



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 15 OF 2014

MARY NYAMBURA MBOTE.....APPELLANT

VERSUS

JANNIFFER MUGURE WAGURA..... RESPONDENT

JUDGMENT

1. The appellant filed suit against the respondent claiming a liquidated sum of Kshs.120,000/= together with costs and interest; the matter proceeded to full hearing and the judgment date was given as 11/02/2014; on the date fixed for delivery of the judgment, the respondent filed a Preliminary Objection; the trial court ruled that a Preliminary Objection could be filed at any-time before judgment was pronounced and thus proceeded to grant the respondent leave to proceed to raise the Preliminary Objection and 28/03/2014 was the date given for the hearing of thereof and the pending judgment was deferred;

2. The Appellant being dissatisfied has appealed against the ruling that was delivered on the 11/02/2014, in its entirety.

3. There are eight (8) grounds of appeal set out in the Memorandum of Appeal dated 2nd April, 2014 which are summarized inter alia;

i. The learned trial magistrate erred in law in postponing the delivery of the judgment;

ii. The learned trial magistrate erred in law by failing to realize that the court had not been properly moved;

iii. The learned trial magistrate erred in allowing the respondent to verbally contradict a written document;

iv. The trial court misdirected herself in allowing the objector/ applicant to adopt the submissions made in another suit (SPMCCase No.28/2012);

v. The Preliminary Objection was not made at an appropriate time considering the stage the proceedings had reached;

vi. The trial court did not appreciate that the applicant had fully participated in the prosecution of the suit and was thus estopped from attempting to stop the proceedings;

vii. The trial magistrates' decision was contrary to the letter and spirit of Article 159(2) (b) of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act.

viii. That the trial court acted against Section 25 of the Civil Procedure Act and Order 2 Rule 1 of the Civil Procedure Rules.

4. The appellant prayed that this court makes a finding that the Notice of Preliminary Objection was not properly made; that the trial magistrate be bound to deliver the judgment; as her actions were contrary to the interest of justice and the Constitution of Kenya.

ISSUES FOR DETERMINATION

5. The appeal was canvassed by way of written submissions; the appellant filed written submissions whereas the respondent relied on the written submissions tendered in the related appeal namely HCCA No.14 of 2014; after reading the written submissions filed by the respective parties this court has framed the following issues;

- i. Whether the Preliminary Objection was properly before the trial court;
- ii. Whether the appeal filed herein is merited;
- iii. Which party should bear the costs of this appeal.

ANALYSIS

Whether the Preliminary Objection was properly before the trial court;

6. The appellants assertion is that the Notice of Preliminary Objection was not properly made before the trial court; in that it had been filed at the advent of the judgment and therefore ought not to have been allowed; the appellant makes reference to Order 2 Rule 1 of the Civil Procedure Rules which then dictates that a party must indicate in the pleadings that they intend to raise an objection on a point of law; when a party pleads as such it is a requirement that the first order of business is that the Preliminary Objection must be dealt with as a preliminary issue because if sustained it has the effect of disposing of the suit instantly;

7. Upon perusal of the defence this court notes that no such indication was given or pleaded in the defence; nevertheless Order 2 Rules 9 of the Civil Procedure Code allows a party to raise an objection on a point of law; there is no limitation provided and therefore a litigant can raise a Preliminary Objection at any stage of the proceedings; even in a case where a court has proceeded to hear the matter and the trial court is empowered to entertain the objection before rendering its final decision;

8. This court notes from the lower court record that the respondent did in fact file a formal notice of objection; the same is dated the 11th February, 2014 and was filed in court on the same date;

9. The appellant was aggrieved by this state of affairs and her contention was that it ought to have been pleaded and raised before the matter proceeded for full hearing and judgment was on the verge of being pronounced; again this court reiterates that a litigant is not stopped from raising a preliminary objection at any stage of the proceedings but it must be before judgment is pronounced/delivered.

10. This court observes from the record that the Notice of Preliminary Objection mentions the Advocates Act but does not specify which section of the law that it was brought under; but with the advent of the Constitution 2010 at Article 159(2)(d) it is the practice of the courts to consider administering justice without undue regard to technicalities of procedure; particularly where the litigant is acting in person, as was the case in the lower court; therefore it is the substance not the form that must prevail;

11. This court is satisfied that the preliminary objection was properly before the trial court; and finds that

this ground of appeal has no merit and it is disallowed.

Whether the appeal filed herein is merited;

12. Upon perusing the final orders sought it is apparent that the interlocutory appeal filed herein is substantially an application to stay the hearing of the Preliminary Objection; this court opines that the primary consideration that the appellant ought to have addressed at length herein is whether the pending Preliminary Objection is frivolous and unarguable and has no chance of success; instead, Counsel for the appellant in his written submissions limited the issues to matters relating to dates, want of form and legal representation but did not give any indication of the prospects of the success of the pending Preliminary Objection before the lower court; there was need to focus on this latter aspect as this would have convinced this court on the merits of this instant appeal.

13. The trial court has not heard the Preliminary Objection and therefore this court reiterates the appellant also had the onus of convincing this court that the trial court in exercising her discretion acted whimsically or unreasonably when it granted leave and that the Preliminary Objection has no prospects of success and was only being utilized by the respondent as a means to stop or derail the judgment.

14. In essence this court finds no reasons have been advanced to interfere with the trial courts' decision to grant leave to the respondent to present the Preliminary Objection.

15. This court is satisfied that the law allows a litigant to raise a Preliminary Objection at any stage of the proceedings before a judgment is rendered;

FINDINGS & DETERMINATION

16. For the forgoing reasons this court makes the following findings;

- a. This court finds that the Notice of Preliminary Objection is properly before the lower court;
- b. The subordinate court is properly seized of the matter; and the file is hereby referred back to the subordinate court for hearing and determination of the Preliminary Objection.
- c. The appeal is found to be lacking in merit and is hereby dismissed.
- d. The costs of this appeal are granted to the respondent;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 4th day of May, 2017.

HON.A. MSHILA

JUDGE