



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2020

UCHUMI SUPERMARKETS PLC.....TENANT/APPLICANT

-VERSUS-

TIPSY COMPANY LIMITED.....LANDLORD/RESPONDENT

RULING

This ruling is in respect of a preliminary objection dated 8th February 2021 by the Landlord/Respondent on the grounds that the suit is fatally defective and contravenes the provisions of Section 19 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 3 Rule 1(1), and Order 4 Rule 1 (1) & (2) of the Civil Procedure Rules, 2010.

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

LANDLORD/RESPONDENT'S SUBMISSIONS

Counsel submitted that the suit is defective as it contravenes Section 19 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 3 Rule 1(1), and Order 4 Rule 1 (1) & (2) of the Civil Procedure Rules, 2010.

Counsel submitted that Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by rules and relied in the case of **Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others [2018]eKLR** where it was held that;

“Section 19 of the Civil Procedure Act further provides that every suit shall be instituted in such manner as may be prescribed by the rules. From a reading of Section 19, it seems that the rules applicable to filing of suits are not only found in the Civil Procedure Rules meaning that other statutes may contain Rules on how suits will be commenced.”

Counsel further submitted that the applicant has not adhered to Section 19 of the Civil Procedure Act and the provisions of Order 3 Rule 1 which require that every suit be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

In view of this, counsel submitted that the application is defective to the extent that a Plaint was not filed to accompany the Notice of Motion Application and relied on the case of **Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others [2018]eKLR** where the Court held as follows;

“ In the end, I find that the applicant is not properly before this court as there is no suit upon which the Notice of Motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect.” Reliance was further placed on *Peter Mwema Kahoro v Benson Maina Githethuki [2005]eKLR* where the Court held that; “The only objection which has caused me anxiety is the one directed at the manner in which the Applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:

19. Every suit shall be instituted in such manner as may be prescribed by rules.

And Order IV Rule 1 of the Civil Procedure Rules reads:

“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed.”

The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under the Advocates Act.

In the light of the above, I am not persuaded that the Applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the Application dated 2nd February, 2005 and filed on 4th February, 2005 is incompetent and is struck out with costs.”

Mr Yego also referred to Order 4 Rule 1 & 2 which provides for the particulars of a plaint and all the accompaniments of the Plaint. That the application has no particulars or description of the parties neither. There is also no verifying affidavit among other prerequisites.

Counsel cited the case of **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR** where the Court held as follows;

“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 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 raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?” See Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164.

Counsel therefore urged the court to strike out the application with costs to the landlord.

TENANT/APPLICANT’S SUBMISSIONS

Counsel opposed the preliminary objection and reiterated the contents of the replying affidavit. Counsel relied on the case of **Anchor Limited v Sports Kenya [2017] eKLR** where it was held that;

“The powers of the Court to strike out a pleading are special powers which ought to be exercised only in clear circumstances where the pleading is hopeless. Halsbury’s Laws of England, 3rd Edition Volume 30 at page 38 states that:

The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases, and where a question of general importance or serious question of law would arise on the pleadings, the court will not strike the pleadings unless it is clear and obvious that the action will not lie.”

Counsel submitted that the application is properly before the court filed under the provisions of Order 51 Rule 1 as well as Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya.

Counsel also submitted that there is the main suit pending determination being **IP 25 OF 2018 IN RE UCHUMI SUPERMARKETS PLC** and the applications filed are directly related to the said Insolvency Petition therefore there is no point filing fresh suits when the miscellaneous application is anchored under the main file that is **IP 25 OF 2018 IN RE UCHUMI SUPERMARKETS PLC**.

The applicant also relied on the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 which provision enjoins courts to administer justice without undue regard to procedural technicalities. Counsel therefore urged the court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION.

Preliminary objections must be purely on points of law as was held in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD – VS- WEST END DISTRIBUTORS [1969] E.A 696** in which it was held thus:-

“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 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 issues for determination are as to whether there is a suit at all and if so whether it is defective. It is procedural that one can only institute a suit through a Plaint, a Petition or an Originating summons.

The object of pleadings is to ensure all parties are aware of the issues between them so that each may sufficiently prepare for the case. In this matter the tenant/applicant only approached the Court by way of a Notice of Motion application and did not file a proper suit as envisaged by the law.

In the case of **Joseph Kibowen Chemior V William C Kisera [2013] eKLR** the court extensively discussed filing of suits as follows:

“The word "suit" has several meanings. Black's Law Dictionary defines "suit" as any proceedings by a party or parties against another in a court of law (7)"suit of a civil nature" is defined to be a civil action.

(8) "A civil action" is an action brought to enforce, redress, or protect a private or civil right.

(9) Section 2 of the Civil Procedure Act, defines "suit" as all civil proceedings commenced in any manner "prescribed" under Section 2 means prescribed by rules.

"Rules" means rules and forms made by the Rules Committee to regulate the procedure of courts.

(12) "pleadings" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.

Under Section 19 of the Civil Procedure Act, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example the Probate & Administration Rules under the Succession Act, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted".

It means therefore that where a person is commencing a civil suit (in this instance to enforce a civil action), he needs to follow prescribed rules.

The notice of motion is not a suit properly so called and the failure to follow the laid down procedure goes to the root of litigation and therefore cannot be salvaged by Article 159 of the Constitution or Sections 1A, 1B and 3A of the Civil Procedure Act or Order 51 of the Civil Procedure Rules as submitted by the Applicant.

In the case of **Salim Tunja Gambo v Commissioner of Lands**. Where Waki J. held as follows;

"Section 3A of the Civil Procedure Act is not a panacea for all wrongs. The inherent powers of the court ought not to be used indiscriminately when there are specific provisions of the law which can be invoked."

In the case of **Raila Odinga v. I.E.B.C & others (2013) eKLR**, the Court observed that:

"Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

Similarly in the case of **Board of Governors Nairobi School v Jackson Ireri Geta (1999) KLR** cited with approval in **Fidelity Bank Ltd v John Joel Kanyali Misc.Appl.8/2014** clarified how a suit can be commenced when it said:

"2. Pleading is defined in Section 2 of the Civil Procedure Act to:

Include a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV Rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

3. The use of the term "summons" in the definition of the term "pleading" must be read to mean "originating summons" as that is a manner prescribed for instituting suits.

4. Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder."

The tenant made reference to a pending suit before the High Court Commercial Division which is a separate court from the Environment and Land Court, the applicant cannot file applications across the courts in respect of the same issue.

In the case of **ELDORET ELC MISC APPLICATION NO 26 OF 2017 In the matter of the Estate of Cheptoo Rotich alias Lotobiko Cheptoo Rotich(deceased) and in the estate of Constantina Kabon Komen(deceased) between Alois Yano Chebet, Joseph Yano Murkomen and Kaino Kanda Rotich Vs Keneth K. Komen** this court upheld a preliminary objection and struck out the miscellaneous application for having not been instituted in a proper manner.

I have considered the preliminary objection, the submission by counsel, the relevant authorities and come to the conclusion that the objection has merit. The same is hereby upheld and the application struck out with costs to the Landlord.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE