



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC NO.517 OF 2017

JOSEPH KURIA KARIRI.....PLAINTIFF/APPLICANT

VERSUS

H-YOUNG & CO (EA) LIMITED..... DEFENDANT/RESPONDENT

RULING

The matter coming up for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated **5th May 2017**, brought under Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions and regulations of the law and seeks for the following orders:-

a) Spent.

b) That this Honourable Court be pleased to issue a temporary order of injunction compelling the Defendant/Respondent by themselves, their respective agents, servants, employees and/or any other person in their name from constructing a culvert or a water run-way on the Plaintiff/Applicant's parcel of land until the hearing and determination of this application.

c) That cost of this application be borne by the Defendant/

Respondent.

This application is supported by the grounds stated on the face of the application and by the **Supporting Affidavit** of **Joseph Kuria Kariri**. These grounds are:-

i That the Defendant/Respondent has started constructing a culvert and a water runway directing rain water to drain on the Plaintiff's/Applicant's compound and parcel of land.

ii That the Defendant/Respondent has done the above without consulting the Plaintiff/Applicant.

iii That it is in the interest of justice that this application be allowed as prayed

In his supporting affidavit, the Plaintiff/Applicant averred that he is one of the administrators of the Estate of **Francis Wainaina Ngene (deceased)**, who is the registered owner of **LR.No.Ng'enda/Kimunyu/808**, as evidenced from **JKK-1**. He averred that the above stated Succession Cause is ongoing at Gatundu Law Courts and Confirmation of Grant had not yet been done. He further alleged that the

Defendant/Respondent is in the process of constructing a culvert and a water run-way on the above mentioned parcel of land without consulting him or his co-administrator. It was his further allegation that if the rain water is allowed to drain on their parcel of land, then they will suffer greatly as their land is flat and the said water will definitely flood their land. That even after demand from their lawyer to stop the illegal acts, the Defendant has continued with the said construction. It was his contention that the Defendant's acts are not only illegal but also portrays lack of respect for them. Further that if the illegal activities of the Defendant are not stopped, he is going to suffer irreparable loss and/or damage. Therefore that it is for the interest of justice and fairness that the application herein be allowed as prayed.

The Defendant has vehemently opposed the instant **Notice of Motion** application. Defendant filed a **Notice of Preliminary Objection** on 27th June 2017, and urged the Court to strike out the application with costs on the following ground:-

a) In stark contravention of the mandatory provisions of Section 82 of the Law of Succession Act, the Plaintiff herein, being a Joint Administrator of the Estate of Francis Wainaina Ngene alias Wainaina Ngene, together with Margaret Wanjiru, is only empowered to act and/or sue jointly and that he has no locus standi to unilaterally initiate proceedings in his name alone and purport to be suing on behalf of the Estate. Accordingly, the Notice of Motion dated 5th May 2017 ought to be struck out with costs.

Further **Audrey Namwakira**, the **Corporate Affairs Officer** of the Defendant Company, swore a **Replying Affidavit** on 29th June 2017, and averred that the Defendant/Respondent was contracted by **Kenya Rural Roads Authority (KeRRA)** to carry out various construction works along the **Mutumo-Kimunyu Kenyatta Road**. Further that in the course of carrying out its mandate under the contract, the Defendant Company under the instructions of **KeRRA** sought to construct a culvert and a water runway in order to provide for drainage of water way from the road. She also averred that prior to undertaking the construction of the culvert, **Ernest K. Ruttoh**, the Site Agent and an employee of the Defendant Company approached **Margaret Wanjiru**, the owner of plot **No.808, Kiambu Ng'enda Location** and on behalf of the Defendant herein obtained her written consent to excavate a trench leading to the direction of her premises. She attached a copy of the **Written Agreement** dated 12th May 2017.

It was her further allegation that as per the said agreement and request, the Defendant Company filled back the trench to its original state as per the attached **photograph AN2**. She also contended that the excavation was necessary in order to ease the casting of the cross culvert end structures. Further that the construction of the culvert was in the interest of the members of the public and consequently, it overrides any private interest.

She also contended that the Defendant is a mere agent carrying out instructions of **KeRRA** (principal) and therefore the question pertaining to construction of the culvert ought to be raised with the principal. Therefore the deponed alleged that it is for the interest of justice that the Plaintiff's application should be dismissed with costs.

The parties herein agreed to canvass the instant **Notice of Motion** application by way of written submissions and which directions they complied with and the Court has carefully read and considered the said written submissions, the cited authorities and relevant provisions of law.

The Court has also considered the instant **Notice of Motion** and the pleadings in general. The Court too has also considered the annexures and it renders itself as follows:-

The Respondent has raised a **Notice of Preliminary Objection**. Since a **Preliminary Objection** has capacity of determining a matter conclusively at the point of determination, then the Court will determine the Preliminary Objection first.

