



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

ELC CASE NO. 18 OF 2017

JAMES KARIUKI KAMAU.....PLAINTIFF/APPLICANT

BENARD KAIRO KAMAU.....PLAINTIFF/APPLICANT

VERSUS

JOHN KIPKETER RUTO.....DEFENDANT/RESPONDENT

ROBERT MBUGUA NDURANU.....DEFENDANT/RESPONDENT

NJOROGE NDURANU.....DEFENDANT/RESPONDENT

JOHANA MWANGLI.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of a Notice of a Preliminary Objection by the 2nd and 3rd Defendants dated 27th February 2017 on the following points of law:

- a) That the Plaintiff does not disclose a cause of action as the immovable property which is the subject matter of the suit is not identified;
- b) The verifying affidavit has not been attested by a commissioner;
- c) This Honorable court has no jurisdiction to hear and determine the matters complained of;
- d) The Plaintiffs have not demonstrated that they have a confirmed Granted of Letters of Administration to give them locus standi to prosecute their claim.

The applicants subsequently filed a notice of preliminary objection on 3rd July 2018 claiming that the amended plaintiff did not disclose a cause of action and further, that the court had no jurisdiction to hear the matter.

APPLICANT'S CASE

Counsel for the applicant submitted that the Plaintiff filed on 23rd January 2017 does not disclose a cause of action known in law as the immovable property which is the subject matter of the Plaintiffs' cause of action has not been specifically identified and if any orders are made by this Honorable Court would be unenforceable.

Order 2 Rule 15 (1) (a) of the Civil Procedure Rules 2010 provides that:

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action

Counsel further submitted that the Plaintiffs did not produce a certificate of official search to identify the suit property cited in the notice of

motion namely Title number NGERIA/KESSES BLOCK 5/BAYETE 61 and that there is no evidence that the said parcel of Land was excised from the original property known as LR NO. 11130/Original Number 717/1) which was sold by the original proprietor one CHRISTOFFELINA MAGDALENA STEENKAMP to WENDANI FARMERS CO-OPERATIVE SOCIETY LIMITED.

On the second issue counsel submitted that that the verifying affidavit purportedly verifying the Plaintiff is itself a nullity as the said Affidavit has not been attested by a Commissioner for Oaths and relied on the case of **Monica Jeruto Ruto v Simon Ngugi & 8 others [20181 eKLR]** where this court held that

“attesting of a verifying affidavit is a requirement under the law. The plaint upon which this suit is hinged is not dated and the verifying affidavit is not attested to by a commissioner for oaths or a Magistrate. It is also not dated. To make matters worse the supporting affidavit by the applicant is also not attested to. This is a requirement under the law and thus the application has no legs to stand on. This does not amount to technicality but a requirement under the law and procedure. The verifying affidavit and the supporting affidavit do not qualify as affidavits for the reasons stated above. They are therefore expunged from the court record

On the third issue the applicant submits that this Honorable court does not have jurisdiction as the Plaintiffs alleged cause of action appears to be founded on a Grant of Letters of Administration to the Estate of one ZIPPORAH NJERI KAMAU (DECEASED) and these proceedings should have been instituted in the Family Division of the High Court.

Counsel submitted that the jurisdiction of this Honorable Court flows from Article 162(2) (b) of the Constitution of Kenya 2010 which is read together with the provisions of section 13(2) of the Environment and Land Court Act. The latter provides as follows;

"In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) any other dispute relating to environment and land

On the fourth issue the applicant submits that the Plaintiffs have not exhibited a Certificate of Confirmation of the Grant of Letters of Administration to indicate that they have the necessary locus standi to prosecute their claim before this Honorable Court.

Counsel relied on the case of **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [20191 eKLR (ELC CASE NO 222 OF 2018)]** Lady Justice L. Gacheru made reference to **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, 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 Court of Law".

Further in the case of **Alfred Niau and Others. . Vs. City Council of Nairobi (1982) KAR 229**, the Court also held that; -

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

Counsel therefore urged the court to uphold the preliminary objection as the plaintiffs have not established an interest over the suit property.

