REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 4 OF 2020

(FORMERLY EMBU CC NO 157 OF 2008)

JACKSON NDINGU KAGUE & ANOTHER.....PLAINTIFFS

VERSUS

THE ATTORNEY GENERAL.....1st DEFENDANT

DC KIRINYAGA DISTRICT.....2nd DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA.....3rd DEFENDANT

RULING

Summary of facts

The ruling coming up in this matter is in respect of the Plaintiff's Notice of Preliminary Objection filed on 12th November 2019. The point of preliminary objection raised is that the advocates appearing for the 3rd Defendant, being Wanyonyi & Muhia Advocates are improperly on record as there is already counsel on record for the 3rd Defendant, being D.N Gitonga & Co Advocates.

Parties canvassed the preliminary objection by way of submissions.

Submissions

The Plaintiff filed his submissions on 18th November 2020. He submits that the record reflects that the 3rd Defendant was acting in person until when judgement was delivered in 2007. He further submits that the firm of D.N Gitonga & Co Advocates filed a notice of appointment on 3rd December 2016. He notes that the advocates appearing on behalf of the 3rd Defendants, being the firm of Wanyonyi & Muhia Advocates have neither filed a notice of appointment nor a notice of change of advocates and they are thus improperly on record. He quotes *Order 9 Rule 5 of the Civil Procedure Rules, 2010* which requires a notice of change of advocates to be filed in the event that new representation is sought by a party to any proceedings.

The 3rd Defendant filed their submissions to the Plaintiff's preliminary objection on 04th November 2020. They submit that the firm of Wanyonyi & Muhia Advocates filed a Notice of Appointment on 23rd September 2013. They submit that the firm of Wanyonyi & Muhia Advocates have come on record to join the firm of D.N Gitonga & Co Advocates. Several authorities are cited to the effect that a party is at liberty to instruct as many advocates as they may wish to represent them in a matter. The cited authorities are: *Willie Kiritu Vs Batholomew Muruli & 3 Others [2014] e KLR; Orion East Africa Vs Mugama Farmers Co-operative Union Limited & Another [2015] e KLR*. The 3rd Defendants further submit that in any case, by operation of *Article 159 of the Constitution and the Overriding Objectives in the Civil Procedure Act*, courts have been hesitant to strike out applications merely for lack of conformity with the provisions of *Order 9 Rule 5 of the Civil Procedure Rules, 2010.* The case of *Iway Africa Limited Vs Infonet Africa Limited & Another [2019] e KLR; Richard Ncharpi Leiyagu Vs IEBC & 2 Others [2013] e KLR; Kamlesh Mansukhlal Damji Pattni Vs Nasir Ibrahim Ali & 2 Others [2005] e KLR and Richard Murigu Wamai Vs Attorney General & Another [2018] e KLR* are quoted in support of this position.

Issues for determination

Whether the preliminary objection raised is one that ought to occasion the striking out of the applications and documents filed by Counsel appearing for the 3rd Defendant.

Legal analysis and opinion

The first step to be take in determination of the application is to evaluate the preliminary objection filed by the Plaintiff under the light of various judicial authorities and to assess whether the same can be sustained.

The locus classicus on preliminary objections is the dictum of ***Law J.A*** in ***Mukisa Biscuit Manufacturers Ltd Vs Westend Distributors Ltd (1969) EA 696.***

> *"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 rise to the suit, to refer the dispute to arbitration."*

The words of ***Sir Charles Newbold P*** in the same case at ***page 701, B*** are helpful:

> *"...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."***

The Supreme Court of Kenya has cited with approval the position on preliminary objections emphasized by the Court in the case of ***Hassan Nyanje Charo Vs Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] e KLR;*** and in ***Aviation & Allied Workers Union Kenya Vs Kenya Airways Ltd & 3 Others,*** **Application No. 50 of 2014, [2015] e KLR:**

> *"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie* **presented in the pleadings on record."**

It is abundantly clear from the body of decisions cited above, that preliminary objections must confine themselves to pure points of law. Questions of fact requiring the court to evaluate the evidence on record fail to meet the bar that has been set for preliminary objections. Decisions designed to assist litigants in determining whether a preliminary objection obtains in their case abound. See - ***Oraro Vs Mbaja [2005] e KLR*****, where the distinction between a question of law and fact was discussed:**

> *"… 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 point…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."*

The decision in ***Omondi Vs National Bank of Kenya Ltd & Others*** **{2001}** ***KLR 579; [2001] 1 EA 177*** also provides useful guidance:

> *"The objection as to the legal competence of the Plaintiffs to sue …… and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."*

The case of ***George Owino Mulanya & 4 others Vs Charles Achieng Odonga & another [2017] e KLR*** makes valuable addition to the subject:

> *"…a* ***question of law****, also known as a* ***point of law****, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a* ***question of fact****, which must be answered by reference to facts and* ***evidence*** *as well as inferences arising from those facts. The answer to a question of fact (a "****finding of fact****") usually depends on particular circumstances or factual situations."*

The Supreme Court of Kenya in the case of ***Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 others [2015] e KLR*** assessed the proper purpose of a preliminary objection as follows:

> *"…The* occasion to hear this matter accords us an opportunity to make certain observations regarding *the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.*

> *In light of the decisions, it is overwhelmingly clear that a preliminary objection must be one that raises pure points of law. In situations where the court is unable to discern a point of law or where the preliminary objection as raised requires the court to make a determination on contested facts through the usual process of taking into account the weight of evidence submitted by the parties, that is clear signal that the Preliminary Objection is improper.*

In the instant case, the plaintiff is contesting the manner in which the firm of Wanyonyi & Muhia Advocate have been appointed to act for the defendant. According to the plaintiff, the said firm of Advocates ought to have filed a Notice of Change of Advocates, not a Notice of Appointment of Advocates as there was an existing firm of Advocates acting for them namely D.N. Gitonga & Co. Advocates. I agree with the learned counsels appearing for the defendants that ***Order 9 Rule 5 CPR*** does not bar a party from appointing as many Advocates as he may wish. The appointment of the firm of Wanyonyi & Muhia Advocates in addition to the firm of D.N. Gitonga & Co. Advocates is not in breach of any procedural law.

A similar question arose before **Lady Justice R.P.V. Wendoh** in the case of ***Willie Kiritu Vs Batholomew Murute & 3 Others (2014) e K.L.R*** where she stated as follows:-

> "*The question then is whether the firm of Murimi, Mbogo & Muchela are properly on record. I have perused the file and I find no notice of change or appointment. This was their first appearance in this matter. I do agree with Mr. Murimi's contention that a party can have as many advocates as he wishes".*

The issue whether the firm of Wanyonyi & Muhia Advocates ought to have filed a Notice of appointment or a Notice of Change is a technical matter which does not go into the substance of the dispute before Court. The issue is of a technical nature which can be cured by the application of ***Article 159 (2) (b) of the Constitution of Kenya 2010*** and ***Sections 1A of the Civil Procedure Act***. The overriding objective of the ***Civil Procedure Act*** and the Rules made thereunder enjoins this Court and all Courts to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes without undue regard to procedural technicalities.

I find the Notice of Preliminary Objection not well taken and the same is not upheld. Consequently, the plaintiffs Preliminary Objection dated 12th November 2019 is hereby dismissed with costs to the 3rd defendant. It is so ordered.

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 24th day of March, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Nyangati holding brief for Beaco for Defendants*
2. *Mr. Mwangi Maina holding brief for Wangechi Munene for Plaintiffs*
3. *Kabuta – Court clerk.*