



**REPUBLIC OF KENYA**

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

**ELC No. 217 OF 2016**

**FRANCIS OYUCHI & 27 OTHERS .....PLAINTIFFS**

**VERSUS**

**FLORENCE WANJIRU NDUNGI .....1<sup>ST</sup> DEFENDANT**

**JOHN KIOI KARANJA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

***(A preliminary objection that an amended application is an abuse of court and that an amended plaint cannot sustain any claim against the defendants; whether these constitute valid preliminary objections; held that the amended application was properly filed and that a preliminary objection should be on a pure point of law; preliminary objection dismissed)***

1. This ruling is in respect of Notice of Preliminary Objection dated 13<sup>th</sup> March 2017 and filed in court on 14<sup>th</sup> March 2017 by the 1st defendant. The preliminary objection is pleaded as follows:

1. The Plaintiffs have other pending applications dated 8<sup>th</sup> June 2016 and 21<sup>st</sup> July [Sic] respectively on the same issue and seeking almost similar prayers which have not been heard and determined. Consequently, the plaintiffs'/applicants' application dated 17<sup>th</sup> February 2017 is an abuse of court and misconceived and intended to vex the 1<sup>st</sup> respondent and delay the final trial of this suit.

2. The plaintiffs' amended plaints cannot sustain any claim against the defendants.

2. A detailed background of the matter leading up to the filing of the Notice of Preliminary Objection is necessary. The suit was filed on 16<sup>th</sup> June 2016 pursuant to plaint dated 8<sup>th</sup> June 2016. The sole plaintiff in the said plaint is "Emuhaya Self Help Group" while the sole defendant is Florence Wanjiru Ndungi. The plaintiff is described as "a legal entity registered under the provisions of Business Registration Act." Simultaneously with the plaint, a Notice of Motion dated 8<sup>th</sup> June 2016 was also filed. The prayers in the application are for orders:

1. THAT this application be certified as urgent.

2. THAT this application be heard ex-parte and service upon the defendant be dispensed with in the first instance.

3. THAT pending inter-partes hearing a temporary injunction do issue to restrain the defendants

from charging, leasing, mortgaging, selling, transferring to 3<sup>rd</sup> party or to themselves or in any other manner doings [sic], dealings or perpetrating acts of waste upon land [sic] NAKURU/SAN MACRO 538 and 539 a subdivision of NAKURU/SAN MACRO 506 pending the hearing and determination of that suit until further or other orders of court.

4. THAT pending inter-partes hearing a temporary injunction do issue to restrain the defendants from interfering with the plaintiff possession of land comprised in NAKURU/SAN MACRO/538/539 a subdivision from NAKURU/SAN MACRO/506 in any way interfering with the said possession including free and unhidden access until the determination of this suit or until further or other orders of the court.

5. THAT costs for this application be provided for.

3. The application was filed under certificate of urgency and the file was placed before the Deputy Registrar who ordered that the matter be mentioned before the judge on 19<sup>th</sup> July 2016. On 19<sup>th</sup> July 2016 both plaintiff and the defendant were represented in court and the defendant sought and was granted 14 days to file a response to the application. The application was set for inter parte hearing on 7<sup>th</sup> September 2016. Come 7<sup>th</sup> September 2016 the matter was again placed before the Deputy Registrar since the judge was away on annual leave. The matter came up again on 4<sup>th</sup> October 2016 before the Deputy Registrar for mention whereupon it was fixed for mention on 10<sup>th</sup> October 2016 before the judge.

4. Meanwhile, the defendant had entered appearance on 12<sup>th</sup> July 2016 and filed a defence on the same date. On 22<sup>nd</sup> July 2016, the plaintiff filed an amended plaint in which the name of the plaintiff was changed to “Francis Oyuchi & 27 others“ while a second defendant by the name “John Kioi Karanja” was introduced. There were also several other amendments within the body of the plaint. The plaintiff also filed an “Amended Certificate of Urgency,” an “Amended Notice of Motion” and incredibly, an “Amended Supporting Affidavit” all on the same date of 22<sup>nd</sup> July 2016. The record does not show whether any leave was sought or obtained prior to the filing of those documents.

5. I am of course aware that Order 8 rule 1 of the Civil Procedure Rules, 2010 grants right to amend without leave before close of pleadings. Order 2 rule 13 sets the date of close of pleadings. It states:

*The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.*

6. The defence herein was filed on 12<sup>th</sup> July 2016. Even if it was served immediately upon filing, only ten (10) days would have lapsed by the time the amended plaint was filed on 22<sup>nd</sup> July 2016. It follows therefore that the amended plaint filed on 22<sup>nd</sup> July 2016 was properly filed since no leave was needed. For whatever reason, the plaintiff found it necessary to also file an amended Notice of Motion though it appears that only the title or parties of the application was amended. The prayers remained the same as those in the original notice of Motion.

