REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 16 OF 2017

PETER MUTHAURA LINGULI.....APPELLANT

VERSUS

HALIMA TINA MOWESLEY.....1ST DEFENDANT

MARIA TERESA RUGURU.....2ND DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....3RD DEFENDANT

SAMUEL KIOME RIMBERE MURIITHI.....INTERESTED PARTY

JUDGEMENT

INTRODUCTION

This appeal arises from the ruling/order by the Hon. Chief Magistrate (Meru) issued on 29th June, 2017. The Appellant who is the Plaintiff in the Lower Court case had filed a suit against the Respondents for a permanent injunction restraining them by themselves, or their agents and/or servants from selling, purchasing, re-advertising, transferring and/or in any manner dealing with the suit land LR. No. NYAKI/KITHOKA/1914 and/or in any way or at all interfering with the Plaintiff/Applicant's possession and use of the suit land. The plaint was later amended and new prayers were added to include damages for breach of contract and cancellation of the title currently in the name of the Interested Party and the same be revered to the 4th and 5th Defendants for onward transfer and registration in the name of the Plaintiff. Before the hearing of the suit, the Interested Party filed a Notice of Preliminary Objection dated 13th January, 2016 on the following grounds:

> **1. The Honourable Court lacks jurisdiction to hear and determine the matter, as value of land in question exceeds the pecuniary jurisdiction of the Honourable court.**
>
> **2. The Defendants lack locus standi to be sued in the matter since they are strangers with no colour of right over the ownership of the land and or in the estate of the late Michael Rukungu Mowesley.**
>
> **3. The Plaintiff ought to have pursued his claim over the ownership of the land in the matter of the estate of the deceased Michael Rukungu Mowesley vide HCC Succession Cause No. 120 of 2014 (Mombasa)**
>
> **4. The Honourable court exceeded its mandate by infringing the Interested Party's Constitutional right to property by inhibiting his land without him being made a party to the suit and without due regard to the Constitution and the principles of governance as enshrined under Article 10 (2) (b) Article 50 and 40.**
>
> **5. The Plaintiffs suit is an abuse of court process and ought to be dismissed with punitive costs to the Interested Party.**

On 20/4/2017 the trial court directed that submissions on the preliminary objection be filed with each party given 14 days to file their respective submissions. The Plaintiff was also directed to file whatever application he wishes. On 25/4/2017, the Plaintiff filed a Notice of Motion dated 24/4/2017 under certificate of urgency seeking the following orders:

> **(a) Spent.**
>
> **(b) Pending hearing and determination of this application the Honourable court be pleased to stay its orders of 20th April**

2017 requiring the parties to file written submissions on the Interested Party's preliminary objection dated 15th January 2016 as well as requiring the Plaintiff/Applicant to file an application for amendment of his pleadings and any other further proceedings herein.

(c) The Honourable court be pleased to review, vary and/or altogether set aside its orders of 20th April 2017 requiring the parties to file written submissions on the Interested Party's preliminary objection dated 13th January 2016 as well as requiring the Plaintiff/Applicant to file an application for amendment of his pleadings.

(d) The annexed draft amended plaint be duly filed subject to payment of further court fees.

(e) Costs of the application be in the cause.

In a ruling dated 29/6/2017, the Learned Magistrate upheld the preliminary objection by dismissing the entire suit with costs to the Interested Party.

Being aggrieved by the said order the Plaintiff appealed before this Honourable court on the following grounds:

1. The Honourable Learned trial Magistrate erred in law and fact in refusing to allow an amendment to the Appellant's pleadings and insisting on leave to amend the Appellant's pleadings when the pleadings had not closed.

2. The Learned Trial Magistrate erred in law and fact in directing the registry staff to decline receipt of the Appellant's draft amended plaint when the pleadings had not closed.

3. The Learned Trial Magistrate erred in law and fact in giving precedence to the Respondents preliminary objection instead of the Appellant's amendment application for amendment dated 24/4/2017.

4. The Learned Trial Magistrate erred in law and fact in assuming that the Respondent was the registered owner of the suit land by the time of instituting the suit when that was/is not the case.

5. The Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit against the two Defendants purportedly on a point of law when two Defendants had not raised any such point of law.

6. That the Learned Trial Magistrate erred in law and fact in treating the Appellant's suit casually and in dismissing it as a preliminary stage on grounds/manners that would require proof by way of evidence.

7. The Trial Magistrate erred in law and fact in failing to inform her decision by the provisions of Article 159 of the Constitution of Kenya, 2010 as well as Order 1A and 1B CPR 2010.

8. That the Learned Trial Magistrate erred in law and fact in rushing to dismiss the Applicant's suit without cautioning herself that the Appellant's claim was not against the deceased one Michael Rukungu Mowesley but rather against the two Defendants who had not entered appearance.

9. That the Learned Trial Magistrate erred in law and fact in sending the parties away from the seat of judgement in limine and without a remedy.

