



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 691 OF 2012

KIPLAGAT KOTUT.....PLAINTIFF

VERSUS

ROSE JEBOR KIPNGOK.....DEFENDANT

RULING

1. **Rose Jebor Kipngok**, the Defendant, filed the Notice of Preliminary Objection dated 4th October, 2019 raising the following grounds to the Motion dated 26th September, 2019;

- (a) *That the firm of M/s Bundotich Korir are not property on record for the Plaintiff.*
- (b) *That the garnishee proceedings are premature as they have not shown cause under **Order 23 of the Civil Procedure Rules**.*
- (c) *That the process herein breaches **Article 31 of the Constitution of Kenya**.*
- (d) *That the supporting affidavit depones to falsehoods and illegally obtained evidence.*

2. The Learned Counsel for the Defendant and the Plaintiff made their oral submissions for and against the preliminary objection on the 13th February, 2020 as summarized hereinbelow;

A. DEFENDANT'S COUNSEL SUBMISSIONS:

- (i) *That the firm of M/s Bundotich Korir & Company Advocates are not properly on record for the Plaintiff as required by Order 9 of the Civil Procedure Rules.*
- (ii) *That the garnishees should have been served with notices first under **Order 23 of the Civil Procedure Rules** as there could be a possibility the debt has already been attached.*
- (iii) *That the Defendant has not been called upon to show cause before the attachment proceedings were commenced.*
- (iv) *That the supporting affidavit by Counsel has deponed to matters that amount to breach of the Defendant's right to privacy under **Article 31 of the Constitution**, and should be struck out with costs. That the supporting affidavit contravenes **Order 19 Rule 3 of the Civil Procedure Rules** as the deponent is an Advocate for the party, and has deponed to contested matters.*

B. PLAINTIFF'S COUNSEL SUBMISSIONS:

- (i) *That the grounds on the preliminary deals with contested matters of fact and not issues of law.*
- (ii) *That M/s Bundotich Korir & Company Advocates are properly on record for the Plaintiff as evinced by the consent dated 9th August, 2019 and filed on the 4th September 2019, and the notice of Change of Advocate filed on the same date and served on the 5th September, 2019.*
- (iii) *The garnishee will have the opportunity to show cause during the hearing of the application in terms of **Order 23 Rules 1 and 2 of the Civil Procedure Rules**.*
- (iv) *That the preliminary objection was filed prematurely as the garnishee are yet to be invited to show cause.*

(v) That the right to privacy under **Article 31 of the Constitution** is not absolute, as it is subject to exemptions, like through a Court order to enable the Plaintiff execute on debts the Defendant is owed.

(vi) That the Defendant has not pointed out what paragraphs of the supporting affidavit contains falsehoods and the court can only make a determination on that during the hearing.

(vii) That **Order 23 Rule of the Civil Procedure Rules** allows garnishee applications to be supported by affidavits sworn by party or Counsel on record for the party.

3. The issues for determinations are as follows;

- (a) Whether M/s Bundotich Korir and Company Advocates are properly on record for the Plaintiff.
- (b) Whether the application contravenes **Order 23 of the Civil Procedure Rules**.
- (c) Whether the supporting affidavit breaches **Article 31 of the Constitution** or contains illegally obtained evidence.
- (d) Who pays the costs of the preliminary objection?

4. The Court has carefully considered the grounds on the preliminary objection, the oral submissions for and against, the record and come to the following conclusions;

(a) That during the hearing of the preliminary objection, Mr. Korir Advocate for the Plaintiff informed the Court from the bar that he had shown Dr. Chebii Advocate for the Defendant their receiving stamp on the filed consent and Notice of Change of Advocate filed on the 4th September, 2019. That though those documents are not traceable in this file, the Court has noted that Dr. Chebii did not dispute that information when making his reply. That as preliminary objection cannot lie in a situation where the facts are disputed as on this matter, that ground is rejected. The parties are at liberty to pursue the issue in subsequent proceedings.

(b) That **Order 23 Rule 1 and 2 of the Civil Procedure Rules** allows a decree holder like the Plaintiff herein to apply to the Court;

“1 (1)...either before or after an oral examination of the Judgment debtor and upon affidavit by the decree holder or his advocate...stating that another person is indebted to the judgment debtor...order that all debts...to the judgment debtor shall be attached to answer to the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order, it may be ordered that the garnishee shall appear before the Court to show cause why he should not pay the decree holder.....

(2) At least seven days before the day of hearing the Order nisi shall be served on the garnishee and unless otherwise ordered, on the judgment debtor.”

That the application dated the 26th September, 2019 by the Plaintiff shows it is brought pursuant to **Section 38(c) and (f) of the Civil Procedure Act** and **Order 23 Rule 1 and 2 of the Civil Procedure Rules**, and the contention by Counsel for the Defendant that it contravenes **Order 23 of the Civil Procedure Rules** has no basis.

(c) That **Order 19 of the Civil Procedure Rules** makes provisions for affidavits. That the supporting affidavit to the Motion dated the 26th September, 2019 is deponed by **Jonah K. Korir**, the Counsel for the Plaintiff. That while Counsel for the Defendant has in their notice of preliminary objection indicated that it contains falsehoods and illegally obtained evidence, the Learned Counsel did not specify which specific paragraphs or parts of the paragraphs contains falsehoods or illegally obtained evidence. That further, the Court has noted that the Defendant’s Counsel has filed the Notice of Intention to cross examine the said deponent dated 4th October, 2019 and hopefully the relevant paragraphs, if any, will be disclosed during the subsequent hearing. That accordingly, that ground fails.

(d) That as **Order 19 Rule 3 of the Civil Procedure Rules** requires affidavits to be confined to matters that the deponent is able of **“his own knowledge to prove”** provided that with **“leave of the Court, an affidavit may contain statement of information and believe showing the sources and grounds thereof”** in interlocutory proceedings, the Court has noted that the details of the accounts listed at paragraphs 3 and 4 of the supporting affidavit are not details found anywhere in the annexures attached which includes the Order issued on 7th March, 2019 in **Kisumu Court of Appeal Civil Appeal No. 31 of 2015**, and Certificate of Costs thereof marked **J.KK 1 and 2** respectively. That as the deponent has not disclosed the source of his information and is not the party, the account details are not matters within his knowledge and the two paragraphs are hereby struck out under powers granted to this Court under **Order 19 Rule 6 of the Civil Procedure Rules**, on the court’s own motion. That the striking out of the two paragraphs still leaves the Motion with the rest of the paragraphs of the affidavit in support, and is hence not sufficient to strike out the application.

(e) That the foregoing shows the Defendant’s preliminary objection has no merit.

5. That flowing from the foregoing, the Defendant’s preliminary objection has no merit and is rejected and dismissed with costs.

Orders accordingly.

Dated and signed at Eldoret this 7th day of May, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy Registrar through the online media given by Counsel/Parties.

Court Assistant: Christine