



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 646 OF 2015 (0.5)
IN THE MATTER OF PROFESSIONAL UNDERTAKING

BETWEEN

D. NJOGU & COMPANY ADVOCATES.....PLAINITFF

VERSUS

HARIT A. SHETH

T/A HARIT SHETH ADVOCATES.....DEFENDANT

AFRISON EXPORT IMPORT LIML.....1ST INTERESTED PARTY

HUELANDS LIMITED.....2ND INTERESTED PARTY

RULING

1. The Plaintiff herein filed the instant suit for enforcement of an advocate's professional undertaking. Together with the Originating summons dated 17th December, 2015, the Plaintiff also filed a Notice of Motion of the same date seeking the following orders;
 - a. *Spent*
 - b. *Spent*
 - c. ***THAT a prohibitory order do issue against the transfer, charging and/or alienation in any way whatsoever all those parcels of land known as LR. Number 7879/4, 7879/24 and 7879/25 Ruaraka Nairobi pending the hearing and determination of the originating summons filed herein.***
 - d. ***THAT the respondent do pay the applicant the cost of this application.***

2. Consequently the Defendant filed a Notice of Preliminary Objection to the Plaintiff's application. The same was dated 21st January, 2016 and seeks the striking out of the Notice of Motion on the following grounds that ;
 - i. ***This Honourable Court does not have the jurisdiction to hear and entertain the Application as it seeks orders relating to land which are under the exclusive jurisdiction of the Environment and Land Court;***
 - ii. ***This Honourable Court does not have the jurisdiction to grant the orders sought in the***

- application;*
- iii. *The Application seeks orders effectively against parties who are not parties to these proceedings;*
 - iv. *The Application effectively seeks orders against a party who is not the owner of the properties in respect of which the prohibitory orders are sought;*
 - v. *The Application seeks orders which cannot be sought or granted in the suit in which it has been made;*
 - vi. *The Application is incompetent and cannot lie under the provisions of the law upon which it is brought;*
 - vii. *The application offends the mandatory provisions of the law;*

3. By consent of the parties, the court ordered that the Notice of Preliminary objection should be dispensed first through written submissions. To this end, the defendant filed its written submissions on 17th February, 2016, while the Plaintiff filed its written submissions on 7th March, 2016.
4. It was the Defendant's argument that this court did not have the jurisdiction to hear or entertain the orders sought in the application as the same is the sole preserve of the Environment and Land Court under Article 162 (2) of the Constitution of Kenya. That further the Applicant was through the orders sought effectively challenging the entitlement to transfer the suit properties until the professional undertaking is honored meaning that the dispute amounts to a land dispute.
5. Further, it was the Defendant's assertion that the orders sought in the application are against parties that are not party to this proceedings. In line with this, it was the Defendant's submission that it was not the owner of the land with respect to which the prohibitory orders are sought and in the foregoing, the application is incompetent and should be struck out. In its submissions, the Defendant argued that the application is also defective as the same was founded on the wrong provisions of law. In sum, the court was urged to strike out the application as sought by the Defendant.
6. In rejoinder to the above submissions, the Plaintiff contended that the objection with regard to jurisdiction is without merit as the Plaintiff was not claiming ownership or occupation or use of land to warrant in order to invoke the jurisdiction of the Environment and Land Court. According to the Plaintiff, the matter at hand was a commercial dispute, where the Plaintiff was claiming money as a mortgagee which was secured by land.
7. The Plaintiff insisted that the right parties had been sued in the suit and this particular objection held no water. That further the defendant and the interested parties are solely to blame for the dispute as they should have honored the terms of the undertaking. With regard to the application being incompetent for citing the wrong provisions of the law, the Plaintiff admitted that the same maybe true, but that regardless of this omission, it not prejudicial to the Defendant.
8. That further, the interim orders sought are capable of being granted by the court in order to preserve the status quo and prevent the defendant from effecting any change of ownership in the suit property as the said defendant holds the Titles to the suit properties therein. The Plaintiff therefore prayed that the Notice Preliminary Objection has no merit and the same should be dismissed with costs.
9. I have considered the pleadings, depositions and rival submissions including the various cases cited. The following is my view on the matter. The law on preliminary objections is well settled. Discussing what constitutes a preliminary objection, **Law JA in Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd[2]** stated thus :-

"...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 objection 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."