SUBMISSIONS BY APPELLANT

The Appellant combined grounds 1, 2 & 3 of the Appeal and submitted that it is trite law that a pleading should not be struck out or dismissed if life can be breathed into it through an amendment. He also submitted that it is trite law and a matter of common notoriety under Order 8 Rule (1) CPR 2010 that a party may once without leave of the court amend his/her pleadings before close of pleadings. In total contravention of the foregoing clear position in law, the trial magistrate despite her full knowledge that the pleadings had not closed insisted on the Appellant filing a formal application for amendment of his plaint and even after the Appellant proceeded to file his formal application for amendment, the learned Trial Magistrate still fell into error by ordering the Interested Party's preliminary objection to proceed before considering whether or not the pleading would be saved through amendment. That action by the Learned Trial Magistrate was in all fours erroneous and went against the law as she ought to have first considered the amendment before the preliminary objection. He submitted that a preliminary objection does not take precedence over an amendment to the pleadings. He cited the case of **DT Dobie & Co. Ltd –Vs- Joseph Mbaria Muchina & Another CA No. 37 of 1978 (Nairobi) (1980) eKLR** where the Court of Appeal held as follows:

> ***"……no suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be ejected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

He submitted that there was plainly no justification why the Trial Magistrate dismissed the Appellant's suit summarily on what was purported to be a point of law. He stated that the matters raised in the preliminary objection were ones of fact and not law which needed proof by way of evidence.

GROUND NO. 4 & 6

The Appellant also combined ground No. 4 and 6 and submitted that in allowing the Interested Party's preliminary objection, the Trial Magistrate made a wrong finding that the Appellant had wrongfully sued strangers to the suit land yet they were not the owners of the suit land or connected in any way to the land. The Appellant submitted that indeed he had no intention of suing the deceased Michael Rukungu but those Defendants who were strangers to the sale transaction between him and the deceased and had no reason therefore interfering with the Appellants occupation/possession over the suit land. The Appellant also submitted that the Interested Party was not the registered owner of the suit land as of the time of filing suit and that there is no way the Appellant would have sued him then. He submitted that the Interested Party only came to be registered as proprietor of the suit land on 9th July 2015, nine months after the suit had been filed. He submitted that by dismissing the Appellants suit on account, partly that the owner of the land (Interested Party) had not been sued was all in error. The Appellant further submitted that the presumption by the trial court that the only registered owners of land ought to be sued was erroneous. It is submitted that matters of ownership of land are matters of fact and evidence and not law. The Appellant submitted that in allowing the preliminary objection on grounds of misjoinder of parties, the Learned Magistrate was not alive to the provisions of Order 1 Rule 9 CPR.

On ground No. 5, the Appellant submitted that the preliminary objection leading to the dismissal of the suit against the 1st, 2nd and 3rd Defendants was raised by the Interested Party and not the Defendants themselves. The Interested Party was not acting for the three Defendants. By dismissing the suit against the Defendants who did not even enter appearance or file defence, the Learned Magistrate descended to the arena and with respect litigated for and on behalf of the 1st, 2nd and 3rd Defendants who had not raised any objection.

GROUND 7

The Appellant submitted that Article 159 of the Constitution read together with Section 1A and 1B CPA 2010 provides what a court of law ought to focus on in the cause of administration of justice. He stated that the Trial Magistrate completely missed the point by summarily dismissing the Appellant's suit on simple grounds that did not go to the very root of the Appellant's suit and that the Appellants suit could have been cured through an amendment.

GROUND 9

The Appellant submitted that the Trial Magistrate dismissed his suit on account of a preliminary objection instead of striking it out. He submitted that successful preliminary objections can only be upheld resulting in striking out the offending pleading, not in dismissal. By dismissing the Appellants' suit on points of law, the Learned Trial Magistrate was out to perpetually send the Appellant away from the seat of judgement.

In conclusion, the Appellant submitted that the purported preliminary objection by the Interested Party did not meet the threshold in the leading and celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd** as to warrant a summary dismissal of the Appellants suit as the purported preliminary objection was based on matters that needed proof by way of evidence and not law.

INTERESTED PARTY'S SUBMISSIONS

The Interested Party/4th Defendant submitted the appeal has no merit and ought to be dismissed with costs. The Interested Party also submitted that the Trial Court never denied the Appellant chance to amend his pleadings. He also submitted that he filed his preliminary objection on 13th January 2016 and on 20th April 2017, the court allowed the Appellant to file any application he wished and on 24/2/2017, the Appellant filed an application under certificate of urgency seeking to amend the plaint. That application was fixed for hearing on 11/5/2017. On 11/5/2017, the application was adjourned to 25/5/2017 when the court gave a ruling date and directed the parties to file their submissions. The 4th Defendant further submitted that he had filed an application dated 1st September 2015 seeking to be enjoined as a Defendant as the legal owner of the suit property which application was allowed. He stated that from the annextures to his application is a green card which shows that the 1st, 2nd and 3rd Defendants have never been owners of the suit property as at 2014 to enable the Appellant claim from them. In conclusion, the 4th Defendant sought to have this appeal dismissed with costs.

