



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.638 OF 2015

RUTH WAKONYO KABUNDU.....1ST PLAINTIFF

KABUNDU HOLDINGS LTD.....2ND PLAINTIFF

-VERSUS-

PATRICK MUKIRI KABUNDU.....DEFENDANT

RULING

The Plaintiffs herein ***Ruth Wakonyo Kabundu*** and ***Kabundu Holdings Limited*** filed this suit on ***20th February 2015***, and sought for various orders against the Defendant herein, ***Patrick Mukiri Kabundu***.

The orders sought are:-

- i. An order of permanent injunction, the Defendant be hereby restrained either by himself, his representatives, agents. Employees and or assigns and or any other person acting under his instructions and or authority from interfering with the constitution, directorship, shareholding, operations and or posing and or holding himself as an agent, director, attorney and or general manager of the 2nd Plaintiff and or in any other way dealing with the affairs of the 2nd Plaintiff.***
- ii. A declaration that the Defendant is an intermeddler as related to the affairs of the 2nd Plaintiff Company and therefore has no locus to execute the Judgement dated 4th May 2004 which is in favaour of the 2nd Plaintiff.***
- iii. An order of permanent injunction restraining the Defendant and/or his employees, assignees, and/or agents and/or any other person acting on his behalf from interfering in any manner whatsoever and/or collecting rent and or entering and/or trespassing into parcels of land known as Nairobi 7771/9, 7771/10, 7771/11, 7771/12, 7771/13, 7771/14, 7771/15, 7771/16, 7771/17, 7771/18, 7771/19, 7771/20 and 7771/21 located in Nairobi and LR. No.Mombasa/Block XX/47/(A) and LR.No.Mombasa/Block XI/4911 located in Mombasa and parcels of land known as and the developments thereof.***
- iv. An account of monies received by the Defendants from rentals of LR.No.Mombasa/Block XX/47/(a) and LR.No.Mombasa/Block XI 4911 situated in Mombasa and hand over all original***

titles belong to the 2nd Plaintiff.

v. Costs of this suit.

vi. Any other relief the Court deems fit to grant.

Simultaneous to the Plaint, the Plaintiffs also filed a **Notice of Motion** application even dated wherein they sought for various injunctive orders against the Defendant.

On **11th March 2015**, **Justice Mabeya** allowed the prayers sought in the **Notice of Motion** dated **20th February 2015**, in terms of prayers No.3, 4, 6 7 and 8 of the said **Notice of Motion**. The grant of the above orders culminated in filing of various other applications among them, the Defendant's **Notice of Motion** application dated **18th March 2015**, which among other prayers, sought for stay of the exparte orders granted on **11th March 2015**, *ex debito justitiae* and discharge or setting aside of the exparte order dated **11th March 2015**, and other consequential orders in respect to the exparte proceedings in **HCCC No.66 of 2015**, which is the instant suit.

There was also a further applications dated **24th March 2015**, which also sought for stay of the orders granted by the Court on **11th March 2015**, and for **Justice Mabeya** to **disqualify himself from hearing** any matter between the parties herein.

Before the **Notice of Motion** applications dated **18th March 2015** and **24th March 2015** could be heard, **Justice Mabeya Suo Motto** set aside part of the order issued on **11th March 2015**, as it purported to injunct a Decree of the Court which was issued by **J. B. Ojwang J.** (as he then was). However, before the hearing of the Defendant's applications, the Plaintiffs filed another **Notice of Motion** application dated **8th April 2015**, seeking for temporary orders of injunction and on his part the Defendant filed a **Notice of Preliminary Objection** dated **11th April 2015**. There is therefore a multiplicity of Applications in this matter. It is also evident that the parties have been involved in various other litigations among them, **HCCC No.649 of 1996**, which had been filed by the Plaintiffs in which **Ombija J.** held that the 1st Plaintiff (**Ruth Wakonyo Kabundu**) had no capacity to file the suit as there was no resolution of the Company granting 1st Plaintiff authority to file that suit.

