vs- Steve Flavian Mwangi & City Council of Nairobi and cited the following passage at the page 13 of the Judgment of Kwach, JA (as he then was):

**'... and as a matter of strict procedure, those objections should have been dealt with in the form in which Mr Ngatia presented them. An application should have been made by summons in chambers under Order I rule 22 of the Civil Procedure Rules.' (my underlining).**

I understood Mr Kihara to contend that the defendants' notices of preliminary objection in the present case are in the category of 'an application' as alluded to in the above quoted passage and that they should have been by way of chamber summons and that since the preliminary objections in this case did not follow that procedure, they are incompetent. It seemed to be Mr Kihara's position that if the court allows him to develop that argument first, it will dispense with the defendants' preliminary objections straightaway.

Mr Ongoya for the 2<sup>nd</sup> defendant associated himself with Mr Ojiambo's submissions, adding that the issue of jurisdiction initially arises from the plaintiffs' own plaint (paragraph 15) where he avers that the court has jurisdiction, which the defendants dispute vide paragraph 12 in the 1<sup>st</sup> defendant's defence and paragraph 11 in the 2<sup>nd</sup> defendant's defence. He (Mr Ongaya) maintained that even if it is assumed that all the facts pleaded by the plaintiff are correct, still the court has no jurisdiction to entertain the chamber summons and the suit. He re-echoed Mr Ojiambo's submission that the defendants' preliminary objections be heard first.

I think the issue as to which of the parties should argue his or her case first regarding the defendants' preliminary objections and the plaintiff's objection thereto can be disposed of quite briefly as under.

While the case of "Lillian S" related to admiralty jurisdiction, the statement by the late Nyarangi, J.A. to the effect that a question of jurisdiction ought to be raised at the earliest opportunity and that the court seized of the matter is then obliged to decide the issue straightaway is of general application and not only can but should apply to the present case.

I understand the defendants to say essentially that they want to argue preliminary points of law arising from the pleadings on record and that they hope to persuade the court that neither the chamber summons nor the suit upon which it is based has any legal basis and should be terminated now. On the other hand, it is the plaintiff's case that the defendants have not validly brought their preliminary objections and that the said objections should not be entertained.

This court holds that the parties are entitled to their respective rival views but they, the parties, are reminded that the order in which they are heard will not necessarily be the deciding factor. Even if I hear the plaintiff first on his objection to the defendants' preliminary objections, I shall not decide the matter on the basis of his submissions alone but shall also give the defendants a hearing before deciding. Likewise, even if I hear the defendants' preliminary objections first, I shall not decide the matter without hearing the plaintiff thereon. That is my understanding of the rules of natural justice. So it does not really matter which of the parties I hear first. Each party will have his or her day in court. More fundamentally, I am of the persuasion that the issue of jurisdiction is a pure point of law which can be raised at any time and that it is better raised at the earliest possible opportunity. It has been raised at the start of the proceedings before me, and that is as it should be. I must hear arguments and counter arguments early and make a decision on it and on other proper preliminary points of law arising from the pleadings as they stand before doing anything else in this matter.

The upshot is that I shall hear the defendants preliminary objections first and the plaintiff will be entitled to make his counter – submissions or argue his objection to the defendants' preliminary objections in response. Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 15<sup>th</sup> day of March, 2007.**

B.P. KUBO

JUDGE