



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 246 OF 2019

LUCY OUGO.....1ST PLAINTIFF

DOROTHEA MSHILA.....2ND PLAINTIFF

ELIZABETH WANJIKU NJOKA.....3RD PLAINTIFF

JOHN NJERU KIAMBUTHU.....4TH PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF NAIROBI.....1ST DEFENDANT

H.E MIKE MBUVI SONKO.....2ND DEFENDANT

RULING

1. The plaintiffs brought this suit through an unsigned plaint dated 24/11/2019. Together with the unsigned plaint, the plaintiffs brought a notice of motion of even date seeking, at the interlocutory stage, a mandatory injunctive order against the 1st defendant. The plaintiffs alleged that they were tenants of the 1st defendant in a property known as **LR. 209/4300/162**, located in Pangani Estate, Guinea Bissau Crescent, Nairobi. The Plaintiffs are no longer in occupation of the suit premises because the premises were demolished by the 1st defendant. The 2nd defendant was sued in his capacity as the elected Governor of the 1st defendant at the time of filing this suit.

2. Upon being served with pleadings relating to this suit, the defendants filed a notice of preliminary objection dated 1/11/2019, urging the court to strike out the suit. The said notice of preliminary objection is the subject of this ruling.

3. The preliminary objection was premised on the following grounds.

1. There is no suit before the court as the pleadings have been lodged in breach of Order 2, Rule 16 of the Civil Procedure Rules, by reason of which there is nothing to adjudicate upon.

2. The suit is barred by operation of Section 6 of the Civil Procedure Act, as plaintiff No.4 and 5 herein have levied the same claim on the same facts vide Nairobi Elc Case No.224 of 2019 which is pending trial before this Honourable Court. The other Plaintiffs are deemed to claim under the said plaintiffs

3. There is no written authority in writing under the hand of plaintiff Nos 2, 3, 4 and 5, authorizing the 1st plaintiff to represent them in the suit, in breach of Order 4, Rule 2 of the Civil Procedure Rules.

4. The motion dated 14th July 2019 seeks mandatory injunctions which effectively are final orders at an interlocutory stage, calling for the dismissal of the motion.

4. The preliminary objection was canvassed through written submissions dated 15/10/2020. The defendants argued that the plaintiffs' suit should be struck out on the ground that their pleadings failed to meet the mandatory requirements of the law. Their argument was that: (i) in breach of **Order 4, Rule 2** of the **Civil Procedure Rules**, the 1st plaintiff did not have a written authority to institute the suit on behalf of her co-plaintiffs; (ii) contrary to **Order 2 Rule 16** of the **Civil Procedure Rules**, the plaintiffs' pleadings were unsigned by their advocate and consequently there was no claim before court capable of adjudication; (iii) the plaintiffs' suit was barred by **Section 6** of the **Civil Procedure Act** by dint of the fact that the 4th and 5th Plaintiffs had lodged the same claim on the same facts that vide **Nairobi ELC No. 224 of 2019**; and lastly (iv) the plaintiffs' application sought mandatory injunctive orders at an interlocutory stage which were final in nature thus offending settled law. The defendants relied on various authorities in support of their arguments.

5. In response to the defendants' submissions, the plaintiffs filed written submissions dated 16/02/2021. The plaintiffs identified the following

as the two issues falling for determination in the preliminary objection: (i) Whether the preliminary objection was meritorious; and (ii) Whether ground numbers 2, 3 and 4 were grounds for preliminary objection. In essence, the plaintiffs' arguments were that their pleadings in the court file were duly signed in accordance with **Order 2 Rule 16** of the **Civil Procedure Rules** and in the event they were not signed, then the same could be cured by the "oxygen principle" under **Article 159 (2)(d)** of the **Constitution**. They further contended that since pleadings had not closed, they could cure the defect in their pleadings by filing proper pleadings and serving them upon the defendants. On the subsistence of **Nairobi ELC No. 224 of 2019**, they argued that this was a matter of fact which could only be ascertained by evidence and therefore did not meet the threshold of a preliminary objection. Lastly, on the ground of finality of the mandatory injunctive orders, they contended that this ground did not meet the purview of a preliminary objection. The plaintiffs relied on various authorities in support of their arguments.

6. The general principle of law governing a preliminary objection is well settled. In the *locus classicus* case of **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited [1909] EA 696** the court defined the tenor and import of preliminary objection as follows: -

"...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... 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 improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop..."

7. The above definition will be the lens upon which the defendants' four grounds of preliminary objection will be mirrored against. I will sequentially analyse and make my brief findings on the grounds of objection in the order in which they were itemized in the notice of preliminary objection.

8. The first ground of objection is that by dint of **Order 2, Rule 16 of the Civil Procedure Rules**, there is no suit for this court to adjudicate upon. This provision of law provides as follows: -

"Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person." (Emphasis mine)

9. To set the record straight on whether the pleadings in the court file are signed or not, I do confirm the plaintiffs' pleadings and motion both dated 24/07/2019 are both unsigned, which is contrary to **Order 2, Rule 16 of the Civil Procedure Rules**. This provision of law is couched in mandatory terms and the intent was to ensure that there is ownership of the contents of pleadings either by an advocate of a party, a recognised agent or the party to the suit. The plaintiffs have sought refuge in **Article 159 (2) (d)** of the **Constitution**. In my view an unsigned pleading is a substantive issue that goes to the root of the pleadings and, cannot be cured by the "oxygen principle". The courts have held that unsigned pleadings are a nullity. In the case of **Vipin Maganlal Shah & another v Investment & Mortgages Bank Limited & 2 others [2001] eKLR** the Court of Appeal was of the following view: -

"...If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed as required by Order VI rule 14, these other requirements clearly become meaningless. Whatever may be the position in India or even in England, the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law..."

10. Similarly in the case of **Regina Kavenya Mutuku & 3 others v United Insurance Co Ltd [2002] eKLR** the court held as follows on unsigned pleadings:

"... I am in agreement ... that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same... An unauthenticated document is not a pleading of anybody. It is a nullity. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record... I find that the defendant has no valid defence on record."

11. Consequently, it is my finding that the plaintiffs unsigned pleadings are a nullity. In the absence of a signed pleading, the 1st ground in the notice of preliminary objection is upheld.

12. The second ground of objection is that by operation of **Section 6 of the Civil Procedure Act**, this suit is barred by the fact that the 4th and 5th plaintiffs had lodged a similar claim as this one in **Nairobi ELC Case No. 224 of 2019**. The defendants raised this issue as a preliminary objection as opposed to any other platform thus denying themselves the opportunity to place before this court documentary evidence concerning the other suit. **Mukisa Biscuit case (supra)** has long settled the question as to what a point of law is. In my view, once the court is being tasked with interrogating the facts of a case including whether or not a previous suit had been filed in court by some of the parties over the same facts then that is not a preliminary point of law. The proper platform for canvassing this particular point would, in my view be a motion supported with an affidavit. Consequently, I do not find any merit in the second ground of objection.

13. The third ground of objection is that by dint of **Order 4, Rule 2 of the Civil Procedure Rules**, the 1st plaintiff does not have written authority from the 2nd, 3rd, 4th and 5th defendants authorizing her to represent them in the suit.

14. Looking at the above provision of law, it relates to the drawing of a monetary claim. The relevant provisions of law on written authority by a non corporate entity is found under the provisions of **Order 1 rule 13 (1) (2) and Order 4 Rule 1(3) of the Civil Procedure Rules** which provides thus: -

“...Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding... The authority shall be in writing signed by the party giving it and shall be filed in the case’...and that ‘...Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.”

15. In the instant case, the 1st plaintiff purports to institute the suit on behalf of the 2nd to 5th plaintiff without their written authority. Does this warrant the striking out of pleadings? My answer to this is in the negative. My understanding of **Order 1 rule 13 (1) and (2) and Order 4 Rule 1(3) of the Civil Procedure Rules** is that in the event a plaintiff does not have written authority from her co-plaintiffs, then she cannot purport to represent them. Lack of such an authority does not necessarily void the proceedings, but rather it incapacitates the plaintiff from purporting to represent her co-plaintiffs. The suit is treated as that of the one plaintiff. In the case of **Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others [2016] eKLR** the court in affirming this settled law reasoned as follows: -

“However, the court of appeal appears to have settled the foregoing issue when it held in the case of Research International East Africa Ltd V Julius Arisi & 213 Others [2007] eKLR, C.A at Nairobi Civil Appeal No. 321 Of 2003 that the superior judge had discretion and jurisdiction not to strike out a plaint where the verifying affidavit was sworn without the authority of other plaintiffs, but to allow the parties to remedy the situation by complying with the rules of procedure...Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules...”

Accordingly, the 3rd ground of the preliminary objection fails.

16. The fourth and last ground is that the plaintiffs’ application dated 14/07/2019 seeks mandatory injunctive orders at an interlocutory stage. The court in exercising its discretionary power in arriving at a determination on whether or not to grant a mandatory injunctive order has to analyse the pleadings and documentary evidence presented before it. The Court of Appeal in the case of **Olive Mwhaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR** was persuaded by the Indian case of **Ashok Kumar Bajpai - v- Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88** which laid down the criteria for granting final orders at an interlocutory stage as follows: -

“...It is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief...” (Emphasis mine).

From the **Olive Mwhaki Mugenda(ibid)** case, it is obvious that a fact finding process has to be undertaken before a court grants a final relief to a litigant at an interlocutory stage, and consequently, I do not find any merit in the fourth ground of objection.

17. In summary ground number 1 in the notice of preliminary objection dated 1/11/2019 succeeds. The other grounds fail.

18. Ultimately, I make the following disposal orders in relation to the defendants’ notice of preliminary objection dated 1/11/2019.

a) The suit herein is struck out on the ground that the pleadings initiating the suit are not signed as required by the law

b) The plaintiffs shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF JULY 2021

B M EBOSO

JUDGE.

In the Presence of: -

Mr Kinyanjui for the Defendants

Mr Mabeya holding brief for Mr Okatch for the Plaintiffs

Court Assistant: June Nafula