



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CIVIL APPEAL NO 247 OF 2011

BETWEEN

WILLIAM KIPRONO TOWETT & 1597 OTHERSAPPELLANTS

AND

FARMLAND AVIATION LTD 1ST RESPONDENT

MARCO DUNN 2ND RESPONDENT

TOBY DUNN 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court at Nakuru (Wendo, J.) dated 15th July, 2011

in

NAKURU HCCC No 79 of 2010

JUDGMENT OF THE COURT

At the heart of this appeal is the vexed question of “preliminary objections” as we know them. Newbold, J.A. (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he famously surmised as follows in **MUKISA BISCUIT CO LTD V WEST END DISTRIBUTORS LTD [1969] E.A. 696:-**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law (emphasis ours) 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 ours) or if what is sought is the exercise of judicial discretion”. (Emphasis ours)

He went on to state perspicuously that;

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

Such was the eminence of a preliminary objection at the time, a position which still prevails to date owing to its determinative nature in the event that it is successfully canvassed. It was in the matter before us and it is against the foregoing backdrop that the appellant invites this Court through his memorandum of appeal to consider this first appeal.

A brief summary of the facts as can be gathered from the plaint is that on or about 11th January, 2010 the 1st respondent acting through the 2nd and 3rd respondents as its agents, servants or employees engaged in aerial spraying of large scale wheat farms within the locality of Mulot, Narok South District with a view to killing weeds. While at it, and due to alleged carelessness or negligence on the part of the respondents, there was a big drift of the pesticide which was being applied causing massive damage to the appellant's farms in the vicinity, wherein crops such as maize, beans, sweet potatoes and peas wilted and dried up. The pesticide in question was allegedly confirmed to be *glycel* and *weedol*.

Other than damage to plants, the said pesticide allegedly affected both animal and human health with the former experiencing miscarriages; and the latter complaining of irritation, coughing and pain to the skin. The appellants tabulated the particulars of negligence and averred that they would be relying on the principle of strict liability as set out in the celebrated case of ***RYLANDS VS FLETCHER [1861-73] ALLER REP 1***. The particulars of loss and damage sustained by each appellant were also set out and computed accordingly. The cumulative amount of damages was in the sum of **Ksh 376, 565, 859**. Service of the appellant's plaint, verifying affidavit and summons was duly effected as can be deduced from the filing of memoranda of appearance and statements of defence by the respective respondents.

The gist of the 1st respondent's statement of defence was a preliminary objection on the alleged misjoinder of 1,598 parties to the suit before the trial court yet it was clear that each party had a separate and distinct claim arising from his or her circumstances. Other facets of the said objection were the want of particulars with regard to the damage which had been occasioned to plant, animal and human health. The rest of the statement was characterized by denials of the averments contained in the appellant's plaint and the setting up of defences in support of the 1st respondent's case. The 2nd and 3rd respondent's statement of defence adopted a similar approach and raised similar objections.

Pleadings came to a close thereafter and the preliminary objections were set down for hearing on 15th March, 2011. The trial court upheld the preliminary objection prompting the appellants to lodge the present appeal wherein they fault the learned trial Judge for:-

- ***Striking out the appellant's suit on the grounds that there was a misjoinder of parties.***
- ***Considering extraneous and alien matters in her ruling.***
- ***Making a ruling of such draconian effect which rendered the fair and expeditious disposal of the suit impossible.***

MR. OYUGI OMBUI, learned counsel argued the appeal on behalf of the appellants, while **MR. MUKITE MUSANGI**, learned counsel did so on behalf of the respondents. Mr. Ombui submitted that the learned trial Judge erred by striking out the suit; that **Order 1 Rule 1** of the **Civil Procedure Rules (2010)** provided for joinder of parties; that the joinder herein did not violate the said provision; and that the relief sought arose from the same facts or circumstances. Counsel took issue with the point at which the preliminary objection was raised, contending that there were alternatives including ordering separate suits in the event that the action would delay, embarrass and put the appellants to an election on how to proceed. Striking out the suit was not one of the options he pressed, which error was compounded when they were also penalized in form of costs.

He contended that there was no embarrassment in prosecuting the suit as filed as the respondents had filed their respective statements of defence responding to the issues raised by the appellants. Counsel submitted that delay alone cannot be a ground for striking out the suit and the same was draconian. We were urged to note that a preliminary objection would not lie if facts have to be ascertained or what was sought was the exercise of judicial discretion. See the ***MUKISA BISCUITS CASE*** (supra). Counsel cited the case of ***KENYA COMMERCIAL FINANCE COMPANY LIMITED VS RICHARD AKWESERA-CIVIL***

APPEAL (APPLICATION) NO 329 OF 2009 in support of his submission to the effect that where there are alternatives there should not be striking out; and **Order 1 Rule 9** of the **Civil Procedure Rules (2010)** for the submission that no suit shall be defeated by reason of misjoinder or non-joinder of parties.

Learned counsel termed extraneous the considerations entertained by the learned trial judge in doubting the possibility of the parties, counsels and the presiding Judge seeing the end of the suit as strange. The trial court was faulted for terming the suit before it as different. Furthermore, the trial court had allegedly misapprehended the provisions of **Section 1A& B** of the **Civil Procedure Act**. In addition the court had a duty to do justice. Counsel submitted that the pursuit of efficiency should not cloud or defeat substantive justice. In any event, the said proviso simply enjoins the court to adopt a more pragmatic approach. In conclusion, counsel conceded that **Order 11** of the **Civil Procedure Rules (2010)** was then in place but it was in transition, and that case management had not taken place; neither had directions been given. He urged us to reinstate the suit pursuant to **Section 3A& B** of the **Appellate Jurisdiction Act** and direct that the suit proceeds.