RESPONDENT'S CASE

The respondent has not filed any submissions in response to the preliminary objection.

ANALYSIS AND DETERMINATION

The issues for determination are as to whether the plaintiff discloses a cause of action, whether the verifying affidavit has been attested to, whether this court has jurisdiction to hear and determine this matter, whether the plaintiffs have locus standi to prosecute the claim.

On the first issue as to whether the plaintiff discloses a cause of action, Order 2 Rule 15(1)(a) of the Civil Procedure Rules 2010 provides that;

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law;

A perusal of the plaint filed on 23rd January 2017 reveals that the plaint does not specify the details of the suit land. The particulars of the suit land are only contained in the plaintiff's statement. However, the plaintiff filed an amended plaint on 30th January 2018 and cured this issue.

On the second issue as to whether the verifying affidavit has been attested by a Commissioner of Oaths,

Order 3 Rule 2 of the Civil Procedure Rules provides;

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- (a) the affidavit referred to under Order 4 rule 1(2);
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

Order 4, Rule 1 & 2 provide;

(1) The plaint shall contain the following particulars—

- (a) the name of the court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff, and an address for service;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) the place where the cause of action arose;
- (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
- (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

The plaint instituting the suit did not contain a verifying affidavit but the same was subsequently amended and it has a verifying affidavit that is attested to by a Commissioner of oaths.

The Court of Appeal in **Kenya Commercial Finance Company Limited vs Richard Akwesera Onditi Nairobi Civil Application No. 329 of 2009** stated in this regard that:

“The Court now has wider powers and will not automatically strike out proceedings but will before doing so, look at available alternatives. According to the defendant, a verifying affidavit must be filed with the plaint and not subsequently. Order 4 rule 1(6), however, gives the court discretion when it comes to striking out based on such omission. The defendant is, however, incorrect in submitting that the omission to file one verifying affidavit would necessarily lead to the striking out of the suit. In my view, the only suit that would be affected by such omission in the present case is that of the 3rd plaintiff. In exercising this discretion, the most important consideration, in my view, is that of justice and unless the omission has occasioned the defendant prejudice, the court, as always, should lean towards sustaining a suit. The only prejudice alleged herein is that the effect of validating the plaint and the suit would be to pull the rag from the feet of the defendant as it were since it would have the effect of rendering a portion of the defendant's application filed earlier on superfluous. That may be so; however, it does not, in my view justify resort to the draconian option of striking out a suit, especially where the defect would only affect the suit by one of the several plaintiffs. The issue of the place of abode, in my view, is no longer a matter of life and death in light of the provisions of Order 19 rule 7 of the Civil Procedure Rules, 2010 which empower the court to receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

I find that it would be a draconian measure to strike out the suit on that ground which has been cured by a subsequent amendment.

On the issue whether the court has jurisdiction to hear and determine this case, Article 162 of the Constitution of Kenya provides;

"In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) relating to compulsory acquisition of land;
- c) relating to land administration and management;
- d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e) any other dispute relating to environment and land

A perusal of the amended plaint reveals that the particulars of the encroachment include;

- a) cultivating, leasing portion of the suit land without the consent of the plaintiffs.
- b) Erecting a fence on the portion of suit land hence preventing plaintiff's entry thereon.
- c) Denying or restraining the plaintiffs from using the suit land
- d) Grazing on a portion of the suit land without lawful cause
- e) Interfering with the plaintiffs' rights of enjoyment over the suit parcel of land without lawful cause or justification.

The above issues are within the jurisdiction of this court.

On the last issue whether the plaintiffs have *locus standi*, in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, on what preliminary objections consist of ,it was held 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. 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

The issue of confirmation or issuing of a grant of letters of administration has to be ascertained by production of evidence and therefore cannot be determined by way of a preliminary objection.

I therefore find that the preliminary objection lacks merit and is therefore dismissed with each party bearing their own costs.

DATED and DELIVERED at ELDORET this 16TH DAY OF JUNE, 2021

M. A. ODENY

JUDGE