For the above reasons, the Plaintiffs claim was dismissed but the Defendant's Counter-claim was allowed to proceed. Thereafter the Court entered Judgement as prayed in Counterclaim which the Defendant herein is referring to as **Decree** issued by **J. B. Ojwang J.** on **7th May 2004**.

This matter came before me on several occasions for directions wherein the parties were granted an opportunity to try an out of Court settlement. However, it seems this is a convulated matter involving close family members and the parties were unable to arrive at an out of Court settlement.

This Court has also noted that even before the **Preliminary Objection** dated **11th April 2015** could be set down for hearing, the Defendant filed yet another **Notice of Motion** application dated **24th April 2015**, and sought for various prayers. Among the prayers sought are; That the Plaint dated **20th February 2015**, together with application even dated and the one dated **8th April 2015**, which he alleged were similar to the application and **Amended Plaint** and **Counter-claim** in **HCCC No.649 of 1996**, be dismissed and or stayed for being **scandalous, frivolous and vexatious** and **an abuse of the process of the Court**. Further that the **Plaint** dated **20th February 2015**, and subsequent applications by the Plaintiffs be struck out for being scandalous, frivolous and vexatious and/or for seeking orders that were already sought in **HCCC No.649 of 1996**, wherein some prayers were granted and others have been settled. The Defendant also sought to have this suit struck out or dismissed for lack of authority.

This application dated **24th April 2015**, is **opposed** by the Plaintiffs herein and **Ruth Wakonyo Kabundu**, the 1st Plaintiff filed a **Replying Affidavit** which was sworn on **21st May 2015**, and she vehemently

opposed the said **Notice of Motion** application.

It is on the above background that this Court gave directions **on 5th May 2015**, and directed that the **Notice of Preliminary Objection** dated **11th April 2015**, be heard first as it is challenging the competence of any other proceedings in this suit and is therefore capable of disposing off the suit entirely if allowed. However the Defendant had wished to have the **Preliminary Objection** dated **11th April 2015** and the **Notice of Motion** dated **24th April 2015**, heard together.

However, the Court directed that the **Preliminary Objection** be canvassed first. This Ruling therefore is in respect of the **Notice of Preliminary Objection** dated **11th April 2015**, filed by the Defendant herein. The said **Notice of Preliminary Objection** seeks for **dismissal of the suit** on the following objections:-

- i. That the suit is *res judicata* as the Plaintiffs are seeking for orders which were also sought in HCCC No.649 of 1996 and the said orders were granted.**
- ii. That the Plaintiffs have not appealed against the Ruling of Ombija J. issued on 10th February 2004 and Decree of the Court issued by J. B. Ojwang J (as he then was) on 7th May 2004.**
- iii. That the suit and applications are bad in law, misconceived and an abuse of the Court process.**
- iv. That it is in the interest of justice that litigation should come to an end.**
- v. That the Decree of the Court issued on 7th May 2004 has been complied with already.**
- vi. That parties are barred by Section 7 of the Civil Procedure Act from commencing any further trial of concluded issues.**

The **Notice of Preliminary Objection** is supported by the **Verifying Affidavit of Patrick Mukiri Kabundu**, the Defendant herein, which has 45 paragraphs. The said **Verifying Affidavit** has given history of the dispute involving **Kabundu Holdings Limited** and the various cases filed over the matter. In particular, the Defendant dwelt with **HCCC No.649 of 1996**, wherein two decisions were given, one by **Ombija J.** on **10th February 2004**, wherein the Court held that **Ruth Wakonyo Kabundu**, the 1st Plaintiff had no capacity or authority from 2nd Plaintiff to bring up that suit. The second decision was by **J.B. Ojwang J.** (as he then was) wherein he entered Judgement for the Plaintiff in the Counter-claim in **HCCC No.649 of 1996**. He also explained about the **Succession Cause No.408 of 1978**, which dealt with the distribution of the properties of the late **Joseph Mukuongo Kabundu**, the husband to **Ruth Wakonyo Kabundu** and father to **Patrick Mukiri Kabundu**.