In reply, Mr. Musangi cited a portion of **Order 1 Rule 2** of the **Civil Procedure Rules (2010)** which gives the court power to:- **“make any (such) other order as may be expedient”** and submitted that discretion is important to allow a trial court to deal with a case as appropriate. The trial Judge had exercised discretion and the appellate Court should be slow to interfere with the same. Counsel also submitted that no restrictive reading exists in Rule 2. Accordingly, the trial court did not destroy the litigation. Counsel posed a rhetorical query as to how the trial court could have ordered separate trials in the suit as presented. He was however candid that he did not support the order on costs made.

Other aspects of Mr. Musangi’s submissions were that: - every person with a claim had to prove it; the length of the trial was not an extraneous issue. He boldly expressed profound opposition to Newbold, J.A.’s assertion that a matter seeking the exercise of judicial discretion is not appropriate for a preliminary objection. He then contended that the learned trial Judge felt that there was no other way the suit could have been dealt with, and that the matter fell squarely within the provisions of **Order 1** or **Order 6** of the **Civil Procedure Rules (2010)** calling for striking out.

Mr. Ombui replied by submitting that the matter before the trial court was one of judicial discretion justifying the application of the case of **SHAH V MBOGO [1967] E.A. 116**. According to counsel, **Order 1 Rule 2** did not contemplate or apply to striking out of a suit; and that the respondents were relying on issues of fact to defeat the case. Counsel submitted that the learned trial Judge could have ordered the declarations sought in the suit and then each matter would have been dealt with on the question of damages. He concluded by submitting that the suit was still transferable.

Our role as the first appellate court is delineated by **Section 66** of the **Civil Procedure Act (2010)**. We take guidance on the precise nature of our mandate from the case of **SUMARIA&ANOTHER V ALLIED INDUSTRIES LTD (2007) KLR 1** where this Court expressed itself as follows:-

“Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did”.

This appeal turns entirely on the nature of a preliminary objection as set out in the opening paragraphs of this judgment. As such the following questions commend themselves to us for determination:-

(i) Did the preliminary objections raise a pure point of law?

(ii) Was there need to ascertain any fact?

(iii) Were the respondents seeking the exercise of judicial discretion?

Perusal of the respondent's respective statements of defence reveals that the preliminary objections raised were multi-faceted so to speak, with the larger part comprised of misjoinder, and the remainder dealing mainly with complaints to do with the appellant's alleged failure to provide further and better particulars of their respective claims; denial of damage to the appellant's crops and alleged failure to describe the respondents properly in the plaint.

We are of the considered view that the preliminary objections raised by the respondents did not raise any pure point of law. By and large the respondents dwelt on the character of the suit before the trial court in terms of the number of parties involved. Of concern to the respondents was the fact that each of the appellants had a separate and distinct claim. The respondents were of the view that the said claims were deserving of separate suits and hearings as opposed to a collective hearing. Even if for a moment, and for arguments sake, we were to take the subject of misjoinder as a pure point of law, the veracity of the respondent's pleadings in this regard cannot be vouched for in the absence of a trial. Most critically **Order 1 Rule 9** of the **Civil Procedure Rules (2010)** makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder:-

“9 No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

See **KENYA BANKERS ASSOCIATION V ROSE FLORENCE WANJIRU & 2 OTHERS [2014] eKLR.**

Analogous to **Order 1 Rule 9** is **Order 3 Rule 2& 3 (c)** of the **Civil Procedure Rules (2010)** which envisages a suit of the nature filed before the trial court by the appellants. It introduced a 'track' system, which would have assigned ***“Multi-track”*** to the instant suit. The same refers to ***“a case with complex facts and legal issues; or several parties and which would likely be concluded within two hundred and forty days from the date of the pre-trial directions under Order 11”.***

Whereas the trial court was of the considered opinion that the suit filed before it could not be conveniently tried and determined as filed, the court was at liberty to and should have, in our considered and respectful opinion, either upon the application of any party, or on its own motion ordered separate trials, or made such order as may be expedient. See **Order 3 Rule 8 of the Civil Procedure Rules (2010)**. Given that avenue that was available to it, the trial court's order to strike out the appellant's suit comes into sharp focus. The same was discretionary in the face of the grounds adduced by the respondents and submissions both in favour and against the issuance of the said order. Thus, strictly speaking the respondent's preliminary objection did not meet the requisite threshold and should not have been allowed. We think that Newbold, J.A. was right to opine that matters discretionary are outside the purview of preliminary objections and while we note Mr. Musangi's contrary view, we respectfully think counsel has it wrong.

The upshot is that this appeal has merit. We hereby allow the same, reverse the finding of the High Court and dismiss the preliminary objections with costs to the appellants in both courts. Finally, we direct that the appellants suit be re-instated for hearing on a priority basis at the High Court before any Judge other than Wendo, J. We direct that **Order 11** of the **Civil Procedure Rules (2010)** be complied with fully for the avoidance of doubt.

Dated and delivered at Nakuru this 2nd day of August, 2016

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR