



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 17 OF 2014**

**JOHN MAINA KIHARA & 33 OTHERS.....APPELLANTS**

**(T/A MWIRERI GITUTO YOUTH GROUP)**

**VERSUS**

**JAMES HEHO WANJOHI & 9 OTHERS.....RESPONDENTS**

***(AN APPEAL FROM THE RULING/ORDER OF THE RESIDENT MAGISTRATE HON. KIMUTAI K.T. DELIVERED ON 8<sup>TH</sup> JUNE 2006 AT WANGURU ON S.R.M.C.C NO. 31 OF 2005)***

**JUDGMENT**

**BACKGROUND**

This is an appeal from the decision by Hon. Kimutai K.T. delivered on 8<sup>th</sup> June 2006 in S.R.M.C.C No. 31 of 2005. The said decision arises from the dismissal of a Preliminary Objection raised by the Appellant against a Notice of Motion dated 6<sup>th</sup> February 2006. The said Notice of Motion by the Respondent was brought under **Order VII Rule 1 (2) and (3) CPR and Section 3A CPA**. The Respondent was seeking to strike out the plaint dated 12<sup>th</sup> April 2005 and amended on 30<sup>th</sup> May 2005 together with their verifying affidavits. The Respondent was also seeking to be provided with costs. The application was premised upon the affidavit of the 1<sup>st</sup> Respondent one James Heho who deponed that the plaint and the amended plaint was fatally defective and that the plaintiff had no locus standi to sue since a deceased cannot authorize a person to confirm the correctness of the contents of a document. The 1<sup>st</sup> Respondent further contend that the deponent of the verifying affidavit had lied on oath that the contents of the plaint were true yet that was not true.

In a replying affidavit sworn by the 1<sup>st</sup> Appellant, the Appellants opposed that application arguing that the same was fatally defective and bad in law stating that when the deceased plaintiffs passed on, the suit was still on-going and that it was not correct that they were enjoined in this suit after they died. The Appellants further stated that the mere fact that the two of the members of their group were deceased did not in any way invalidate the entire suit since the Court had discretion to strike out the names of the deceased plaintiffs from the suit and/or substitute with other members before the suit abated. In addition, the Plaintiff/Appellant raised a Notice of Preliminary Objection seeking to strike out the said Notice of Motion. When the application came up for hearing, the trial magistrate heard the counsels appearing for the two sides and on 8<sup>th</sup> June 2006, he rendered himself by dismissing the same.

The Appellant was aggrieved by the said decision and preferred the present appeal on the following grounds:

***(1) That the learned Resident Magistrate erred in law and fact by not holding that the application dated 6<sup>th</sup> February 2006 was fatally defecting and inconsistent in law having been brought under the wrong provisions of the law.***

***(2) That the learned magistrate erred in law by not finding that Section 3A of the Civil Procedure Act cannot be invoked where there is clear provisions of law stipulated to move the Honourable Court.***

***(3) That the learned magistrate erred in law and fact by not properly addressing his mind to the issue raised in the submissions by learned counsels of the parties and hence failed to determine those issues on his ruling dated 8<sup>th</sup> June 2006.***

***(4) That the learned Resident Magistrate erred in law and fact by failing to dismiss the application dated 6<sup>th</sup> February 2006 on grounds raised in the Preliminary Objection.***

***(5) That the learned magistrate erred in law by ordering that the application dated 6<sup>th</sup> February 2006 by the Respondents herein be amended whereas no party prayed for those orders at any stage and hence made a ruling based on extraneous issues other than the ones addressed to the Court by the parties.***

## ANALYSIS AND DETERMINATION

I have considered the five grounds of this appeal and the submissions by their counsels. I have also considered the applicable law. This appeal is challenging the dismissal of a Preliminary Objection by the trial magistrate.

A Preliminary Objection was defined in the celebrated case of *Mukisa Biscuits Company Vs Westend Distributors Limited (1969) E.A 696, at page 701* as follows:

***“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 has 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 nothing but unnecessarily increase costs and occasionally confuse the issues. This improper practice should stop”.***

It is now well settled that a Preliminary Objection must only be raised on a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. The Appellant in his Notice of Preliminary Objection argued that the Respondents application was incompetent, an abuse of the Court process and fatally defective on grounds that the Appellants had invoked the wrong provisions of the law. A party who invokes the wrong provisions of the law does not necessarily spell doom to an otherwise meritorious application. That was the holding in the case of *Nancy Nyamira & Another Vs Archer Dramond Morgan Ltd (2012) e K.L.R* where **Ngugi J.** held that:

***“Next the defendant argues that the plaintiff’s application must fail because it cites the wrong provisions of the law. The enforcement application cites Order XLIV, Rule 17. The defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma’s remarks Salume Namukasa Vs Yosefu Bukya (1966) E.A 433, invoking the wrong provisions of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in Gitari Vs Muriuki (1986) K.L.R 211 which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise cause injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded”.***

I am guided by the holding by the learned Judge in this decision and hold that the learned magistrate properly directed his mind to the applicable law in dismissing the Preliminary Objection. However, I find that he misdirected himself in allowing the application dated 6<sup>th</sup> February 2006 where the parties had not taken directions on how to canvass the same. What came up for hearing on 9<sup>th</sup> March 2006 was the Preliminary Objection and not the main application dated 6<sup>th</sup> February 2006.

In the result, I issue the following orders:

- (1) This appeal partially succeeds in that the order dismissing the Preliminary Objection is upheld.***
- (2) The order allowing the Notice of Motion dated 6<sup>th</sup> February 2006 is set aside and the matter is referred to Wanguru Law Courts for hearing before a magistrate other than Kimutai K.T.***
- (3) The Appellant shall bear the costs of this appeal.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.

**E.C. CHERONO**

**ELC JUDGE**

**4<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

1. Ms Wambui holding brief for Mr. Kahigah for Appellant
2. Respondents/Advocate – absent