



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 64 OF 2018

ANTONY NDEREBA1ST APPELLANT

DAVID MWENDA MUKINDIA2ND APPELLANT

VERSUS

AMOS MWENDA KAIRICHIA.....RESPONDENT

(Being an appeal from the ruling of Hon. J. IRURA in S.R.M ELC 40 of 2018 NKUBU delivered on 21.11.2018)

JUDGMENT

1. By a memorandum of appeal dated 18th December 2018 the appellants being the defendants in the trial court seek the ruling delivered on 21st November 2018 by principal magistrate Hon. Irura Esq in Nkubu ELC no. 40 of 2018 set aside on the following grounds:

- a. That the learned principal magistrate erred in law and facts by finding that the appellants were in contempt of consent orders allegedly adopted on 28.5.2018 when there were no such orders.
- b. That the learned principal magistrate erred in facts and in law by finding the appellants in contempt of court orders when no application to find then in contempt of the court orders was ever made.
- c. That the learned principal magistrate erred in law and in facts by disregarding the appellants preliminary objection dated 15.5.2018 which contested the competency of the whole suit and the capacity of the plaintiff to institute ELC no. 40 of 2018 and the 1st appellant alleged legal representation of the estate of the deceased's.
- d. That the learned principal magistrate finding is against the law and the evidence.

Background

2. The respondent by a plaint dated 15th March 2018 sued the appellants herein seeking for specific performance as per the lease agreement attached damages for breach of the lease agreement and a permanent injunction restraining 2nd defendant from trespassing on parcel of L.R Nkuene/Uruku/98.
3. Alongside the plaint the respondent brought a notice of motion dated 15th March 2018 seeking for temporary injunction orders. The same was supported by an affidavit sworn by Amos Mwenda on 15th March 2018 attaching several documents in support of his claim namely annexures *DM 1*” and *DM 2*”.
4. On 6th April 2018 a temporary injunction was issued restraining the respondent from trespassing, entering, cultivating or in any way interfering with the subject land pending hearing and determination of the application.
5. Subsequently on 25.4.2018 parties compromised the application so as to go for the main hearing. The appellants entered appearance on 18th April 2018, filed a replying affidavit sworn on the same date. Likewise the appellants filed a defence, list of witness statements and preliminary points of objection on 16th May 2018.
6. The preliminary point of objection set out the following grounds:

- i. That the plaintiff's suit is incompetent and null and void abinito for the reasons that the plaintiff lacks capacity to sue over land parcel LR no. Nkuene/Uruku/98 belonging to the late Ibuuri Ibeere (deceased).
- ii. That the 1st defendant is erroneously sued as a legal representative of the late Ibuuri Ibeere (deceased) when he has never obtained letters of administration over the deceased's estate.
- iii. That the 1st defendant is sued over an alleged agreement entered between the plaintiff and the 1st defendant's late wife Catherine Kanini (deceased) when has not obtained letters of administration to administer her estate.
- iv. That the 1st defendant is sued for a breach of alleged periodic lease when will be effective from 31st December 2026.

7. Before the court could take directions as agreed the respondent filed a notice dated 14th May 2018 seeking for contempt of court supported by an affidavit sworn on 14th May 2018 and a further affidavit sworn on 10th July 2018.

8. The appellants herein opposed the said application through a replying affidavit sworn on 25th June 2018 respectively on orders issued on 25.4.2018 by consent.

9. Directions were given by the trial court for disposal of the same by way of written submissions on both the application and the preliminary objection. The respondent filed submissions dated 10th July 2018 while the appellants relied on their written submissions dated 25th July 2018.

10. A ruling was delivered on 21st November 2018 in which the trial court dismissed the preliminary objection and found the appellant's guilt of contempt of court for orders issued interpartes on 25th April 2018 triggering the instant appeal.

11. By consent this appeal has been canvassed through written submissions by the appellants dated 24th September 2020 while those of the respondent are filed on 23rd June, 2020 though not dated.

12. This being an appeal it is the duty of the court to review the lower court holding and satisfy itself that the decision was well founded as regards the two issues; finding the appellants guilty of contempt of court and dismissing the preliminary point of objection.

13. On the issue of preliminary objection the law on the same is now settled by our courts.

14. In **Nitin Properties Ltd vs Singh Kalsi and another (1995) eKLR** the Court of Appeal held;

“A preliminary objection 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”.

15. In **Hassan Ali Joho and another vs Suleiman said Shaba and 2 others (2013) eKLR**, the Supreme Court stated;

“A preliminary objection consists of a point of law which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.

16. Similarly in **Independent Electoral and Boundaries Commission vs Jane Chepenger and 2 others (2015) eKLR** it was held;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objection. The true preliminary objection serves two purposes of metis. Firstly it serves as a shield for the originator of the subject – against profligate deployed 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 distinct to be resolved judicially and on the merits”.

17. In the instant case the trial court considered the legal principles as to what a preliminary point of law is as per **Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) EA 696** and in my considered opinion correctly applied the principles.

18. The trial court found, correctly so, that there were two rival sets of facts disputed by the parties requiring to be ascertained only through full hearing hence ground 3 of this appeal falls on the wayside.

19. Secondly on the issue of temporary orders, the record is clear that the parties compromised the application for injunction and agreed for status quo to be maintained. The court went ahead and clarified in their presence what the status quo meant. The appellants have not appealed against the orders made on 25th April 2018. If indeed the appellants were aggrieved by the said orders, they would have exercised their rights as to appeal by 24th May 2018. Instead they waited until the application of contempt was filed.

20. In my considered view the court cannot be faulted under ground no. 1 of the memorandum of appeal.

21. With regard to ground no. 2 of the appeal and as stated by the court in this judgment there was an application for contempt of court duly

filed and served upon the appellants to which each, of them responded by filing replying affidavits and written submissions.

22. The appellants cannot therefore possibly turn around and deny such obvious facts. I reject that ground of appeal.

23. Turning to ground no. 4 of the appeal the court as stated above has found the lower court considered the legal principles on the twin issues, applied the law correctly under the circumstances and hence arrived at the right decision. The appeal also fails on that ground.

24. In the circumstances the court finds the appeal herein without merits. The same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

Kaunyangi holding brief for Gichunge for appellant

Okubasu & Munene advocates for respondent

HON. C.K. NZILI

ELC JUDGE