

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ELC CASE NO 117 OF 2019

JUSTUS WEKESA

PAULINE SALASIA

JANET VUGUTSA.....PLAINTIFFS

VERSUS

ABUBAKAR BIBI MANSOR HAJI (Sued in their capacity as the registered

trustees of Imam Shafi Center for Memorization of the Quran Mosque.....DEFENDANTS

RULING

This ruling is in respect of a preliminary objection by the defendant/applicants on the grounds that the suit is fatally defective for misjoinder of parties and lack of locus standi to file the suit.

Counsel agreed to canvass the preliminary objection by way of written submissions which were duly filed.

DEFENDANT/APPLICANT'S CASE

Counsel for the defendant/applicant relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West Distributors (1969) EA 969** on preliminary objections where it was stated that:

“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.”

Counsel also relied on the case of **Oraro vs Mbaja (2005) KLR** where Justice Ojwang echoed the definition of a preliminary objection and that such should only succeed if it raises a point of law and stated that:

A "Preliminary Objection " correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.

Mr Kagunza submitted that the plaintiff lacks locus standi to file the instant suit as the prayers sought by the plaintiff are a permanent injunction restraining the defendants from any further dealing with the structure constructed on the parcel of land known as ELDORET MUNICIPALITY BLOCK 21 (KINGONGO) 4729 registered in the name of Salim Kabwere and that the respondents be allowed to reconvert the mosque into madrasas as it was initially.

It was counsel's submission that the said Salim Kabwere has neither given the plaintiffs any registered power of attorney to institute this suit on his behalf nor the authority to depone and act on his behalf.

Counsel relied on the case of **Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000** on the definition of locus standi where the court held that;

‘locus standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in a court of law.’

That further in the case of Kibera Blessed Academy v World Missionary Evangelism of Kenya Registered Trustees & 4 others (2016) eKLR it was held that:

"If a party is found to have no locus standi, it means that he or she cannot be heard even on whether or not he has a case worth

listening to

Counsel submitted that the suit offends Order 2 Rule 15 of the Civil Procedure Rules and cited the case of **KIVANGA ESTATES LIMITED VS NATIONAL BANK OF KENYA LIMITED (2017) eKLR**, where the Court of Appeal upheld the decision in **TRUST BANK LIMITED VS AMIN COMPANY LIMITED & ANOTHER (2000) KLR 164** that stated:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and it is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raise irrelevant issues which may involve expenses which will prejudice the fair trial of the action.

Mr. Kagunza therefore stated that the presence of the defendants will not contribute to the effectual or complete adjudication of this matter since no right of relief could be flowing from the defendant to the plaintiffs warranting the plaintiffs enjoining the defendants to this suit as the defendants have no claim to the suit land or the purported structures on the said land.

Counsel therefore urged the court to uphold the preliminary objection with costs as the suit is fatally defective for misjoinder of parties.

PLAINTIFF/RESPONDENT'S CASE

Counsel for the plaintiffs opposed the application and submitted on the ingredients of a preliminary objection That for a preliminary objection to succeed, it must satisfy the following ingredients;

- a) It has to be on a pure point of law
- b) It is raised on the understanding that the facts pleaded by the other side are not disputed. The facts pleaded by the opposite party must be agreed.
- c) It must not be one which requires evidence to establish it.
- d) It must be one if successful will dispose of the proceedings
- e) It must be one which has been pleaded or one which has arisen in the course of pleadings.

Mr Okara submitted that the preliminary objection does not meet the threshold of a preliminary objection and that whether the suit herein discloses no reasonable cause of action can only be determined after the Honourable court has heard parties by the way of viva voce evidence in which case it calls for evidence to be tendered.

Counsel relied on the provisions of Order 1 Rule 9 of the Civil Procedure Rules which states that:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Mr Okara also cited the case of **William Kiprono Towett & 97 others vs Farmland Aviation Ltd & 2 others [2015] eKLR** to emphasize the position in law and urged the court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

The issues for determination in this preliminary objection is whether the same meets the threshold of a preliminary objection as was held in the **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. The classicus case demands that the objection must consist of a point of law, must have been pleaded or arises from the pleadings and if argued may dispose of the suit. Where a court is asked to look outside the pleadings or for evidence to come up with a decision on the preliminary objection, then the same does not fit to be termed as a preliminary objection but to call for either viva voce or affidavit evidence.

The applicant has submitted that the plaintiff lacks locus standi and that the suit should be dismissed for misjoinder. The court will deal with the two issues simultaneously. It is the applicant's assertion that the plaintiffs do not have locus standi on the ground that the suit land belongs to one Salim Kabwere who is not a party to the suit and that he has not donated any power of attorney to the plaintiff. There is no annexure in terms of a title or a lease certificate to show who the owner of the suit property is. This is a more reason why this is not a suitable case to be dealt with vide a preliminary objection. There will be need for evidence to be tendered to disprove that assertion.

Further, it should be noted that the suit does not deal with the ownership of the property, the plaintiffs are complaining that there are unapproved structures on the suit land which is causing them harm.

The plaintiffs acknowledge that the suit land is registered in the name of one Salim Kabwere and therefore they have no rights to the suit land. Locus standi is defined in **Black's Law Dictionary, 9th Edition at page 1026** as-

"The right to bring an action or to be heard in a given forum".

The Court of appeal in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** put it in the following terms: -

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

On the second issue as to whether the suit should be dismissed due to misjoinder, Order 1 Rule 9 of the Civil Procedure Rules provides;

Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

The Court of Appeal in **WILLIAM KIPRONO TOWETT & 1597 OTHERS VS FARMLAND AVIATION LTD & 2 OTHERS (2016) eKLR** held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Further in the case of **REPUBLIC VS. DISTRICT LAND REGISTRAR, UASIN GISHU & ANOR (2014) eKLR** Justice Ochieng held that:

“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”

I have considered the pleadings, the submissions and the authorities therein and find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiffs.

DATED and DELIVERED at ELDORET this 26th DAY OF JANUARY, 2021

M. A. ODENY

JUDGE