



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CAUSE NO. 114 OF 2019

KENCOM SACCO SOCIETY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

DAVID MACHIO.....1ST DEFENDANT/OBJECTOR

ANTHONY MUTHUSI.....2ND DEFENDANT/OBJECTOR

DAVID MWINDI.....3RD DEFENDANT/OBJECTOR

ANDREW ODUOR OLUOCH.....4TH DEFENDANT/OBJECTOR

CHRISTOPHER NJURU KINYANJU.....5TH DEFENDANT/OBJECTOR

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **16th December 2019** by the Defendants on the grounds that;-

- 1. THAT the plaintiff's suit is in violation of Order 1 rule 10(2) of the Civil Procedure Rules, 2010 which requires a party to obtain the leave of court if they wish to add the name of any person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit.**
- 2. THAT the defendants are strangers to the suit and they are not aware of and/or served with any application seeking leave to enjoin them as parties of the suit nor did the court order suo moto that they be enjoined.**
- 3. THAT the suit herein is therefore misconceived, incompetent ab initio, fatally flawed, incurably defective, an abuse of court process and should thus be struck out.**

The Notice of Preliminary Objection was canvassed by way of written submissions and the Defendants/ Objectors through the **Law Firm of Andrew & Steve Advocates** submitted that the Preliminary objection raises a point of law on the issue of the Defendants not being sued rightfully as provided for under **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** as the Defendants are not proper parties to the suit and the suit should therefore be struck out. It was further submitted that pleadings are yet to be closed and the Plaintiff/ Respondent is entitled to amend the pleadings. However, the Courts need to distinguish between amendment of pleadings and substitution or addition of parties to a suit. The Defendants further submitted that the Plaintiff is mandated to seek leave of Court to enjoin the Defendants to the suit, which determination lies with the discretion of the Court. Further that the Court's *suo moto* may enjoin such parties but there is no evidence that the Plaintiff/Respondent sought or obtained the Court's sanction. Therefore, the Plaintiff was not entitled to enjoin them.

It was further submitted that there is no evidence in the filed pleadings, Plaint, Application or Supporting Affidavit that ties the Defendants to the claim and that the allegations raised in the Application are of a blanket nature and lie against Residents in the neighbourhood. Further that no reason has been tendered as to why the Defendants have been singled out from the other residents.

It was further submitted that the Plaintiff unilateral amendment of the pleadings to join the Defendants as parties to the suit was irregular, an abuse of Court process and a nullity that should not be condoned by the Court. The Defendants relied on various provisions of law and decided cases and urged the Court to Uphold the **Preliminary Objection** and **strike out** the suit against them.

The Plaintiff filed its submissions through the **Law Firm of Robson Harris & Company Advocates**, dated **25th February 2020**, and submitted that they relied on the Amended Plaint dated **28th October 2019**, Plaintiff's Application dated **6th November 2019**, together with

a Supporting Affidavit dated 28th October 2019, Notice of Withdrawal dated 28th October 2019, of the Application dated 21st June 2019. It was its submissions that the Amendments were procedural and anchored in law as the import of the amendments as to the parties were material in nature made in a bid to help the Court determine the real question before it. It was further submitted that the amendments do not seek to introduce a new cause of action or prejudice the other parties and that they came to a realisation that **Kencom Sacco Homes-Runda Residents Association** was not a Legal entity and thus a claim against them would be fatally defective.

It was the Plaintiff's further submissions that the Civil Procedure Rules under **Order 8 Rule 1**, provides that a party may without the leave of the Court amend any of its pleadings once at any time before the pleadings are closed. The Plaintiff placed reliance on various decided cases. It was further submitted that pleadings are yet to be closed as the Defendants have not filed their statement of Defence and that it is the first time that the Plaintiff has amended its Pleadings and no injustice was caused on the other side. Therefore, the Plaintiff filed its Amended Plaint in accordance with the law and urged the Court to dismiss the Preliminary Objection with costs.

The Court has now also carefully read and considered the pleadings of the parties the annexures thereto together with the written submissions and renders itself as follows:-

A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

“So far as I am aware, 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”.