The said **Preliminary Objection** is **opposed** by the Plaintiffs herein who filed their grounds of opposition dated **21st May 2015**, and averred that the **Preliminary Objection** herein is an abuse of the process of this Court and should be dismissed. Among the grounds for the opposition of the **Preliminary Objection** are that; the instant **Notice of Preliminary Objection** and the grounds therein are **fatally and incurably defective, premature, bad in law** and therefore insufficient to warrant dismissal of the Plaintiffs suit. Further that the said **Preliminary Objection** dated **11th April 2015**, which is seeking to strike out the Plaintiffs suit is improper and fatally defective as it is accompanied by the **Verifying Affidavit**, verifying facts presented therein, wherein it is evident that **Preliminary Objection** must only raise pure points of law and cannot be supported by affidavit which affidavit addresses issues of facts.

The said **Notice of Preliminary Objection** was **canvassed** by way of **Written Submissions**, which this Court has carefully read and considered. The parties also highlighted their respective Submissions on **3rd October 2016**. On the date of highlighting the submissions, the Defendant alleged that he will only deal with the issue of jurisdiction. He submitted that the matters raised in the suit were effectively dealt with in **HCCC No.649 of 1996**. That this Court has no jurisdiction to revisit the issues already dealt with and

decided by a Court of concurrent jurisdiction. It was his submissions that the Court should not deal with the merit of this matter until the issue of jurisdiction has been settled. To him, this suit is an abuse of the Court process and it should be dismissed with costs. He further submitted that the issue of jurisdiction is a point of law and that the Plaintiffs suit amount to multiplicity of suits and he urged the Court to uphold his Preliminary Objection.

The Plaintiffs in their submissions stated that the **Notice of Preliminary Objection** herein does not meet the test of what amount to a **Preliminary Objection** as was held in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors (1969)EA 701**. The Plaintiffs submitted that the Preliminary Objection must contain pure points of law whereby if successfully argued, it can dispose off the matter. It was further submitted that the Defendant's **Preliminary Objection** is full of facts and documentary evidence as it is accompanied by a **Verifying Affidavit** with 29 annexures. The Plaintiffs relied on the various decided cases, among them the case of **Oraro...Vs....Mbaja (2005) eKLR**. Therefore, it was their submissions that this **Preliminary Objection** is **very defective** and **cannot pass the test of being a Preliminary Objection**. The Plaintiffs further submitted that the suit herein cannot be challenged on jurisdiction, as the matter referred to **HCCC No.649 of 1996**, was never heard and determined on merit, as it was dismissed on a technicality and therefore the issue of jurisdiction cannot arise.

This Court has now considered the arguments for and against the **Notice of Preliminary Objection**. Before the Court can embark on the merit of the Preliminary Objection, it has first to determine whether what has been raised by the Defendant herein is a **Preliminary Objection** as was described in the **Mukisa Biscuits case**. **Black Law Dictionary, 7th Edition** describes Preliminary Objection as....

"An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the Court's jurisdiction is an example of a Preliminary Objection."

What constitutes a **Preliminary Objection** has been stated in many judicial decisions. In the case of **Mukisa Biscuits Manufacturing Ltd...Vs... West End Distributors Ltd 1969 EA 697**, the Court held that:-

"A Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any facts 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 the issues."

Further, in the case of **Quick Enterprises Ltd ...Vs.... Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, 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 alone."

So with the above positions in mind, the Court will consider what has been filed by the Defendant vide his **Notice of Preliminary Objection** dated **11th April 2015**, to arrive at a finding on whether it meets the test of what amounts to a Preliminary Objection.

Indeed, the Defendant herein filed a **Notice of Preliminary Objection** and in it, he has filed a **Verifying Affidavit**. In the case of **Mumias Agricultural Transported Ltd...Vs....Chanan Agricultural Contracts, Nairobi HCCC No.786 of 1996**, the Court held that:-

"In a Preliminary point of law, affidavit evidence is inadmissible."

Though the Defendant submitted that he had abandoned the other points in his **Notice of Preliminary Objection**, the said **Notice** was never withdrawn and in the Submissions highlighted in Court, the

Defendant referred to his **Notice of Preliminary Objection**. The said Notice is accompanied by a **Verifying Affidavit**. The said **Verifying Affidavit** was never expunged from the Court record. The **Verifying Affidavit** was used to explain and ascertain facts. In the case of **Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, 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.”

