



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 57 OF 2018**

**NAFTALI N. MWANGI.....1<sup>ST</sup> PLAINTIFF**

**MICHAEL THUKU KIMANI.....2<sup>ND</sup> PLAINTIFF**

**VS**

**MARY WAMBUI GACHANJA.....1<sup>ST</sup> DEFENDANT**

**MWANIKI MWANGI.....2<sup>ND</sup> DEFENDANT**

**GATAMBIA MWANGI.....3<sup>RD</sup> DEFENDANT**

**MAINA MWANGI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit is commenced by way of plaint on the 10/7/17. Alongside it an application for injunction has been filed. As the matter raged on, an application was made to serve the 4<sup>th</sup> Defendant by substituted services.

2. The Defendants were duly served going by the Affidavit of service on record.

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Defendants have filed curious pleadings. The reason why the Court refers to the 1<sup>st</sup>-3<sup>rd</sup> Defendants pleadings as curious is that they have filed a Preliminary Objection, a memorandum of appearance and statement of defence in that order all signed by the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> Defendant has not identified herself as an advocate of this honorable Court or other person, if any, authorised by the law to draw, sign and file pleadings in this Court on behalf of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or any other persons.

4. The ideal situation would have been where the 1<sup>st</sup> – 3<sup>rd</sup> Defendants are acting in person to separately draw, sign and file their pleadings as individuals. The manner in which the 1-3<sup>rd</sup> Defendants have filed their pleadings must be discouraged. The Court may proceed with the hearing of the case nevertheless and make appropriate orders at the conclusion of the case.

5. The Preliminary Objection filed by the 1<sup>st</sup> Defendant on 25/7/18 is the subject of this ruling. In order for a matter to be taken by the Court as a Preliminary Objection it must, guided by the definition of a Preliminary Objection as acknowledged in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

"..... 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".

6. In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

**".....a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

7. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be a pure point of law; it must be pleaded by one party and admitted by the other; it must be a matter of law which is capable of disposing the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

8. The Court will take in turn each of the grounds constituting the Preliminary Objection and evaluate it against the definition above so as to ascertain its veracity, thus; a) para 3 makes reference to documents (plaint filed which the 1<sup>st</sup> Defendant admits does not understand). Such admission does not permit this para to be a Preliminary Objection.

9. The salient part of what would constitute the 1<sup>st</sup> Defendant's Preliminary Objection is contained in para 3 to 11 inclusive of the said Preliminary Objection filed on the 25/7/18. The Court has read and understood all the grounds. In order for all or any of the grounds to constitute grounds of Preliminary Objection the Court has evaluated them against the definition stated above.

10. Again, at para 3 of the 1<sup>st</sup> Defendant's Preliminary Objection, the 1<sup>st</sup> Defendant has expressed inability to understand the plaint and the certificate of urgency filed by the Plaintiffs. At the same time, she or the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have not filed an affidavit in reply to the affidavit filed by the Plaintiffs in support of their Notice of Motion to which the certificate of urgency is annexed. The Defendants have filed a statement of defence signed by the 1<sup>st</sup> Defendant on 13/8/18 as explained before. In the statement of defence the Defendants have only admitted their description and denied the rest of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' claim. There is no point of law or admission made in the statement of defence which points at a plea by the Plaintiffs and admitted by the 1-3<sup>rd</sup> Defendants so as to constitute a Preliminary Objection.

11. After evaluating and considering in its entirety the Preliminary Objection of the 1<sup>st</sup> Defendant and doing the best I can with regard to legal parameters and limitations as to what a Preliminary Objection is in the law, I am satisfied that the 1<sup>st</sup> Defendant's Preliminary Objection filed on the 25/7/18 is not merited. In the circumstances the Preliminary Objection is dismissed with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs.

**It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20<sup>TH</sup> OF DECEMBER 2018**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mbuthia HB for PM Mwangi for the Plaintiffs/Respondents

Defendants/Applicants: 1 Present in person

2 Present in person

3 Present in person

4 Absent

Irene and Njeri, Court Assistants