10. In the words of Sir Charles Newbold P at page 701, B:-

"...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."

11. Again in the case of **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows on preliminary objections:

"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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

12. Has the applicant satisfied the above principles? The objection before me raises the question of the court's jurisdiction, non-joinder of a necessary party and failure of the application to conform to the law. I propose to start with the issue of jurisdiction.
13. As stated earlier on, this suit is for enforcement of an advocate's professional undertaking. The jurisdiction of the court is not in doubt and was expressed as follows by the Court of Appeal in **Patel – vs – Kairu [1999] 2 EA 279**:-

"The jurisdiction of the court in an application for enforcement of a professional undertaking (is) a summary jurisdiction over advocates which should be exercised only in a clear case. It (is) an inherent jurisdiction which the court (has) over advocates who (are) officials of the court. It (is) a jurisdiction exercised, not for purposes of enforcing legal rights, but for purposes of enforcing honorable conduct on the part of the court's own officials. The court (has) to be satisfied that there had been a breach of an undertaking given by an advocate acting professionally."

14. Bearing the above in mind, it is clear that this court has the jurisdiction to determine any issue with regard to enforcement of a professional undertaking. However the Defendant's major concern is that this court does not have the jurisdiction to entertain the prayer for prohibitory order against the transfer, charging, and/or alienation of the suit properties pending the hearing and determination of the suit.
15. I am of a different view. The orders herein are injunctive in nature. The Court under order 40 of the Civil Procedure Rules is clothed with the jurisdiction to decide on whether or not to grant an injunction. The injunctive sought in my view does not amount to a dispute with regard to the use, occupation of and title the suit properties.
16. It only seeks that the court order the Defendant from doing specified actions with regard to the suit properties pending the hearing and determination of the suit. Whether or not prayer has merit, is a matter that will have to await for the determination of the court. In sum I see no merit in the

- objection that that this court lacks jurisdiction to hear and determine the subject.
17. With regard to whether the correct parties have been sued it is the opinion of this court that this is not a pure point of law as it involves questions of fact and law. It is a matter entangled with factual issues, therefore, not a Preliminary Objection in the sense of the law. I note however that same is a very pertinent issue since the issue of whether correct parties have been sued will have fatal repercussions on not only the application, but the suit itself, if it is successful.
 18. Be that as it may, I am of the opinion that the arguments advanced by the respective counsels of the parties are better suited in the determination of the subject application as opposed to a preliminary point of objection. The same goes for the arguments advanced by the defendant that the Plaintiff has no interest or claim over the suit properties to warrant the orders sought. These issues cannot equally form the basis of a preliminary objection as this court will have to investigate these disputed facts. The aforesaid preliminary points of objection are therefore dismissed.
 19. I now turn to the issue that the application is incompetent and cannot lie under the legal provisions that it has been brought. I note that the Application herein states that it has been brought under Order 51 Rule 1 of the Civil Procedure Rules 2010. The same is a general provision setting out the procedure and format under which the application is made.
 20. It is therefore clear that the Applicant did not indicate under what provisions of the law the court is empowered to grant prohibitory orders as sought. The Plaintiff has not denied this fact. However, I am of the view that the same does not render the application incurably defective as the court is enjoined in Article 159(2) (e) to administer justice without undue regard to procedural technicalities. Likewise Order 51 rule 10 of the civil procure Rules states as follows;

“51. 10(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”

21. In view of the above, it is my finding that the fact that the Plaintiff failed to indicate the order and rule in which the application is made is not fatal to the same.
22. Accordingly, I shall dismiss the Notice of Preliminary Objection dated 21st January, 2016 with costs to the Plaintiff.
23. It is so ordered.

Written, dated and signed at Nairobi this 5th day of May 2016.

C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

O. SEWE

JUDGE