



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT GARISSA

ELC CIVIL APPEAL NO. 4 OF 2017

OSMAN ADAN.....APPELLANT

VERSUS

NADHIF B. ABDI SAMAD.....RESPONDENT

(Being an Appeal from the Judgment and orders of Honourable B. Rogoncho RM delivered on 5th May, 2014 in Wajir PMCC No. 2 of 2013)

JUDGMENT

The Appellant was aggrieved by the order of Hon. B. Rogoncho, Resident Magistrate Wajir in PMCC No. 2 of 2013 upholding a preliminary objection dated 26th February, 2014. The Appellant filed this Appeal on the following grounds:

- 1. The Learned Magistrate erred in law and fact in dismissing the Plaintiff's suit in utter disregard of the letter of allotment in the name of the Plaintiff to the suit land.**
- 2. The Learned Magistrate erred in law and fact in declining to review the order of dismissal of Plaintiff's suit by the same Court which dismissal was unsubstantiated and manifestly unjust as the Plaintiff had the letter of allotment and transfer of suit land from his father in his name.**
- 3. The Learned Magistrate erred in law and in fact in pre-judging the suit on merits at the interlocutory stage which was against fair hearing, viva voce evidence and natural justice.**
- 4. The Learned Magistrate erred in law and in fact in dismissing the Plaintiff's suit against the weight of evidence.**
- 5. The Learned Magistrate occasioned miscarriage of justice by disregarding documentary proof in the possession of the Plaintiff.**
- 6. The Learned Magistrate took into consideration extraneous matters and disregarded relevant evidence in favour of the Plaintiff available in the suit.**
- 7. The Learned magistrate erred in law and in fact in failing to summon the County Administrator of Wajir, the custodian of lands documents to testify as regards the Plaintiff's ownership of suit plot.**

The gist of this appeal is a purported notice of preliminary objection dated 26/02/2014. The said Notice of Preliminary Objection is not contained in the record of Appeal. I have also attempted to trace in the trial court file no. 2 of 2013 but the same cannot be obtained. Be that as it may, my discernment of the said objection can be reflected from the ruling of the Learned Magistrate where at paragraph 2 stated as follows:

“What is before me is the defendant's preliminary objection dated 26th February, 2014. The defendant is contesting the eligibility of the plaintiff to bring this suit before court. She says that the plaintiff lacks locus standi by virtue of the fact that in his plaint, the plaintiff has stated in paragraph 3 that the plot in dispute had and was allocated to his father in 1991. The plaintiff in his rejoinder has averred that even through paragraph 3 of the plaint is worded as such, it goes further to state that his father registered the suit property in his name to hold the same in trust of the rest of the family.”

In the conclusion of his ruling, the Learned Magistrate stated:

“.....The plaintiff has not produced or attached anything in his replying affidavit to prove that his father was allocated the

land and that the father subsequently transferred it to him. Paragraph 3 of the plaint clearly starts by stating that the parcel was allocated to the father. The defendant is dwelling on that wording to claim a chain of events so as to bequeath the plaintiff with locus to sue. On that ground, I find that the preliminary objection succeeds. I proceed to strike out the plaint with costs to the defendants. It is so ordered.”

A preliminary objection was defined in the celebrated case **of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors (1969) EA 696** at 700 where Law JA stated as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication of pleadings, and which if argued as a preliminary point may dispose of the suit.....”

The Learned Justice further in the same case observed as follows:

“.....a preliminary objection is on the nature of what used to be demeanor. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side is 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 of preliminary objection does nothing but unnecessary increase costs and on occasion confuses the issues and this improper practice should stop.”

The issues that the Learned Magistrate in his ruling stated that the plaintiff had not produced or attached to his replying affidavit are matters of evidence which cannot be produced during the hearing of a preliminary objection. A preliminary objection as defined in the Mukisa Biscuits Case (supra) indicates that it can only be argued on the assumption that all the facts as pleaded by the other side is correct. It cannot be raised where any fact has to be ascertained. I find that the Learned Magistrate misdirected himself in law by entering the raising of a purported notice of preliminary objection not based on the pure point of law and striking out the plaintiff’s suit for lack of locus standi.

Order 1 Rule 9 & 10 Civil Procedure Rules provides as follows;

“1 (9) 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.

(10) (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the right plaintiff, the court may at any stage of the suit if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, enter 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.”

It is clear from the provisions of the Civil Procedure and Practice that no suit can be defeated by reason of either misjoinder or non-joinder.

In the case of **William Kiprono Towett 1597 others –Vs- Farnland Aviation Ltd & 2 others (2016) eKLR**, the court held as follows:

“Whereas the trial court was of the considered opinion that the suit filed before it court not be conveniently tried and determined as filed, the court was at liberty to and should, in our considered and respectful opinion, either upon the application of any party, or on its own motion ordered separate trials, or made such order as may be expedient.....Given that avenue that was available to it, the trial court’s order to strike out the appellant’s suit comes into sharp focus. The same was discretionary in the face of the grounds adduced by the respondents and submissions both in favour and against the issuance of the said order. Thus, strictly speaking the respondent’s preliminary objection did not meet the requisite threshold and should not have been allowed. We think that Newbold, JA was right to opine that matters discretionary are outside the purview of preliminary objections.....”

I truly subscribe to the decision of the Superior Court in this case. In the upshot, this appeal succeeds and I hereby reverse the findings of the Learned Magistrate and substitute it with dismissing the preliminary objection dated 26th February, 2014 with costs to the appellant in both courts. I also direct that the appellant’s suit be reinstated for hearing on priority basis before any Magistrate Gazetted to hear ELC cases except Ho. Bildad Rogoncho. I direct that Order 3, 7 and 11 Civil Procedure Rules be complied with for the avoidance of doubt.

Read and Delivered in the open court at Garissa this 28th day of March, 2019

HON. E. C. CHERONO

ELC JUDGE

In the presence of:

1. Mukhuni holding brief Wanyoike for Appellant

2. Respondent/Advocate: Absent

3. Amina: Court clerk; present