



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 18 OF 2015

GRACE WANJIRU KARIUKI.....APPELLANT

VERSUS

JOSEPH WAINAINA MARARO.....1ST RESPONDENT

GABRIEL MWANGI MARARO.....2ND RESPONDENT

JUDGMENT

(AN APPEAL FROM THE JUDGMENT BY HON. P.M. KIAMA PRINCIPAL MAGISTRATE WANGURU IN CIVIL CASE NO. 1/2015 DELIVERED ON 16TH JUNE, 2015)

INTRODUCTION

The Appellant Grace Wanjiru Kariuki was the plaintiff in SPMCC No. 1 of 2015 (Wanguru Law Courts) while the Respondents were the defendants therein. The plaintiff/Appellant had sued the defendant/Respondents for an equitable relief of injunction restraining them either by themselves, agents, servants and any one claiming under them from entering, trespassing, cultivating, leasing or in any other way interfering with the plaintiff's enjoyment of two (2) acres (A & B) in Thiba Section No. 2491 Unit 19. The plaintiff also sought costs and interest of the suit. In a joint statement of defence dated 27th January 2015, the defendants denied the plaintiff's claim and sought to have the suit dismissed with costs.

After the case was heard, the trial magistrate rendered himself by dismissing the suit in its entirety with costs. The plaintiff was aggrieved by the said decision and exercised her right of appeal to this Honourable Court on the following grounds:

- (1) The learned magistrate erred in law and in fact by upholding the Preliminary Objection and finding that the contract between the Appellant and the Respondent was void and unenforceable.***
- (2) The learned magistrate erred in law and in fact by failing to find that despite lack of consent from the Manager National Irrigation Board, the Appellant was entitled to refund of her lease price as the Respondent had clearly breached the same.***
- (3) The learned magistrate erred in law and in fact by failing and upholding the fact that the Respondent could benefit from his own mischief and fail to refund the sale.***
- (4) The learned magistrate erred in law and in fact by finding that under Rule 8 (1) (b) of the Irrigation Act, the plaintiff was obliged to obtain statutory consent from the Manager National Irrigation Board before leasing the said land to the defendant.***

APPELLANT'S SUBMISSIONS

The appellant through the firm of Wangechi Munene & Co. Advocates submitted that when the suit before the trial Court came for hearing, the defendant raised a notice of Preliminary Objection arguing that the lease agreement dated 30th December 2013 was null and void for want of statutory consent by the National Irrigation Board. The Court upheld the said Preliminary Objection and dismissed the suit. The learned counsel cited **Regulation 8 (1) (a) of the Irrigation Act** which provides that **"a licensee shall devote his full personal time and attention to the cultivation and improvement of his holding and shall not, without the permission, in writing of the manager allow any other person to occupy his holding or to cultivate it on his behalf"**.

The Appellant's counsel posed whether a party loses her rights under the contract in case the contract is declared null and void? The Appellant argued that it was incumbent upon the Respondents also to seek and obtain consent from the lessor before leasing their

land to the Appellant. In conclusion, the learned counsel submitted that it is not well for the lessor to benefit from a lease agreement which has been declared by the Court to be null and void. She cited the case of **Charles Otiso Getugi Vs Ramesh Chauder Ndingwa C.A. No. 154 of 2009** and reported in (2018) e K.L.R.

RESPONDENTS SUBMISSIONS

The Respondents through the firm of Kinyua Kiama & Co. Advocates on their part submitted that the cause of action before the trial magistrate which has now given rise to the present appeal was in relation to a lease over land within the National Irrigation Settlement Scheme and governed under **Regulation 8 (1) of the Irrigation Act** which required the parties to obtain written consent from the Board Manager allowing them to proceed with the lease transaction. The learned counsel submitted that the parties did not obtain the statutory consent as stipulated. The failure therefore rendered the agreement null and void. As such, they submitted the legal effect is that such an agreement cannot form a cause of action in a Court of law unless the statute has a redress for the aggrieved party. The learned counsel argued that the **Irrigation Act** has no statutory redress and therefore the Preliminary Objection was well founded and that the trial magistrate was right in upholding the Preliminary Objection.

