



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CASE NO. E017 OF 2021

REPES SAIROWUA.....PLAINTIFF/APPLICANT

-VERSUS-

NAREYIOEN OLOGESO.....1ST DEFENDANT/RESPONDENT

DAVID MUTUTO MUMO.....2ND DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is a notice of preliminary objection dated 31st August, 2021 and filed on 6th September, 2021. He seeks to have the application and the suit filed by the plaintiff on the 19th August, 2021 struck out on the grounds that:

- i. That the application and suit as drawn and filed is fatally defective and incompetent as against the 1st Defendant/Respondent who is deceased and has not been sued in a representative capacity.**
- ii. That the suit is an abuse of the process of court having been instituted against the 1st Defendant in her personal capacity whereas she is deceased.**

2. The preliminary was argued by way of written submissions.

3. The counsel for the 2nd Defendant filed written submissions dated 10th September, 2021. The counsel cited the case **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696** which is the yardstick on what a preliminary objection constitutes.

4. The counsel argued that a preliminary objection should be concise and specific and should not be shrouded in mystery that can only be discerned from a deep interrogation of pleadings or extrinsic materials. That the issues of capacity are central to any proceeding and qualify as a point of law. The counsel argued that this suit stems from the Narok CMELC. No.23 of 2021 filed at the Lower Court and which was withdrawn by the plaintiff. That prior to the withdrawal of the suit, the 2nd defendant raised the issue that the 1st defendant is deceased and the plaintiff ought to have conducted due diligence before instituting the suit.

5. The counsel further argued that the question of capacity is so central that it permeates mere irregularity and an entire suit and proceedings become void. The counsel cited the case of **Patrick Kiseki Mutisya (suing as the personal representative to the estate of Nzomo Mutisya (deceased) v. K.B. Shaghani & Sons Limited & Another [2012] eKLR** where counsel for the Defendant filed a notice of preliminary objection in which he argued that the suit as originally filed was a nullity. The court in its analyses found two issues in support of the preliminary objection and that was: -a) filing the suit in the capacity of next friend and secondly filing the suit without first obtaining a grant of letters of administration. The court relied on the case of **Macfoy v. United Africa Ltd [1961] 3 ALL E.R. 1169** where the court observed that:

“if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. “There is no need for an order of the court to set aside. It is automatically null and void with more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

6. The counsel for the Plaintiff filed his submissions dated 20th September, 2021. He submitted on what constitutes a preliminary objection and cited the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696**. The counsel further submitted on whether the death of a Defendant can defeat a suit. He has cited **Order 24 rule 4 (1) & (2) of the Civil Procedure Rules** which provides for the action to be taken in the event one of two or more defendant dies. In this case, the counsel argued that the issue of demise of the 1st Defendant, if at all true, is being raised by the 2nd Defendant. That the duty of the 2nd Defendant is to defend the suit whether the 1st Defendant is alive or not. That the cause of action as against the 2nd Defendant continues.

7. The counsel further cited **Order 1 Rule 9 and 10 of the Civil Procedure Rules** that provides for procedure where there is misjoinder or non-joinder of parties.

8. The counsel submitted that the preliminary objection challenging the legality of the proceedings on misjoinder of the 1st Defendant does not affect the court's jurisdiction to entertain the plaintiff's claim against the 2nd Defendant and that the latter is looking for an escape route to avoid trial.

9. The counsel argued that the power to strike out pleadings is draconian and can only be used sparingly. He has cited **Halsbury's Laws of England 4th Edition at paragraph 45** which in part reads '**Nor will a pleading be struck out where it raises an arguable, difficult or important point of law**'. In conclusion the counsel submitted that the notice of preliminary objection contains impermissible factual contention which can only be proved by evidence. That an amendment to the plaint can easily cure the defect if at all it is established that indeed the 1st Defendant is deceased.

10. I have carefully analyzed the notice of the preliminary objection, the written submissions filed by rival parties and the authorities relied upon and the issue for determination at this stage is whether the suit and the application are fatally defective and incompetent as against the 1st Defendant.

11. It is the common ground that the leading authority on what constitutes a preliminary objection is **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) EA 696**, where law J.A and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701 held as follows:

Law, JA.:

"So far as I am aware, a preliminary objection consists of a pure 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 on 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."

Newbold, P.:

" 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising points by way of preliminary objection does nothing but unnecessarily increases cost and, on occasion, confuse the issues. This improper practice should stop."

12. **Order 24, rule 4. (1) and (2) of the Civil Procedure Rules** provides that:-

(1) where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

13. In the instant case, the Plaintiff filed suit dated 28th March, 2021 as against the Defendants at the Magistrates Courts'. The Plaintiff also filed a notice of withdrawal of the suit dated 18th August, 2021 against the Defendants and proceeded to file an application for temporary injunction against the Defendants of even date before this court on 19th August, 2021 wherein the court granted prayers 2 and 3 of the notice of motion application.

14. The 2nd defendant, filed a replying affidavit sworn On 30th August, 2021 in which he deponed that the 1st Defendant is deceased and proceeded to attach a copy of a letter from the chief, Ol Kinyei Location dated 10th May, 2021. He also filed grounds of opposition dated 30th August, 2021 in opposition to the application.

15. In my view, **Order 24 rule 4** gives room for substitution of a deceased party. In this case, it is the 2nd Defendant who brought the information of the demise of the 1st defendant to the attention of the court. It would appear that the Plaintiff was not aware of such information. However, it is trite law that he who alleges must prove. The 2nd Defendant has attached a copy of the letter from the chief. I note that the said letter dated 10th May, 2021 indicates that the 1st Defendant died sometime in the year 2019 but the chief could not confirm the exact date and neither could he provide a copy of the certificate of death. I do also note that the letter is not written on the official letter head but a plain paper. Does the letter from the chief prove death of the 1st Defendant? In my view, it does not. It is only a certificate of death that can prove so. This then begs the question, in the event that the 1st Defendant is indeed deceased, does this render the suit fatally defective?

16. Without pre-empting the application, the plaintiff averred that the 1st Defendant transferred the suit land to the 2nd Defendant on 17th October, 2013. This shows that the Plaintiff, even in the absence of the 1st Defendant has a claim as against the 2nd Defendant and which this court cannot overlook.

17. In view of the above, I find that the notice of preliminary objection dated 31st August, 2021 lacks merit and the same is dismissed with

costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIA E-MAIL AT NAROK ON THIS 12TH DAY OF OCTOBER, 2021.

MBOGO C.G.

JUDGE

12/10/2021

In the presence of: -

Mr. Timothy Chuma – Court Assistant