



**REPUBLIC OF KENYA**

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

**ELC CASE NO.63 OF 2017**

**J W R.....APPLICANT**

**-VERSUS-**

**D W I.....1<sup>ST</sup> RESPONDENT**

**R N R.....2<sup>ND</sup> RESPONDENT**

**JAMES KARIUKI NJENGA.....3<sup>RD</sup> RESPONDENT**

**JOSPHINE MUKUHI GICHERU.....4<sup>TH</sup> RESPONDENT**

**PETER KIBUIKA NJUGUNA.....5<sup>TH</sup> RESPONDENT**

**RULING**

By a **Notice of Motion** dated **31<sup>st</sup> August 2017**, the Applicant herein sought for various orders against the Respondents herein. The application was premised under various provisions of law and among them Order 40 Rule 1 of the Civil Procedure Rules. Among the orders sought are:

- a) ***That this Honourable Court orders the Registrar of land to place caution or restriction against the sale/transfer of the property LR.No.Ndumberi/Ndumberi/[particulars withheld].***
- b) ***That this Honourable Court issues an order to stop the sale and/or development in the said parcel of land LR.No.Ndumberi/Ndumberi/[particulars withheld], until this matter is heard and determined.***
- c) ***That this Honourable Court orders the Registrar of land to place caution and restriction against the sale/transfer of the property LR.No.Ndumberi/Ndumberi/[particulars withheld], which was sold to the 3<sup>rd</sup> Respondent without spousal consent.***
- d) ***That this Honourable Court issues an order to stop the sale and/or development in the said parcel of land LR.No.Ndumberi/Ndumberi/[particulars withheld], until this matter is heard and determined.***
- e) ***That this Honourable court issues an order to stop the sale and/or development in the said parcel of land LR.No.Ndumberi/Ndumberi/[particulars withheld], until this matter is heard and determined.***
- f) ***That the costs of this application be borne by the Respondents.***

The application was premised on the grounds stated on the face of the application which are:-

- 1) ***That 1<sup>st</sup> Respondent, S R N and the 2<sup>nd</sup> Respondent, Robert Rigii intend to dispose/charge the land LR.No.Ndumberi/Ndumberi/[particulars withheld], without the Applicant's (spouse's) consent.***
- 2) ***That the said title for LR.No.Ndumberi/Ndumberi/[particulars withheld], may change hands or ownership without the Applicant's consent.***
- 3) ***That the said S R N could either dispose off or charge the property without consulting the Applicant (spouse) and therefore***

waste it at the Applicant's expense.

4) That it in the interest of justice that this application is allowed.

The application was also supported by the *affidavit* of **J W R** who averred that the 1<sup>st</sup> Respondent **S R N** is her husband and they have lived on the suit property **Ndumberi/Ndumberi/[particulars withheld]**, as their matrimonial property. Further that the 1<sup>st</sup> Respondent who is elderly and frail has been misled by the 2<sup>nd</sup> Respondent, **R N R**, their son to dispose off the family land. She further averred that the two, 1<sup>st</sup> and 2<sup>nd</sup> Respondents intend to dispose or charge the Land **LR.No.Ndumberi/Ndumberi/[particulars withheld]**, without her consent. It was her contention that **LR.No.Ndumberi/Ndumberi/[particulars withheld]**, which was part of her matrimonial home under **LR.No.Ndumberi/Ndumberi/[particulars withheld]**, was sold illegally to 4<sup>th</sup> and 5<sup>th</sup> Respondents without her consent and knowledge. She had urged the Court to allow her prayers.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent opposed the instant *Notice of Motion* which was brought through a *Miscellaneous Application* by filing a *Notice of Preliminary Objection* dated 30<sup>th</sup> October 2017 and urged the Court to strike out the instant application on the following grounds:-

1) That the application is incurably defective and incompetent '*ab initio*' in that a party cannot in law or in equity commence a suit by way of a *Notice of Motion*.

2) That this Honourable Court has no mandate to issue any orders as sought by the Applicant in the absence of a substantive suit.

