



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO. 1025 OF 2013

IN THE MATTER OF THE ESTATE OF GEORGE KUNG’U WAINAINA

(DECEASED)

ROSEMARY MWANGI (Suing as Administrator

Ad Litem of the Estate of

GEORGE K. WAINAINA(DECEASED).....PLAINTIFF/APPLICANT

=VERSUS=

JOYCE WAMBUI KUNGU.....1ST DEFENDANT

WALLACE NYOTA.....2ND DEFENDANT

SUSAN NJERI KIMITI.....3RD DEFENDANT

AYUB KIMITI GITHUKU.....4TH DEFENDANT

RULING

The Plaintiff herein **Rosemary Mwangi** (suing as Administrator, Ad litem of the Estate of **George Kungu Wainaina** (Deceased) brought an amended Chamber Summons against the Defendants seeking for restraining Orders barring them from transferring, selling, dealing or otherwise interfering, with Land Parcels No. Karai/Karai/926, Karai/ Kamangu Township/T37, Dagoretti /Mutuini/ 333,Dagoretti/ Mutuini/ 478, Nguirubi / Thigio /1553, or any other property held or belonging to the Estate of **George Kungu Wainaina**, until the matter is heard and determined. The application was supported by the Affidavit of **Rosemary Mwangi**.

The 1st Defendant, **Joyce Wambui Kungu**, opposed the application and filed her replying Affidavit dated 18th November, 2013.

Further, the 1st Defendant filed a Notice of Preliminary Objection and raised the following grounds.

- i. *That the applicant lacks **locus** to institute the present application and suit as she is not a wife to the deceased and has not proved her alleged marriage to the deceased.*
- ii. *That even if the applicant may have been in a relationship with the deceased which is denied, the same was illegally and fraudulently contracted and as such the applicant has no interest whatsoever in the Estate of the deceased.*
- iii. *The said application and suit is fundamentally defective for failing to comply with the mandatory provision of the **Civil Procedure Rules, 2010** as the amended *Plaint* does not have list of witnesses. Witnesses statements and list of documents as required by law.*
- iv. *That paragraph 2 of the supplementary Affidavit and the annexure thereto should be struck out as the same is not authentic and does not have any evidential value.*

The Court gave directions that this Preliminary Objection should be disposed of first before dealing with the Amended Notice of Motion.

The parties therefore filed their written submissions in support and opposition of the Preliminary Objection. I have now carefully considered the said written submissions and I make the following findings. Several judicial pronouncements have been made regarding the nature and purpose of Preliminary Objections.

In the case of **Nitin Properties Ltd Vs Jagjit Singh Kalsi & another, Civil Appeal No.132 of 1989**, the court held that:-

“ A preliminary objection 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 1st Defendant herein has alleged that Plaintiff lacks **locus** as she was not a wife to the deceased and has not proved her alleged marriage to the deceased. The Plaintiff on her part has alleged that she was a wife of the deceased and that she got married to him in 1985 and were blessed with four children.

The above allegations are therefore disputed facts which need to be interrogated through calling of evidence and production of exhibits. The same does not raise pure points of law. It was held in the case of **Eunice Karimi Kibunja Vs Mwirigi M’ringera Kibunja, Civil Appeal No. 103 of 1996**.

“ A Preliminary Point of Law cannot be raised if any fact is to be ascertained”.

The allegations by the 1st Defendant requires facts to be ascertained and therefore are not pure **points of law**.

On the second ground, the 1st Defendant alleges that if Plaintiff was in a relationship with the deceased that was an illegal and fraudulent relationship. However, such an allegation is only meant to counter and dispute the Plaintiff’s allegation that she was a legal wife of the deceased. The said allegation is not capable of disposing the suit preliminarily without resorting to ascertainment of facts. In the case of **Quick Enterprises Ltd Vs. Kenya Railways Corporation , Kisumu High Court Civil Case 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 pleading alone”.

In the instant case, both the Plaintiff and 1st Defendant have raised issues which needs to be ascertained by the court and the matter cannot be decided by looking at the pleadings alone.

On the 3rd ground that the suit is fundamentally defective for failing to comply with mandatory provisions of **Civil Procedure Rules** as the amended Plaintiff does not have list of the witnesses, statements of the witnesses and list of documents as required by law, the court finds that the **Amended Plaintiff** is just amending the Plaintiff dated 1st August 2013. The Plaintiff dated 1st August 2013 has complied with **Order 3 Rule 2 of the Civil Procedure Rules** as the witness statements and documents are attached and I concur with the Plaintiff's submissions that the said objection is baseless.

The court in the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation (Supra)** held that:-

“ A good case is always one where the parties are given the opportunity of being heard and not driven from the court unless it is extremely necessary to do so on the facts which are very clear”.

Finally, the 1st Defendant alleged that paragraph 2 of the supplementary affidavit and the annexures thereto should be struck out as the same is not authentic and does not have any evidential value. The said allegation of the annexure not being authentic can only be resolved by calling evidence and ascertaining of facts. The same therefore is not a point of law and cannot dispose of this suit.

The parties herein should be given an opportunity to lay their case and the same be decided on merit. The court in the case of **Mukisa Biscuit Company Vs Westend Distributors Ltd, 1969(EA) 696** held that:-

“Striking out, is a drastic remedy and can be invoked only in plain and obvious cases and the jurisdiction must be exercised with extreme caution. A Plaintiff can be struck out only if the claim is incontestably or hopelessly bad”.

The fact that the 1st Defendant alleges that the annexure referred in the supplementary Affidavit is not authentic is not enough to hold and find that the claim is hopelessly bad.

Having now carefully considered the Preliminary Objection and the written submissions, I find that the Preliminary Objection as raised by 1st Defendant is not merited as the same does not raise any pure points of law and is not capable of disposing of the matter preliminarily without resorting to ascertainment of facts.

The upshot of the foregoing is that the 1st Defendant's Preliminary Objection, dated 18th November, 2013 is not merited, and the same is dismissed entirely with costs to the Plaintiff herein.

It is so ordered.

Dated, Signed and delivered this 27th day of **June 2014**

L. GACHERU

JUDGE

In the presence of

Mr Njuguna for the Plaintiff/Applicant

Mr.Gisembe holding brief Wamalwa for the 1st Defendant

Kabiru Court Clerk

L. GACHERU

JUDGE