



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 47 of 2006

1. ONESMUS MASIKA MUSOLA

2. PHILIP MUNGUTI

3. NELSON WAMBUA

4. BERNARD GITAU

5. FRANCIS KURIA NJUGUNA

6. KITUA KITUKI

7. FRANCIS MUTISO

8. CELESTINE MUTISO

9. FRANCIS MUTISO

10. JAPHETH MUSYOKA

MONDAPLAINTIFFS

VERSUS

1. THE TOWN CLERK

2. TOWN COUNCIL OF

MATUUDEFENDANTS

RULING

The defendants herein have filed a Notice of Preliminary Objection to the chamber summons application dated 11th May 2006 and to the suit generally. The defendants have in the said Notice based their objection on the following grounds:-

1. That the court has no jurisdiction to issue the substantive orders sought.
2. That the application is incurably defective and incompetent as it is based on an incompetent suit.

3. That the application should be struck out with costs to the defendants.

Mr Musyoka, argued the objection on behalf of the defendants in his submissions the counsel submitted that the suit was incompetent because in its final orders it sought a permanent injunction against the defendants to restrain them from carrying out the demolitions on buildings mentioned in paragraph 3 of the plaint. Counsel submitted that no permanent injunction could issue to restrain local authority from carrying out its powers and duties as conferred on it by the Local Government Act. That part of the duty of the defendants were to ensure proper planning and regulated developments within the area of its jurisdiction. That orders sought would be tantamount to usurping those general powers of the 2nd defendant.

Counsel further submitted that the Town Council had through its councilors passed a resolution which culminated in the issuance of a directive to the plaintiffs in the suit. That said directive was the subject matter of the suit and that the plaintiffs had wrongly come to court by way of a plaint. That since directive was a decision of a body exercising its quasi-judicial powers, the same could only be challenged by way of a judicial review.

Lastly, counsel for the defendants submitted that the Town Clerk a public servant was appointed by the Public Service Commission and seconded to the council. That being a public servant he was an officer of the court and that no injunction could be issued against him under Section 16 (2) of the Government Proceedings Act. That in the circumstances the suit as filed could not stand.

Counsel submitted that since the substantive prayer sought was a permanent injunction, and since an injunction cannot stand alone and further that since the suit was incompetent then the application should be struck out with costs.

Mr Mutinda, counsel for the plaintiffs submitted that the preliminary objection raised was brought in bad faith and should not be upheld. Counsel did not quite address the issues raised substantially. Counsel submitted that the plaintiffs had a right in law to challenge the Resolution passed by the 2nd defendant to demolish their property. That since the Resolution was not denied, then the application was rightly before court under Order XXXIX Rule 1 (2) (a) of Civil Procedure Rules.

Counsel further submitted that the 1st defendant, the clerk to Town Council, was sued as the Administrative officer of the 2nd defendant and not as an employee of the government. That in those circumstances the 1st defendant was properly before the court, therefore, counsel submitted that Section 16 (2) of the Government Proceedings Act did not apply.

Counsel submitted that the duty of the plaintiff at this stage was to show that the case had high chances of success. That since the court had jurisdiction to grant injunctions, then the application should be entertained.

Finally counsel submitted that the 2nd defendant was a local authority whose powers and execution of duties did not give them right to interfere with other peoples rights. That the plaintiffs had a right to challenge their actions through the way of plaint.

I have considered all the issues raised in this Preliminary Objection. The first issue I wish to address is fundamental and it is whether the defendants Preliminary Objection raises preliminary points. MUKISA BISCUIT MANUFACTURING CO. LTD. Versus WEST END DISTRIBUTORS LTD 1969 E.A 696 is the leading case on this point. In the Judgement of LAW, J.A, at page 700, learned Judge of appeal made the following observations on this point:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued, as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving use to the suit to refer the dispute

to arbitration.”

In Newpold, President, on the same point made the following observations:-

“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.”

Applying the tests discussed in their lordships remarks to the preliminary objection raised herein by the defendants, the first issue which arises is whether the defendants could be sued apart from making bare contentions. None of the counsels gave any relevant citations in regard to this issue. Section 28 of the local government acts deals with the establishment and incorporation of county councils and town councils. Under Section 28 (3) of the Act specifically answers the issue at hand and provides as follows:

“28 (3) Every County or town council shall, under the name of “the County Council of” or “the Town Council of”, as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land.”

It is explicit and needs no elaboration. Matuu Town Council, the 2nd defendant herein is a corporate body as pleaded in paragraph 1 of the plaint and is capable in law of being sued.

This suit therefore was not incompetent as far as the 2nd defendant was concerned. Since the 2nd defendant was a body corporate, it could be sued directly. It was not necessary to join in the suit an officer of the council. In that light therefore I find that there was no need to join the 1st defendant herein into the suit. I am also satisfied that the anomaly of joining the 1st defendant into the suit as herein, does not render the whole suit defective. The suit against the 1st defendant is severable from that against the 2nd defendant without affecting that against the 2nd defendant. I will therefore struck out from this suit the 1st defendant’s name as a defendant in the suit and consequently strike out the suit against him. The suit against the 2nd defendant is sustained. Having decided that the Town council could be sued I will determine next whether the suit was incompetent as argued by the defendant’s advocate. As quoted from the Mukisa Biscuit Case, Supra, especially in Newpolds observation, a preliminary point is one which raises a purely point of law based on the assumption that facts pleaded by the other are correct and which facts need not be ascertained. The defendants’ advocate argued that the plaintiff was challenging the decision of the council through the case and that such a decision could only be challenged by way of a judicial review application.

The 3rd paragraph of the plaint describes plots which the plaintiffs claim they own within the defendants’ jurisdiction. In the affidavit sworn in support of the application for a temporary injunction several exhibits are annexed and marked “O.M.M. I (A) to (N). These are miscellaneous income receipts and are signed for by the Treasurer/Cashier of the council. The plaint and the supporting affidavit also plead to the fact that the plaintiffs own several buildings within the town council. All these averments have been replied to by the defendant in the defence. They are contentious issues and facts which are not agreed upon by the parties. It means that evidence will need to be called for example to show how the plaintiffs came to own the plots and build the land. For a Preliminary Objection to succeed there must be an agreement of facts. The Preliminary Objection argued herein does not pass the test. The Preliminary Objection does not raise purely point of law and does not fall within the example of cases given by Law, J.A., in the Mukisa Biscuits case, Supra. This Preliminary Objection therefore fails and is consequently dismissed.

Dated at Machakos this 30th day of May, 2006.

J. LESIIT

JUDGE