3) That the issues raised by the Applicant are matrimonial issues which ought to be dealt with by a Court under the Family Division as provided for in Article 162 of the Constitution.

They also filed a *Replying Affidavit* which was sworn by **James Kariuki Njenga**, the 3<sup>rd</sup> Defendant on 30<sup>th</sup> October 2017.

The Court directed that the *Notice of Preliminary Objection* be canvassed first by way of *written submissions*. This is because if the instant *Notice of Preliminary Objection* is upheld, it has the possibility of disposing off the application in issue.

*Black Law Dictionary 9<sup>th</sup> Edition, at Page 1299* describes '*Preliminary Objection*' as follows:-

"an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary."

Further, the description of *Preliminary Objection* was given in the case of *Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696* to mean-

"...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 as a preliminary point may dispose of the suit. Examples are 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".

It is apparent that *Preliminary Objection* which is on pure points of law must stem from the pleadings. See the case of *Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the Court held that:-

"A *Preliminary Objection* must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

The *Preliminary Objection* is also capable of disposing off the matter preliminarily. 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 Respondents have averred that the suit herein is *incurably defective* and *incompetent 'ab initio'* as no suit can be commenced by way of *Notice of Motion*.

The Court has considered the instant *Notice of Motion* and the prayers thereof. Indeed some of the prayers are brought under Order 40 Rule 1, which deals with grant of injunctive orders. Temporary injunctive orders are granted pending the hearing and determination of the main suit. One of the principles to be considered in grant of injunctive order is *prima-facie* case with probability of success at the main trial. The Applicant has sought for injunctive orders in prayers No.(d), (f) and (h).

If this application is determined, there will be no other suit pending determination at the main trial. The Applicant is seeking for substantive

prayers in an application.

Under **Section 2** of the **Civil Procedure Act**, a suit in all civil proceedings should be commenced in any manner prescribed and in the same Section pleading is defined to include a Petition or Summons and the statement in writing of the claim or demand of any Plaintiff and of the Defence of any Defendant thereto and of the reply of the Plaintiff to any defence or Counter-claim of the Defendant.

Again **Order 3, Rule 1 (1)** of the **Civil Procedure Rules** provides that:-

**“Every suit shall be instituted by presenting a *Plaint* to the court or in such other manner as may be prescribed”.**

Therefore from the above provisions of law, it is clear that a civil action can only be commenced by filing a **Plaint, Summons** which in this case means **Originating Summons** and **Plaint**. It cannot be commenced through a **Notice of Motion** as in the case herein. See the case of **Board of Governors, Nairobi School...Vs...Jackson Ileri Geto (1999) KLR**, where the Court held that:-

**“Pleading is defined in Section 2 of the Civil Procedure Act to include a *Petition or Summons*, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any Defendant thereto, and of the reply of The Plaintiff to any defence or counterclaim of a Defendant; this definition is couched in such a way as to accord with Order IV Rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suit, which rule provides that every suit shall be instituted by presenting a *plaint to the court, or in such other manner as may be prescribed*”.**

This Court is guided by the above finding of the Court of Appeal and do find and hold that a **Notice of Motion** is not one of the manner prescribed for commencement of a suit. Therefore the Court finds that there is no proper suit before the Court given that the Applicant is seeking for substantive prayers.

Consequently, the Court finds that the **Notice of Preliminary Objection** as filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is merited and accordingly, this Court upholds the same and proceeds to strike out the

Applicant’s **Notice of Motion** dated **31<sup>st</sup> August 2017**, with costs to the 1<sup>st</sup> - 3<sup>rd</sup> Respondents and further all the consequential orders are hereby vacated.

It is so ordered.

**Dated, Signed and Delivered at Thika this 29<sup>th</sup> day of June 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Irungu holding brief for Mr. Wahome for Applicant

Mr. Adunga holding brief for Mr. Munene for Respondents

Lucy - Court Clerk

**L. GACHERU**

**JUDGE**

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

**L. GACHERU**

**JUDGE**

**29/6/2018**