DETERMINATION

This appeal arises from a Preliminary Objection which was raised by the Respondents and upheld by the trial magistrate. The Notice of Preliminary Objection dated 27th January 2015 read as follows:

TAKE NOTICE that the defendants shall raise a Preliminary Objection on a point of law seeking to have the application dated 6/1/2015 and the entire suit struck out with costs on the following grounds:

- 1. The lease dated 30/12/2013 is NULL and VOID for want of statutory consent by the National Irrigation Board under the Irrigation Act and Rules (rule 8 (1) (a) and no cause of action can be based on it.**
- 2. the plaintiff has no written consent from the National Irrigation Board allowing her to occupy any portion of rice holding number 2491 and her occupation is a criminal act under Rule No. 3 of the Irrigation Rules and this Court should order for her arrest forthwith.**

It is now settled law that Preliminary Objections need to be confined solely to matters of law. That was the finding in the locus classical case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VS WEST END DISTRIBUTORS LIMITED (1969) E.A 696**. The

brief facts of that case are that counsel for the defendant asked the Court by way of Preliminary Objection to dismiss the suit for want of prosecution. The trial Judge declined to dismiss the suit and an appeal was preferred against the order. It was argued on appeal that an order seeking to dismiss a suit for want of prosecution has to be made by way of a motion and not a Preliminary Objection. The Court agreed with that argument but held that since the learned Judge proceeded to entertain the application, notwithstanding its defective form, that objection was not well grounded. **Law J.A.** then proceeded to make the following dictum:

“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, a preliminary point may dispose of the suit. Examples are in 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...”

Newbold J.A. on the same decision at **page 701** stated as follows:

“The first matter relates to the 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 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

The plaintiff in her list of documents before the trial magistrate annexed lease agreements dated 30/9/2011, 24/12/2011 and 9/1/2013. The three lease agreements are written in Kikuyu language and translated into English. The lease agreements do not indicate who was to obtain the consent from the National Irrigation Board which is the lessor. Those are contested issues of fact which could only be determined at the main trial of the case. Only points of law and undisputed facts can be determined by a Preliminary Objection. Where facts are disputed, then evidence needs to be adduced. In **Republic Vs Attorney General (Sued for and on behalf of the Ministry of Lands) & 2 others Ex-parte South and Central (Thika) Investment Limited & another (2016) e K.L.R G.V. Odunga J.** (as he then was) held as follows:

“In my view, Preliminary Objections which have the effect of inviting the Court to make a determination on conflicting factual averments ought not to be entertained. Where a party intends to rely on certain documents, he can only be permitted to do so in arguing the Preliminary Objection where the factual contents of the said documents are not in dispute. However, where the same are disputed, the application or the suit ought to be allowed to proceed in the usual manner as to raise a Preliminary Objection based thereon not only leads to confusion but unnecessarily prolongs proceedings”.

I fully agree with the reasoning of the learned Judge in the above decision. I find that by entertaining the purported Notice of Preliminary Objection, the trial magistrate invited himself into determining conflicting factual averments which ought to have proceeded to the main trial. I therefore find and hold that he misdirected himself in law and fact by upholding a Preliminary Objection and dismissing SPMCC No. 1 of 2015 (Wanguru). Consequently, I find this appeal merited and the same is allowed as follows:

(1) The appeal is allowed.

(2) The judgment in the lower Court, Case No. SPMCC No. 1 of 2015 be and is hereby set aside.

(3) The case is remitted back before the Principal Magistrate's Court Wanguru for hearing and determination before any magistrate other than Hon. P.M. Kiama.

(4) The Respondents shall bear the costs of this appeal but the costs before the lower Court shall abide the event.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. Mr. Maina Kagio for Wangechi Munene for Appellant
2. Respondents/Advocate – absent
3. Mbogo - Court clerk – present