



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 13 OF 2015**

**HON.DAVID KINISU SIFUNA:.....PLAINTIFF**

**VERSUS**

**MARRIANE EYASE KISANJI:.....1ST DEFENDANT**

**DOREEN ADISA KISANJI:.....2ND DEFENDANT**

**OLIVER MAGERO GUMO:.....3RD DEFENDANT**

**R U L I N G**

1. The first and second defendants made an application before court seeking to have the time of entering appearance and filing defence extended. Before this application could be heard, the plaintiff raised a preliminary objection that the first and second defendant/Applicants are in contempt of court and should therefore not be heard unless they purge the contempt. That the first and second applicants are not the registered owners of the suit land and therefore are not entitled to the orders in the application. Finally the plaintiff contends that the applicant's application is incurably defective and the orders are incapable of being granted.
2. During the hearing of the application, Mr. Pukah for the plaintiff argued that there are two applications pending before the court: that of seeking extension of time to file memorandum of appearance and the one for contempt of court. He wanted the court to determine which application should take precedence. In this regard, he submitted that the application for contempt should take precedence over the one seeking to extend time for entering appearance and filing defence. He also argued that this court lacks jurisdiction to entertain the applicants' application as the applicants have already preferred an appeal to the court of Appeal arising from the court's ruling of 14.10.2015 and therefore this court cannot entertain the application by the applicants. In support of the first limb of his submissions Mr. Pukah relied on a decision of the High Court in Nairobi High Court Misc. Application No. 1640 of 2003 between Econet wireless Kenya Limited -vs- The Minister for Information & Communication of Kenya & Another. In the second limb, Mr. Pukah relied on a decision from Kitale Environment and Land Land Court case No. 86 of 2012 between Jane Anyona Omutsani -vs- Nasibi Aore.
3. Mr. Pukah also argued that though the applicants had been jointly sued with one other person the suit land was registered in the name of the third defendant and therefore the orders of 14.10.2015 did not affect the first and second defendants. He further contended that the applicant's application was defective in that the supporting affidavit was sworn by the second defendant on behalf of the first defendant and that there was no written authority from the first defendant to the second defendant to do so on her behalf.

4. M/S Arunga for the first and second defendants opposed the grounds raised by Mr. Pukah. On the issue of jurisdiction, M/S Arunga argued that, this court has jurisdiction and that Mr. Pukah's argument on this was a misinterpretation of the law. On the issue of authority, she submitted that there is no requirement that a party should have written authority before swearing an affidavit. The authority is only required in case of a suit. As regards the issue of the application for contempt M/S Arunga argued that the court was yet to determine whether the first and second defendants are in contempt of court or not and as such their application should not be struck out.
5. I have considered the grounds raised by the plaintiff's advocate. Strictly speaking none of the grounds qualify to be called Preliminary Objection. The issue of jurisdiction was not raised in the grounds filed. It was argued in court and in any case the issue does not arise. The plaintiff is arguing that the first and second defendants have preferred an appeal. There is no appeal preferred by the first and second defendants. It is the third defendant who preferred an appeal. The first and second defendants had not entered appearance or filed defence. The case from Kitale ELC. Court has no relevance in this matter as the issue therein was quite different. An aggrieved party had been granted stay of execution pending appeal. The respondent later came to court seeking to set aside the stay. The court rejected the application on the ground that the applicant in the application review had the option of moving the court of appeal to strike out the notice of appeal if no appeal had been filed or move to dismiss the appeal if one had been filed and it was taking time for the appellant to prosecute it.
6. The grounds which are being raised as Preliminary Objections are grounds which should have been argued in the normal manner during the hearing of the applicants' application. In the case of Mukisa Biscuit manufacturing Co. Ltd -vs- West End Distributors (1969) E.A 696 Sir Charles Newbold P. had this to say regarding Preliminary Objections:-

***“ 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 assumption that all 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 issues. This improper practice should stop”.***

7. There is need to ascertain if the first and second defendants are in contempt of any court order. They cannot be denied audience if this is not yet ascertained. The issue of whether they are not registered owners of the suit land is a matter to be ascertained. What the applicants are seeking is a matter of discretion of the court and therefore no Preliminary Objection should be brought to deny them the chance to be heard. This is a clear case of points which should be properly raised in the normal way which are wrongly raised as Preliminary Objections. This only serves to delay cases and escalate costs. I deprecate this practice. I therefore find that the Preliminary Objection lacks merit. The issues raised in the grounds are not on which application is to be heard first or not. This point was just raised during the hearing. The first case cited by the plaintiff does not therefore apply. I proceed to dismiss the Preliminary Objection with costs to the first and second defendants.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of February, 2016.

**E. OBAGA**

**JUDGE**

In the presence of M/S Arunga for 1st and 2nd defendants

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

29/2/2016