What is a **preliminary Objection**? In the case of **Mukisa Biscuit Manufacturing Ltd...Vs...West End Distributors Ltd (1969) EA 697**, the Court held that a Preliminary Objection is:-

“A Preliminary Objection is in the nature of what used to be called demurrer. It raises pure point of law, which is argued on the assumption that all the facts pleaded 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 Preliminary Objection does nothing but unnecessarily increase costs and on occasion confuse issues”.

From the above description, it is clear that a ***Preliminary Objection*** raises pure points of law and does not require ascertaining of facts. Further, a ***Preliminary Objection*** stems from the pleadings and is capable of bringing a matter to an end. See the case of ***Quick Enterprises Ltd...Vs...Kenya Railways Corporation, Kisumu High Court, Civil Case No.22 of 1999***, where the Court held that:-

“when Preliminary Points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings”.

The Respondent has alleged that the Plaintiff has contravened the provisions of Section 82 of the Law of Succession Act as he is a Joint Administrator with ***Margaret Wanjiru*** to the ***Estate of Francis Wainaina Ngene alias Wainaina Ngene***, but he has brought the suit in his name alone but not on behalf of the Estate.

Therefore the Respondent has raised the objection based on pure points of law and which objection stems from the pleadings. Therefore the ***Notice of Preliminary Objection*** raised by the Respondent is a pure point of law and is therefore a ***Preliminary Objection*** as described in the ***Mukisa Biscuits Case (supra)***.

So is the ***Preliminary Objection*** merited? The Court has looked at the Plaintiff and the ***Notice of Motion*** application. Indeed the suit herein is filed by the Plaintiff alone but not on behalf of the ***Estate of Francis Wainaina Ngene***. Further he is a joint administrator together with ***Margaret Wanjiru Wainaina***. However, the suit herein is not brought jointly by the two administrators. A joint administrator ought to file proceedings on behalf of the Estate jointly but not singularly as the Plaintiff/Applicant has done herein. See the case of ***Simon Kamau Muhindi (Suing as the administrator of the Estate of Esther Nyokabi Muhindi (deceased))...Vs...Monica Wambui Nguqi & Another, HCCC No.207 of 2013***, where the Court held that:-

“The Capacity to agitate any suit on behalf of the Estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times.....one administrator out of the others lacks capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate”.

The Plaintiff/Applicant filed the suit alone without involving the other co-administrator. Further the Plaintiff filed the suit on his behalf instead of stating that he is suing on behalf of the ***Estate of Francis Wainaina Ngene alias Wainaina Ngene***. Therefore the Court finds and holds that the Defendant's ***Preliminary Objection*** is merited and finds that suit herein contravenes the clear provisions of the Law of Succession Act.

However, the Court finds that it will not take the draconian step of striking out the suit since the omissions herein can be cured through amendments of the pleadings. See the case of ***DT Dobie & Co.(K) Ltd...Vs... Joseph Mbaria Muchina & Another, Civil Appeal No.37 of 1988***, where the Court held that:-

“A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim or in such affidavit she may file with the amendment and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved....A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal”.

See also the case of *Francis Kamande....Vs...Vanguard Electrical Services, Civil App.No.152 of 1996*, where the Court of Appeal held that:-

“No suit can be dismissed unless it is so hopeless and it is plainly obvious that it discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment”.

In the instant suit, the Plaintiff has brought the suit wrongly without stating that he is suing on behalf of the ***Estate of Francis Wainaina Ngene*** and without involving the co-administrator, that omission can be cured by amendment of the pleadings and thus this suit is not a candidate for striking out.

On the substantive ***Notice of Motion*** application, the Court finds and holds that the Plaintiff has sought for temporary orders of injunction. However, he has wrongly brought the suit and this Court therefore finds that he had no *locus standi* to bring the instant application on his own behalf and without involvement of the co-administrator. Therefore the Court arrives at a finding that the ***Notice of Motion*** dated ***5th May 2017, is not merited and it is dismissed entirely with costs to the Defendant.***

If the Applicant intends to proceed with the main suit, let him amend the suit accordingly.

It is so ordered.

Dated, Signed and Delivered at Thika this ***16th*** day of ***February*** 2018.

L. GACHERU

JUDGE

16/2/2018

In the presence of

No appearance for Plaintiff/Applicant

Mr. Maina holding brief for Mr. Osimo for Defendant/Respondent

Lucy - Court clerk.

Plaintiff/Applicant present in person.

L. GACHERU

JUDGE

Court – Ruling delivered in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/2/2018