



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 33 of 1997

IN THE MATTER OF THE ESTATE OF MBURUGU NKAABU (DECEASED)

JERICA GATWIRI MAGIRI..... APPELLANT

VERSUS

REBECCA MPINDA & OTHERS..... RESPONDENT

RULING

The applicant was aggrieved by this court's decision (Sitati, J) dismissing her application dated 1st November, 2004 for review of an earlier ruling by the same court on 18th October, 2004 distributing the estate in this Succession Cause. The applicant brought the instant application seeking among other reliefs, stay of execution and proceedings as well as the maintenance of status quo of the suit property.

The application is grounded on the facts that the applicant has filed a notice of appeal, dated 29th October, 2004 yet the petitioners have threatened the applicant with eviction so that they can sell the land. That if the land is sold then the appeal shall be rendered nugatory and the applicant shall be landless.

That application has been opposed by the respondents who have filed grounds of opposition in which they have argued that the application is frivolous, vexatious and an abuse of the court process.

That there can be no appeal after the applicant sought a review of the order, the subject of the appeal, and was unsuccessful.

Secondly, that the applicant has not sought for leave to appeal. The respondents further aver that the conditions for granting of the relief sought have not been satisfied and finally that the intended appeal has been overtaken by events and is an exercise in futility.

The respondents, through counsel, have also filed a notice of preliminary objection which is the subject of this ruling. Objection is raised on three grounds, namely;

- (i) That the application is incompetent and frivolous as the order sought to be appealed from was challenged by way of review and same was rejected by the court and there is no appeal against that refusal to review
- (ii) That the notice of appeal was filed on 1st November, 2004 and no appeal has been filed and hence same lapsed after 60 days of lodging
- (iii) There is no application to revive the notice or extend time of filing appeal.

These grounds were argued before me on 26th March, 2007. Learned Counsel for the respondents submitted that the applicant having filed both an application to review orders of 18th October, 2004 and an appeal against that order, and having elected to proceed with the application for review is presumed to have abandoned the appeal. That notice of appeal cannot be the basis for the application for stay of execution.

Furthermore, he argued, the notice of appeal filed on 1st November, 2004 lapsed since the appeal itself has not been filed. Responding to these arguments counsel for the applicant submitted that a new trend has set in where preliminary objections are being raised in applications. In his view a preliminary objection can only be raised in respect of a suit –and not otherwise. He invited the court to note that the heading of order 14 confirms his contention.

Secondly he submitted that the High Court cannot interfere with a notice of appeal filed in the Court of Appeal. He further explained that they have not been supplied with the proceedings to enable them file the appeal.\

I have weighed these arguments and hold the following view on them. First the law, regarding preliminary objection is order 14 of the Civil Procedure Rules.

Then, of course there is the celebrated case of Mukisa Biscuit Manufacturing Co.Ltd V West End Distributors Ltd (1969) EA 696. Generally speaking all issues arising in a suit must ordinarily be tried together. However, there is exception to this rule as legislated in order 14 rule 2 of the Civil Procedure Rules and espoused in the case of Mukisa. The court has a discretion to allow any question of law to be raised as a preliminary point and decision thereon made before any evidence is given or any issue or question of fact is tried. The only other limitation to the exercise of this discretion, other than that the point raised must be purely one of law, the court must also be satisfied that the point is capable of disposing the matter.

The intention of the Rules Committee was clearly to expedite disposal of cases which can be done summarily. These are, therefore, the parameters within which the instant notice of preliminary objection must be seen and determined.

With respect to learned counsel for the respondents, all the three grounds raised in the notice of preliminary objection do not constitute pure points of law. They are all averments of fact which require ascertainment. They are grounds that can be argued in reply to the application.

For instance, the first ground is to the effect that the applicant having lost the application for review can only appeal against the order dismissing that application and cannot rely on a notice of appeal which has lapsed.

Order 41 rule 4 under which the application is expressed to be brought and specifically sub rule (4) provides that;

“(4) For purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given”

There is no dispute that the applicant has complied with this requirement; a notice of appeal has been filed. Whether it has been filed within the prescribed period or whether 60 days have lapsed are matters of fact.

Similarly the two last grounds are not pure points of law which are capable of disposing of the application. As was alluded in Mukisa case Preliminary objection must relate to matters such as objection to the jurisdiction of the court, a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration or a bar to the suit created by any law.

Before I conclude, counsel for the applicant submitted that preliminary objection cannot be raised in

applications. That order 14 makes reference to suits. He undertook to avail an authority which has held that preliminary objection cannot be raised in an application. He has not done so.

It is true that order 14 and even the Mukisa case makes reference to “suit”. The term suit is defined in Section 2 of the Civil Procedure Act to mean;

“..... All civil proceedings commenced in any manner prescribed”

A Notice of Motion is an instrument used to commence a civil action, which may be properly transacted by a judicial officer in court. It is a means of acquiring jurisdiction over a matter. It follows therefore that a preliminary objection can properly be raised in any form of application.

I come to the conclusion that this objection must fail. It is overruled with costs to the applicant.

DATED AND DELIVERED AT MERU THIS 11th DAY OF May, 2007

W. OUKO

JUDGE