



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 94 OF 2017

(Formerly Kisii ELCC No. 230 of 2013)

PHILIP OLALI OCHARO.....PLAINTIFF/RESPONDENT

VERSUS

WALTER ODHIAMBO OGWADA

t/a MAROWA HARDWARE.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect of a preliminary objection dated 30th July, 2019 filed on even date by M/s. Oguttu, Ochwangi, Ochwal and Company Advocates for the plaintiff (respondent). The preliminary objection is raised against the defendant's (applicant) notice of motion dated 24th July 2019 and filed on even date (the application) and it is based on points (s) of law as hereunder:-

a) The notice of motion application under reference has been filed and/or originated by a stranger, albeit without the requisite Locus Standi. Consequently, the application is a nullity ab initio.

b) The instant application is contrary to and/or in contravention of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. In this regard, the application ought to be expunged.

c) On the other hand, the Notice of motion application herein does not disclose any reasonable cause of action.

d) The instant application is pre-mature, misconceived and bad in law.

e) In the premises, the instant application amounts to and/or constitutes an abuse of the due process of court.

f) Besides, the defendant/applicant is non-suited.

2. In the application brought pursuant to **Order 9 Rules 5,9,order 21 Rule 12 of the Civil Procedure Rules,2010 and sections 1A, and 1B of the Civil Procedure Act (Cap 21)** respectively, the applicant through Abisai and Company Advocates, is seeking the following orders :-

i. Spent

ii. Spent

iii. Spent

iv. The defendant be allowed to change his advocates herein

v. That the defendant/applicant herein be allowed to settle the decretal sum by way of installments.

vi. This Honourable Court do issue any other further orders as it may deem expedient in the circumstances.

vii. The auctioneers charges be taxed.

3. The application is premised on the applicant's 16 paragraphed supporting affidavit sworn on 24th July, 2019 with accompanying

documents marked as “WOO-1” to WOO-3 which include a proclamation by Omwoyo Auctioneers and the applicant’s bank account statement with Diamond Trust Bank (**DTB**). The application is also based on grounds, inter alia, that judgment herein was passed on 8th April, 2019 and that the decretal sum is colossal and the applicant has insufficient means to settle the decretal sum at once.

4. The respondent opposed the application by his 28 paragraphed replying affidavit sworn on 30th July, 2019. He averred, inter alia, that the application has been made with inordinate delay and that the applicant’s proposed new counsel has not obtained leave of the court before hand to mount the application. Thus, the respondent’s counsel sought dismissal of the application.

5. During inter partes hearing of the application today, this court directed that the preliminary objection be disposed of first before the application by oral submissions. Counsel for the respective parties were limited to ten (10) minutes each for oral submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules 2010 and Practice Direction number 33 (a) of the Environment and Land Court Practice Directions, 2014.**

6. Mr. D. Adawo, learned counsel for the respondent submitted that the proposed new counsel for the applicant disregarded **Order 9 Rule 9 of the Civil Procedure Rules, 2010** as there was no notice, consent or order of the court issued to enable him commence the application. That the Civil Procedure Rules, 2010 guide the process of this court and should be adhered to .

7. In the submissions counsel cited **Jones and Bartlett in their book “ Civil Procedure in focus.”** Counsel urged the court to dismiss the application for being mischievous and a nullity abinitio.

8. Mr. Abisai, learned counsel for the applicant submitted that the preliminary objection is without foundation and cause. That order 9 Rule 9 (supra) should be read with Rule 10 thereof. That prayer number 4 sought in the application, is for hearing first and in lieu thereof, the preliminary objection was raised. Counsel also submitted that the former counsel, Bosire Gichana and Company Advocates were duly served on 27th July 2019 as per stamp on a copy of the application.

9. Counsel submitted that the Civil Procedure Rules 2010 were followed in initiating the application. That **Article 159 (2) (c) of the Constitution of Kenya 2010 and sections 1 A (1),(2) and (3) 1B of the Civil Procedure Act (Cap 21)** as well as **section 19 of the Environment and Land Court Act 2015 (2012)**, disregard procedural technicalities .

10. I have carefully considered the preliminary objection and submissions including authorities cited by counsel for the respective parties. So, is the preliminary objection merited in the circumstances?

11. The preliminary objection is expressed on points of law. According to **Black’s Law Dictionary 10th Edition**, the term **“Point of law”** means;-

“ A discrete legal proposition at issue in a case”

12. In the case of **Mukisa Biscuits –vs- West End Distributors Ltd (1969) EA 696**, it was held that a preliminary objection must raise pure points of law and not facts. That the preliminary objection must not be based on facts to be ascertained or what is sought is the exercise of judicial discretion.

13. Learned counsel for the respondent contends that the application offends **Order 9 Rule 9** (supra) which provides;-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court.:-

a) Upon an application with notice to all the parties; or

b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be” (Emphasis laid)

14. On the other hand, learned counsel Mr. Abisai asserts that **Order 9 Rule 9** (supra) should be read with **Order 9 rule 10 of the Civil Procedure Rules,2010** which reads;-

“An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.” (Emphasis added)

15. I note order (prayer) number 4 as well as other orders sought in the application. This court has directed that the preliminary objection be dealt with first as commanded by **Order 9 Rule 10 (Ibid).**

16. It is important to note that the respondent’s counsel is before court further to service of the application upon him. M/s. Bosire Gichana and Company Advocates formerly on record for the defendant were duly served on 27th July 2019 at 9:30 as am shown on a duly stamped copy of the application. I am aware of **Order 9 Rules 5, 6 and 7 of the Civil Procedure Rules 2010** applicable in other cases. In the instant matter, there is no prescribed format of notice to be issued to the parties as envisaged under **Order 9 rule 9 (a) (supra)**. Therefore, the application which was duly served on the former counsel for the defendant and counsel for the plaintiff, would suffice in view of the overriding objective under **Sections 1A,1B,3A and 3B of the Civil Procedure Act (Cap 21) and sections 3 and 19 (1) of the Environment and Land Court Act, 2015 (2012) all aligned to Article 159 (2) (d) (supra).**

17. Moreover, it is well settled that mistakes of counsel should not be visited upon a client; see **Shabir Din –vs- Ram Parkash Anand (1955) EACA volume 22 page 48.**

18. Counsel for the respondent contends that the application is a nullity ab initio. In the case of **Republic –vs- Karisa Chengo and 2 others (2017) eKLR**, the Supreme Court of Kenya held thus :-

“When an act is void, it is a nullity ab initio. It can not found any legal proceedings and Lord Demining’s decision in the Privy Council case of Benjamin Leonard Macfoy United Africa Company Limited (UK) (1962) AC 152, succinctly makes this point....”

19. The instant application duly filed and served does not amount to a nullity. As already observed, the application is curable under the overriding objective and more fundamentally, under **Article 159 (2) (d) (supra).**

20. The applicant has brought the instant application for hearing and determination. **Section 22 of the Environment and Land Act, 2015 (2012)** provides for representation before this court. The right of fair hearing under **Article 50 (1) of the Constitution of Kenya, 2010** can not be curtailed as provided for under **Article 23 (c)** of the same **Constitution.**

21. In the case of **Macharia Mwangi Maina and 87 others –vs- Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal restated the principles of Judicial Authority particularly under **Article 159 (2) (a) (b) and (d) (supra).** The court held that the court of law and court of equity is bond to deliver substantive rather than technical and procedural justice.

22. Similarly, in **Kanwal Sarjit Singh Dhiman –v- Kashavji Jivraj Shah (2015) eKLR**, the Court of Appeal held, inter alia, that the courts exist for purposes of dispensing justice and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests.

23. In **Films Role International Ltd –vs- Cannon Film Sales Ltd (1986) ALLER 772**, Justice Hoffman held that, it is a fundamental principle that the court should take the lower risk of justice. In the instant preliminary objection, the lower risk of injustice is that the preliminary objection be disallowed and order 4 sought in the application be granted. The preliminary objection fails.

24. In the upshot, the applicant’s preliminary objection dated 30th July, 2019 be and is hereby disallowed and order number (4) four sought in the application dated 29th July 2019 is allowed accordingly.

25. Costs be in the cause.

DELIVERED, DATED and SIGNED at MIGORI this 31st day of JULY 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. David Adawo learned counsel for the plaintiff/respondent

Mr. R. Abisai learned counsel for the defendant/applicant

Tom Maurice – Court Assistant.