From the **Notice of Preliminary Objection** raised herein by the Defendant, the Court finds that the Defendant has filed a **Verifying Affidavit to ascertain facts**. The said **Preliminary Objection** therefore **does not stem or germinate from the pleadings**. It has been held by the Court severally that a **Preliminary Objection** cannot be raised if any facts has to be ascertained.

Further, in the case of **United Insurance Co. Ltd...Vs...Scholastica A. Odera, Kisumu HCC Appeal No.6 of 2005**, the Court held that:-

“A preliminary Objection must be based on point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are not contested or disputed.”

The Defendant had raised issues which he has to explain through the ascertaining of facts in a **Verifying Affidavit**. The Court finds that then the issues raised by him do not stem or germinate from the pleadings and have to be ascertained vide his **Verifying Affidavit**. What is therefore raised by the Defendant is not a pure point of law as facts have to be ascertained.

This Court will also rely on the findings in the case of **Oraro...Vs...Mbaja (2005) 1KLR 141**, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive foundation from factual information which stands to be tested by normal ruled of evidence. If the Applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a Preliminary Objection...”

Equally in this matter, the Defendant found it necessary to file a **Verifying Affidavit** to ascertain facts. Therefore the facts being sought to be explained or ascertained by the Defendant renders the **Preliminary Objection** incapable of being called an Objection that raises pure points of law.

For the above reasons, the Court finds that the **Notice of Preliminary Objection** as filed by the Defendant on **11th April 2015**, **does not meet the test of what a Preliminary Objection** is as described in the **Mukisa Biscuits case (supra)**.

Consequently, the Court finds that the Defendant’s **Notice of Preliminary Objection** dated **11th April 2015** is **not a Preliminary Objection** as facts have to be ascertained. The Court will therefore not deal with the **merit** of the said **Notice of Preliminary Objection**.

The Court will also take note that the right to be heard is a fundamental right which cannot be easily taken away unless there are compelling reasons to warrant such a situation. Courts have often held that,

“striking out of a suit is as drastic remedy and can only be invoked in plain and obvious cases and that jurisdiction must be exercised with extreme cause. A plaint can only be struck out only if the claim is incontestably and hopelessly bad.” See the case of **Francis Kamande..Vs... Vanguard Electrical Services, Civil Appeal No.152 of 1996**

With the Promulgation of the new Constitution, 2010. Courts have been enjoined to advance substantive justice and not to rely so much on procedural technicalities. Article 159 (2)(d) of the Constitution states:-

“in exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-

a) Justice shall be administered without due regard to procedural technicalities.”

A good case is always where the parties are given the opportunity of being heard and not driven away from Court unless it is extremely necessary to do so on the facts which are very clear. See the case of ***Nitin Properties Ltd ... Vs...Jagjit Singh KALSI & Another, Civil Appeal No.132 of 1989 2 EA 257.***

It is evident that Courts have been very cautious in dealing with cases of seeking to strike out suits *in limine*. Courts have an inclination of striving to sustain suits and have them heard and determined on merit instead of driving away litigants from the seat of Judgement. In the case ***of D.T. Dobie & Co (K) Ltd...Vs...Joseph Mbaria Muchina & Another (1982) KLR 1***, the Court held that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclosed no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

Equally in the Mukisa Biscuits case, it was held that:-

“That the improper raising of points by way of Preliminary Objection does nothing but just to unnecessarily increase costs and occasion confuse the issue. This improper practice should stop.”

This Court would therefore urge the parties herein to expeditiously prosecute all the multiple applications in this matter so that eventually, the disputed issues can be resolved with finality.

Having now carefully considered the ***Notice of Preliminary Objection*** dated ***11th April 2015***, the Court finds and holds that it ***does not meet the test of what amounts to a Preliminary Objection***. The said ***Notice*** is consequently ***dismissed entirely with costs to the Plaintiffs*** herein.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this ***31st day of August, 2017.***

L. GACHERU

JUDGE

31/8/2017

In the presence of

No appearance for 1st Plaintiff

No appearance for 2nd Plaintiff

No appearance for Defendants

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017