7. When the matter came up for mention before the judge on 10<sup>th</sup> October 2016 there was no appearance for the defendants. Counsel for the plaintiff sought and was granted leave to file an Amended Plaint within 21 days to name the unnamed 27 other plaintiffs. The court also ordered that “*the plaintiff can then file an appropriate application upon amendment of plaint.*” As a result, the plaintiff filed a “Further Amended Plaint” on 5<sup>th</sup> December 2016. On 22<sup>nd</sup> February 2017 the plaintiffs filed a new Notice of Motion dated 17<sup>th</sup> February 2017, apparently in view of the order of 10<sup>th</sup> October 2016 which allowed them to file an appropriate application upon amendment of the plaint. It is the Notice of Motion dated 17<sup>th</sup> February 2017 that provoked the Notice of Preliminary Objection dated 13<sup>th</sup> March 2017.

8. Counsel for the first defendant argued in support of the preliminary objection that the Notice of Motion

dated 17<sup>th</sup> February 2017 is on the same issues and is seeking the same prayers as those sought in the Notice of Motion dated 8<sup>th</sup> June 2016 and amended Notice of Motion dated 21<sup>st</sup> July 2016. As such, counsel submitted, Notice of Motion dated 17<sup>th</sup> February 2017 is an abuse of court process and further that the application is intended to vex the 1<sup>st</sup> defendant and to delay the trial of the matter. For those reasons, counsel urged the court to strike out Notice of Motion dated 17<sup>th</sup> February 2017.

9. In response, counsel for plaintiffs opposed the preliminary objection stating that Notice of Motion dated 17<sup>th</sup> February 2017 was properly filed following further amendment of the plaint pursuant to leave granted on 10<sup>th</sup> October 2016. That while granting leave to further amend the plaint the court also granted leave to file the new application.

10. I have considered the preliminary objection and submissions by both counsels. I have endeavored to give the lengthy background of the matter so as to give perspective on the various steps taken in the matter.

11. One issue is clear beyond argument: that on 10<sup>th</sup> October 2016 the plaintiff sought and was granted leave to file an Amended Plaint within 21 days. Similarly, the plaintiff also got leave to file an appropriate application upon amendment of the plaint. I therefore have no hesitation in finding, as I hereby do, that Notice of Motion dated 17<sup>th</sup> February 2017 was properly filed. Upon its filing, it superseded all the earlier applications. In the case of **National Bank of Kenya Ltd v Wilson Ndolo Ayah [2009] eKLR** the Court of Appeal stated as follows:

*By rules of pleading an amended pleading replaces the existing one and speaks as from the commencement of the action. In the case of **Eastern Radio v. Patel [1962] EA 818**, Gould J.A quoted with approval the words of Collins MR. in **Sneade v Wotherton Barytes** and **Lead Mining Company [1904] 1 KB 295**, as material, as follows:*

*“It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum... upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed.”*

12. It follows therefore that Notice of Motion dated 17<sup>th</sup> February 2017 cannot be said to be an abuse of court or misconceived or intended to vex the 1<sup>st</sup> respondent or delay the final trial of the suit as posited by ground 1 of the preliminary objection.

13. Ground 2 of the preliminary objection was that the plaintiffs’ amended plaint cannot sustain any claim against the defendants. An answer to this aspect of the objection can only be attained upon a hearing of the suit on its merits. It has been held repeatedly by courts that a preliminary objection should raise a pure point of law which requires no evidence to be adduced. In **Mehuba Gelan Kelil & 2 others vAbdulkadir Shariff Abdirhim & 4 others [2015] eKLR** Gikonyo J. rendered himself thus:

*I need not re-invent the wheel. It is trite law that a preliminary objection should be based on pure points of law which do not require copious probing of evidence in order to ascertain. See the opinion by Law JA on this point in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** when he rendered himself thus:*

*“So far as I’m 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.”*

7. Similarly Sir Charles Newbold in the same case stated that:

*“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 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, on occasion, confuse the issue. This improper practice should stop.”*

8. In **Oraro vs. Mbaja [2005] 1 KLR 141** Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

*“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. The first matter relates to 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 demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. 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.....”*

14. The issue raised by ground 2 of the preliminary objection does not therefore qualify to be a preliminary objection since it requires evidence to be adduced.

15. I have said enough to make it clear that the preliminary objection must fail. It is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of April 2017.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Opar for the plaintiffs

Ms. Gasansule for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant

Court Assistant: Gichaba