Further Sir *Charles Nebbold, JA* stated that:-

“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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

This Court having made a finding on the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

Further, in the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999*, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

In determining a **Preliminary Objection**, the Court will also take into account that a **Preliminary Objection** must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Before the Court embarks on determining the merit of the **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what Defendants have filed amounts to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of *Oraro...Vs...Mbaja(2005) 1KLR 141*, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

In the instant **Preliminary Objection**, the Defendants/ Objectors have averred that the suit is in violation of **Order 1 rule 10 (2)** of the **Civil Procedure Rules** which requires a Court to add a name of a Person whose presence before the Court may be necessary in order to enable the Court adjudicate on the matter. It was further averred that the Defendants were never served with an Application seeking leave of Court to add them as parties. The issue of whether or not the Defendants/Objectors are proper parties to this suit is clearly question of law. In determining whether or not the Plaintiff/Respondents sought leave of Court before the defendants were added in the suit, would not require ascertaining of facts.

It is not in doubt that the Defendants have all been added in the suit herein. If the Court was to find that they were not properly added, then the same may dispose of the suit. On whether the leave of Court was sought or not or ought to have been sought that will not require probing of evidence. All that the Court will need to do is to determine what the law says and this would only mean that the same raises a pure point of law

This Court finds that given the description of Preliminary Objection in the *Mukisa Biscuits case (supra)* and given that an issue of *addition or joinder of parties and seeking leave of Court* does not involve ascertaining of facts, then this instant **Notice of Preliminary Objection** as

raised by the Defendants meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere.

Therefore, the Court finds and holds that the **Notice of Preliminary Objection** as filed by the Defendants is a Preliminary Objection as per the **Mukisa Biscuits case (supra)**.

The Court must then determine whether the Notice of Preliminary Objection has merit. The defendants have contended that they were improperly added to the suit herein as the Plaintiff/ Respondent did not seek the leave of the Court before it sought to enjoin them in the suit. However, it has been the Plaintiff's/ Respondent's contention that they only amended the Plaintiff and since the amendment was done only once as required by law and the fact that the amendment was done before close of pleadings, then they did not need to seek leave of Court before the amendment could be done.

It is not in doubt that no leave of the Court was sought before the Defendants were added to the suit property. It is also not in doubt that the Defendants were never parties to the suit and were only added by the Plaintiff upon the amendment of the Plaintiff. The guiding provision of law in relation to addition of parties is **Order 1 rule 10(2)** which provides that;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

While **Order 1 Rule 10** of the Civil Procedure Rules deals with the substitution and addition of parties, **Order 8** deals with Amendment of pleadings, It is not in doubt that the Civil Procedure Rules make a distinction between **addition, substitution** and **amendment** of pleadings See the case of **Atieno v Omoro & Another[1985] Eklr**, where the Court held that

“The Civil Procedure Rules make a clear distinction between the substitution or addition of a party to proceedings and the amendment of the pleadings, and the position in the instant case is governed by order 1 rule 10.”

The provisions of **Order 10 (2)** of the Civil Procedure Rules requires that for any substitution or addition of parties, the Court is to grant such Orders. Therefore, it means that for a party to be added as is the case in the instant matter, the Court ought to have made an order. How then can the court make such an order? The Court can only do so either *suo moto* or through an Application by the parties and in this case, the Plaintiff herein. It is clear that the addition or joinder of the Defendants herein was not made *suo moto* and further there was no Application made by the Plaintiff/ Respondent to add the Defendants/Objectors to the suit. In essence, leave of the Court was required if the Plaintiff was to add the Defendants in the suit. Given that no leave was sought, the court **finds** and **holds** that the addition or joinder of the Defendants herein was therefore improper.

The Upshot of the above analysis is that the **Notice of Preliminary Objection** dated **16th December 2019** by the Defendants/Objectors is **merited** the Court upholds the same entirely with costs to the Defendants. The Plaintiff's entire suit is struck out entirely.

It is so ordered

Dated, signed and Delivered at Thika this 9th day of July 2020

L. GACHERU

JUDGE

9/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via zoom

No consent for the Plaintiffs/Respondent

M/s Mabango holding brief for Mr. Kimathi for the Defendants/Objectors

L. GACHERU

JUDGE

9/7/2020