DISPOSITION

This is an appeal arising from the dismissal of the Appellants suit after the trial court upheld a preliminary objection raised by the 4th Defendant/Interested Party. The definition of a preliminary objection was well set out in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd –Vs- West End Distributors Ltd (1969) EA 698** where it was held as follows:

> ***" 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."***

This was followed up by the judgment of Sir **Charles Newbold** in the same case who put it aptly as follows:

> ***"The first matter relates to the increasing practice of raising pints, 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 demurer. 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 south 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 the issue. The improper practice should stop."***

In his Notice of Preliminary Objection dated 13th January 2016, the Interested Parry/4th Defendant in paragraph 2 stated that the 1st, 2nd and 3rd Defendants lacks locus standi to be sued since they are strangers with no colour of right over the ownership of the land and/or in the estate of the late Michael Rukungu Mowesley. That must have confirmed the trial magistrate's decision when she held as follows:

> ***"I find indeed that the Plaintiffs suit is defective in that he has sued strangers over the suit land Nyaki/Kuhoka/1914. The 1st, 2nd and 3rd Defendants ……going by the last Defendants replying affidavit to the Plaintiffs application of 10th May 2015 the court finds that clearly the Plaintiff has sued the wrong parties. The 1st – 3rd Defendants are not the owners of the suit land nor are they legal administrators of the late Michael Rukungu Mowesley. The Plaintiff claim has not met the threshold of orders 1-4 of the Civil Procedure Rules. The Preliminary objection succeeds and I hereby discharge the Ex-parte inhibitive orders issued by the court on 31st July 2015. The entire suit is also dismissed with costs to the Interested Party/Applicant."***

My view of what was raised as a preliminary objection by the 4th Defendant clearly captures what Justice Sir Charles Newbold had in mind in the Mukisa Biscuit case (Supra) that parties raise improper points disguised as preliminary objection which does nothing but unnecessarily clog the wheels of justice. I find that the trial magistrate erred by upholding the preliminary objection which was not a pure point of law since the opposite parties had not filed any defence to determine whether any fact had to be ascertained. It is also trite law that a pleading should not be struck out or dismissed if life can be injected into it by way of amendment. That was aptly captured in the case of **DT Dobie & Co. (K) Ltd –Vs- Joseph Mbaria Muchina & Another (1980) eKLR** where it was held:

> ***"No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable chance of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be ejected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."***

Immediately after the filing of the preliminary objection, the Appellant filed a Notice of Motion dated 24th February 2017 seeking to amend the plaint. Though the application was filed under certificate of urgency, the trial court failed to give directions whether the proposed amendments were capable of injecting life to the Appellant's suit so that the real issues in controversy would be brought out for purposes of determination.

The other issue I wish to address is mis-joinder and non-joinder of parties. Order 1 Rule 3 CPR states as follows:

> ***" All persons may be joined as Defendants against whom any right to relief on respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where if separate suits were brought against such persons any common question of law or fact would arise."***

Again Order 1 Rule 9 provides thus:

> ***"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."***

The Learned Magistrate in her holding stated that the Plaintiffs claim has not met the threshold of Order 1-4 of the Civil Procedure Rules. Those are provisions relating to non-joinder and misjoinder of parties where the law even allows a claimant to join two or more Defendants where he is in doubt as to the person(s) from whom he is entitled to obtain redress. Order 1 Rule 7 provides as follows:

> ***"Where the Plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more Defendants in order that the question as to which of the Defendants is liable, and to what extent, may be determined as between all parties."***

The last point I wish to point out is that the trial magistrate upheld the preliminary objection and dismissed the suit in its entirety with costs. I agree with Counsel for the Appellant that in cases where courts upheld preliminary objections, the resultant order is to strike out the offending pleading so that the affected party may file a proper pleading compliant with the law. In this case, the Learned Magistrate dismissed the entire suit which is an alien order which is also dragonian to the affected party.

In the upshot of my re-evaluation and analysis of this appeal is that the same is merited and allowed as follows:

> **1. The Order by the Learned Chief Magistrate Hon. H. Ndungu on 29th June 2017 dismissing CMCC No. 373 of 2014 be and is hereby set aside.**
>
> **2. The case is remitted back to the Magistrates Court for hearing before any other Magistrate Gazetted to handle ELC Case other than Hon. H. Ndungu- Chief Magistrate.**
>
> **3. Since the parties had nothing to do with the erroneous dismissal of the suit, I order each party to bear her own costs of their Appeal and the Preliminary Objection.**

Read and delivered in the Open Court this 28th day of February, 2019.

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E. C Cherono (Mr.)

ELC JUDGE - KERUGOYA

In the presence of:

1. Mr. Mutunga holding brief for M/s. Ndorongo for interested party.

2. Appellant advocate

3. C/A: Kananu