



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 70 OF 2017

BETWEEN

J E N alias

J E K.....APPELLANT

AND

D O K.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Thande, J.)

dated 21st July, 2017

in

Divorce Cause No. 45 of 2014)

JUDGMENT OF THE COURT

1. The appeal before us turns principally on whether a preliminary objection raised by the appellant at the High Court was suited. It is settled that a preliminary objection is founded on law and not fact. The essence of a preliminary objection was succinctly set out by the predecessor of this Court in the *locus classicus* case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (1969) EA 696** at 700 wherein Law, JA stated that:

“...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.”

Sir Charles Newbold P. added at page 701:

“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.”

2. The salient facts which gave rise to this appeal are that the respondent filed a petition on 17th June, 2014 seeking dissolution of the marriage celebrated between the appellant and himself on 29th March, 2008. The petition was grounded on allegations of cruelty and constructive desertion as against the appellant. The appellant filed a response to the petition denying the allegations against her.

3. However, when the matter came up for hearing on 30th June, 2016 the trial court noted that the respondent seemed not to understand or follow the proceedings. Apparently, the respondent had been ailing for a long time and had even sought treatment overseas. As a result, the trial court directed the examination of the respondent’s mental state by a competent medical practitioner. Towards that end, he was examined by two doctors namely, Dr. G. K. Mulunga and Dr. C. M. Mwangome who came to the conclusion that he had been suffering from diminished mental capacity since the year 2002.

4. Following that revelation, the respondent’s daughter, Grace Nyamoita Omare filed an application on 31st August, 2016 seeking *inter alia*:

a) To be appointed guardian ad litem of the respondent.

b) Leave to amend the petition.

The application was premised on the grounds that she had been her father’s care giver since the year 2002; the medical reports indicated that the respondent had been suffering from mental diminished capacity from 29th March, 2002; as a result, he lacked the requisite mental capacity to contract the marriage in question. It was therefore essential to amend the petition to seek nullification of the marriage.

5. In opposing the application, the appellant filed a preliminary objection to the effect that since the respondent was found to be of unsound mind, the petition as filed was a nullity *ab initio* or as she put it , ‘still born’. The petition was being instigated by third parties.

6. In response, the intended guardian *ad litem* contended that the preliminary objection was not on a pure point of law and required the court to examine facts to determine the same. The learned Judge (Thande, J.) agreed and in a ruling dated 21st July, 2017 dismissed the preliminary objection with costs. In her own words she expressed:

“ The factual issues of the mental impairment of the petitioner and that the petition was filed by a person of unsound mind, and the allegation that the petition is instigated by a 3rd party to meet that 3rd party’s own material ends can only be adequately and properly interrogated at the hearing of the application. These are factual issues that require to be ascertained and are not pure points of law. The preliminary objection therefore fails the test as it has raised factual issues and not a pure point of law.”

7. It is that decision which instigated this appeal wherein the appellant complains that the learned Judge erred in dismissing the preliminary objection. At the hearing, Mr. Nyamboye appeared for the appellant while Ms. Okata appeared for the respondent. Counsel relied entirely on the written submissions filed on behalf of the parties.

8. It was the appellant’s contention that a petition to dissolve a marriage could only be filed by the parties to the marriage. Therefore, the intended guardian *ad litem* did not have the *locus standi* to amend the petition. Besides, she had not sought leave of the court to file a petition for nullification of the marriage. According to the appellant, the respondent being of unsound mind could not execute legal documents leave alone make reasonable decisions. It was baffling how in such a condition he purportedly signed affidavits in the High Court. In her view, the entire proceedings were at the behest of a third party hence, the petition as it stood was a nullity.

9. In the respondent's view, the preliminary objection did not meet the principles laid down in ***Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (supra)***. Elaborating further, it was argued that for the learned Judge to determine the objection in question she was required to assess the facts before her. In particular, she would have to look into the medical reports therein. As such, the learned Judge did not err in dismissing the preliminary objection.

10. We have considered the record, submissions by counsel and the law. Applying the principles discussed in the ***Mukisa case***, we concur with the learned Judge's position. The objection raised by the appellant was not based on pure points of law and required interrogation of the facts thereto. Whether the petition was a nullity on account of the respondent's mental capacity and/or whether the petition was instigated by third parties could only be determined after the hearing of the intended guardian *ad litem*'s application. Our position is further fortified by the following sentiments of this Court in

Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) vs. Stanley Mombo Amuti [2015] eKLR:

"A preliminary point cannot be sustained if any fact is contested and has to be ascertained..."

11. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 7th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR