



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

E.L.C APPEAL NO. 9 OF 2015

JOHN MACHARIA MAINA.....APPLICANT

VERSUS

VERONICA WANJIKU MWANGI.....1ST RESPONDENT

OSCAR GIKONYO MWANGI.....2ND RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 22ND FEBRUARY, 2011

BY HON. B.M. OCHOI – S.R.M AT WANG’URU SENIOR RESIDENT

MAGISTRATE’S MISC. SUCC CAUSE NO. 23 OF 2002)

RULING

The genesis of this appeal is a dispute revolving around the rice holding **No. 144 TEBERE SECTION** which was originally in the names of one **ERASTUS MAINA BARI** (deceased) who died on 1st February 1990. Following his death, the Senior Scheme Manager Mwea Irrigation Settlement Scheme wrote to the Resident Magistrate Wanguru Court on 16th September 2002 to approve a successor to the said rice holding no doubt in compliance with **Regulation 7 of the Irrigation (National Irrigation Schemes) Regulations 1977** which empowers the Court to approve a successor to a rice holding. The record shows that on 16th October 2002, the Resident Magistrate Wanguru Court (**R.M. MAUNDU**) made an order confirming the Appellant as the Successor to rice holding No. 44 Tebere Section. That order appears to have opened a flood of applications the first one coming some six (6) years later on 26th March 2008 when the 1st Respondent in this appeal filed an application to review that order.

The ruling that has provoked this appeal however arose from an application by the 2nd Respondent dated 19th February 2011 in which she sought to be enjoined as a party in the case and also a temporary order of injunction restraining the Appellant, his servants or anyone claiming under him from interfering with her quiet possession of 3 ¼ acres comprised in rice holding No. 144 B Unit 2 Tebere. The Appellant was not amused by that application and promptly filed a Notice of Preliminary Objection dated 7th February 2011 in which he raised the following grounds:

- 1. That the application is an abuse of Court process, defective and lacks merit.***
- 2. That the application is brought in bad faith.***

3. That the village plot is not subject matter to this suit.

That Preliminary Objection fell upon **HON. B.M. OCHOI** (Senior Resident Magistrate) who upon hearing submissions by both **MS THUNGU** advocate for the Appellant and **MR. KAHIGA** advocate for the Respondents delivered a ruling on 22nd February 2011 dismissing the Preliminary Objection with costs.

The Appellant has now filed this appeal seeking to set aside that ruling and has raised the following grounds:

- 1. The learned magistrate erred in fact and in law in holding that the persons who were not parties in the suit could be compelled to obey Court orders.**
- 2. The learned magistrate erred in fact and in law in holding that the Respondents had not breached the provisions of Order 1 Rule 10 Civil Procedure Rules when they sought orders against the surveyor Mwea Irrigation Scheme without joining him as a party.**
- 3. The learned magistrate erred in fact and in law in holding that the orders sought were temporary in nature whereas they are worded to last permanently and indefinitely.**
- 4. The learned magistrate erred in fact and in law in holding that Order 40 Civil Procedure Rules was applicable in situations other than interlocutory orders and temporary injunctions.**
- 5. The learned magistrate erred in fact and in law in holding that the size of the deceased's Estate was ascertainable when there was no evidence establishing the size of the Estate available for distribution.**
- 6. The learned magistrate erred in fact and in law in failing to up-hold that the village plot in dispute had never been declared as part of the deceased's Estate.**
- 7. The learned magistrate erred in fact and in law in failing to up-hold the Preliminary Objection dated 7th February 2011.**

The appeal was canvassed by way of written submissions filed by both counsels although the Appellant also filed his own submissions after he consented to the Application by **MS THUNGU** advocate to cease acting for him.

I have considered the appeal, the record herein and the submissions filed.

This appeal is on a ruling delivered by **HON. B.M. OCHOI** Senior Resident Magistrate on 22nd February 2011 and in considering it, this Court will be careful not to delve into the dispute which is still pending determination in the trial Court.

In the course of his ruling subject of this appeal, **HON. B.M. OCHOI** Senior Resident Magistrate made the following pertinent findings at page 27 thereof:

“The other issue in the arguments by the objector is the issue of size of the plot which was not determined and also that the orders were being sought in respect of a village plot which had not been distributed to the Estate of the deceased, to me this is an issue of fact and not law and ought to be determined during the hearing of the application”.

The trial magistrate was no doubt alive to the law that a Preliminary Objection must be confined to issues of law and no more. In **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696**, LAW J.A described a Preliminary Objection in the following terms:

“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” Emphasis added

Sir CHARLES NEWBOLD P in the same case said:

“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” Emphasis added

Citing the MUKISA case (supra), OJWANG J. (as he then was) added his own words in ORARO VS MBAJA 2005 1 K.L.R 141 and said:

“A Preliminary Objection correctly understood is now well identified 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 process of evidence. Any assertion which claims to be a Preliminary Objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principal, a true Preliminary Objection which the Court should allow to proceed”. Emphasis added

The above adequately summarize what a Preliminary Objection should contain. Looking at the oral submissions raised by MS THUNGU then appearing for the Appellant on 8th February 2011 when the Preliminary Objection was canvassed, it is clear that counsel raised issues that went beyond pure points of law which is what a Preliminary Objection should confine itself to. Issues were raised regarding the size of the deceased’s Estate and that ownership of a village plot in red soil was also in dispute. Those were matters of fact yet, as was held in the case of ORARO (supra), a Preliminary Objection should not be ***“blurred with factual details”***. The trial magistrate therefore correctly dismissed the Preliminary Objection and cannot be faulted for doing so. To quote from the MUKISA case (supra):

“The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues”

I may add on that by stating that improper raising of Preliminary Objections contributes to delays and frustrates the noble objective of expeditious disposal of cases which is an overriding objective of the Civil Procedure Act and Rules. It also militates against the provisions of Article 159 (2) (b) of the Constitution which provides that ***“Justice shall not be delayed”***.

The up-shot of the above is that this appeal lacks merit and is hereby dismissed with costs.

I further direct that this file be returned to the trial Court so that the application dated 19th January 2011 and all other applications pending therein be heard and determined on their merits.

It is so ordered.

B.N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

Ms Ngangati for Mr. Kahiga for Respondents present

Applicant present in person.

B.N. OLAO

JUDGE

14TH JULY, 2017