



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO 229 OF 2012

JOHNSON GITHAIGA NDERITU 1ST APPELLANT

EUNICE NEKESA MUITA (*As the Personal Representative of PETER MUITA*)

NDERITU (DECEASED) 2ND APPELLANT

ESTHER NJOKI MUIGAI 3RD APPELLANT

FRANCIS MATHENGE NDERITU 4TH APPELLANT

SAMUEL NDIRANGU NDERITU 5TH APPELLANT

VERSUS

NICHOLSA NDERITU MUITA..... 1ST RESPONDENT

MARY NYAMBURA NDERITU 2ND RESPONDENT

Dr. JOSHUA MAINA NDERITU 3RD RESPONDENT

PETER MWANGI NDERITU 4TH RESPONDENT

(Appeal against the Ruling of the High Court of Kenya at Nyeri (Makhandia, J.) delivered on 7th November, 2008

in

HCCC No.57 of 2008)

JUDGMENT OF THE COURT

1. This is an interlocutory appeal against dismissal of a preliminary objection raised by the appellant before the Honourable Judge (*Makhandia J, as he then was*). In the preliminary objection, the appellant had sought orders that the plaint/suit filed by the respondents be dismissed.
2. Some background facts to the parties in this case will shed light as to the nature of the preliminary objection. The 1st Respondent (*1st Plaintiff*) in this appeal is the husband to 2nd Respondent. The appellants and the other respondents are sons and daughters of the 1st Respondent. The 1st Respondent had three wives and several other children. Noting that he was aging, the 1st respondent executed a power of attorney in favour of his elder son the 1st appellant (*1st Defendant*) herein. The power of Attorney was duly registered. Using the power of attorney, the 1st appellant sub-divided the suit premises, transferred and distributed the same to the children and wives of the 1st respondent allegedly not in consultation with and not in accordance with the wishes of the 1st respondent. It is alleged by the respondents that the sub-division and transfer was done without involving all members of the 1st respondent's family.
3. On 29th September, 2008, the suit (*being H.C.C.C. No. 57 of 2008*) came up before the Honourable Judge for taking evidence *debenesse* of the 1st respondent (*1st Plaintiff*) who is since deceased. Counsel for the appellant then 1st defendant raised preliminary objection to the proceedings in the following terms:

“That the 1st Plaintiff was the registered proprietor of the original land parcel Nyeri/Gatarakwa/897 hereinafter referred to as the suit premises. The suit premises has since ceased to exist after the proprietary interest of the 1st Plaintiff in the suit premises was transferred to the 5th defendant through a general power of attorney. The moment the general power of attorney was registered in favour of the 5th defendant the proprietary rights of the 1st Plaintiff under Section 27 and 28 of the Registered Land Act vested in the 5th Defendant as long as the power of attorney had not been recalled. Counsel submitted that the other respondents had no locus standi in the suit as they were wife and sons of the 1st Plaintiff respectively. They could not be plaintiffs when their father is still alive”.

4. Counsel for the 1st Respondent then 1st Plaintiff countered the submission on the preliminary objection as follows:

“That a preliminary objection can only be raised where the facts are not in dispute. The 5th defendant is being accused of committing acts of fraud which issue cannot be determined by way of preliminary objection. That the 1st Plaintiff was the registered proprietor of the suit premises and thus had the necessary locus standi to bring this suit. That as much as there was a power of attorney registered in favour of the 5th defendant, that power of attorney did not give him the powers that he exercised. The extent and limit of those powers were thus a matter of evidence. A suit cannot be dismissed by a preliminary objection. It must be by way of a formal application”.

5. Upon hearing submissions by counsel, the Honourable Judge in dismissing the preliminary objection raised by the appellant *inter alia* stated:

“It is the contention of the 1st Plaintiff however; that the power of Attorney did not give him (5th defendant) the powers he purported to exercise. Accordingly, the said power of Attorney will have to be interrogated. The issue cannot therefore be determined by way of preliminary objection as the nature and extent of the powers donated to the 5th defendant by the 1st Plaintiff under the power of attorney will come under scrutiny. The 1st Plaintiff too has accused the 5th defendant of committing acts of fraud. ...The defendant also accuses the Plaintiffs of lacking locus standi. However, the Plaintiffs have countered that argument by saying they were registered proprietors and/or beneficiaries of the suit premises”.

6. The other reason given by the Honourable Judge, in dismissing the preliminary objection is that no defence to the suit had been filed by the appellant/defendants. We have perused the record of appeal and are satisfied that a Statement of Defence was duly filed. The learned Judge erred in citing this as a ground for dismissing the preliminary objection. We shall evaluate the merits of the other reasons given for dismissing the preliminary objection.
7. At the hearing of appeal, learned counsel **Mr. Gori G. M.** appeared for the appellants while learned counsel **Mr. R. P. Mugambi** was for the respondents.
8. Counsel for the appellant relied on the four grounds of appeal enumerated in the memorandum of appeal. He submitted that the learned Judge erred in law and in fact in finding that there was no statement of defence filed to controvert, challenge or deny the respondent's averments. That the learned Judge erred in law and fact in failing to appreciate that the appellant's submission that the 1st Plaintiff/donor and the 5th defendant/donee, cannot exercise proprietary rights over the suit land simultaneously and therefore the 1st respondent cannot sue the 5th defendant in exercise of the powers donated to him. That the learned Judge erred in law in failing to appreciate the appellant's submission that the 2nd, 3rd and 4th Plaintiffs have no proprietary rights over the suit land when the 1st plaintiff was still alive and they had no capacity to sue the defendants over such suit land. That the learned Judge erred in law and fact by failing to find that the preliminary objection had merit.
9. Counsel for the respondents submitted that the learned Judge did not err in dismissing the preliminary objection. He stated that the appellants never satisfied the grounds for upholding a preliminary objection. That the defence filed by the appellants dated 24th June, 2008, clearly demonstrates in paragraphs 1 and 4 thereof that there are triable issues in the suit. In paragraph 6 of the defence, the appellants aver that they acquired the suit property *bona fides*. *Bona fides* is a question of fact that must be proved by evidence. Counsel submitted that one of the issues is whether the power of attorney given to the appellant was a general power or a specific one; was the power of attorney abused or used in the proper way; was it revoked expressly or by implication. The 1st plaintiff deposed in his affidavit that he had three wives and children and the power of attorney was abused to give land only to one house. Counsel submitted that all these issues were pertinent and could not be determined in a preliminary way. It was submitted that a full hearing and trial is necessary to determine the nature and extent of the power of attorney, if it was used properly and whether fraud is proved or disproved. Counsel concluded by stating that the learned Judge correctly cited and applied the decision in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, relating to preliminary objections.
10. We have examined the plaint and defence filed in this matter as well as other pleadings lodged by the parties. Paragraphs 8, 9 and 10 of the Plaint state in paraphrase that on or about May, 2008, without instructions from the 1st Plaintiff and or any colour of right the defendants sub-divided all the said property **Nyeri/Gatarkwa/897** among themselves. This was and still is against the wishes of the 1st Plaintiff. That the sub-divisions were done secretly and without knowledge of the 1st Plaintiff who was the registered owner. The transfer was fraudulent and the power of attorney was never intended to be used in the manner in which it was used to sub-divide the land parcel **Nyeri/Gatarakwa/897** measuring 130 acres. Particulars of fraud are itemized in paragraph 9 of the Plaint. Paragraph 1 of the Defence denies all averments in the plaint seriatim and puts the plaintiff to strict proof thereof. Paragraph 5 of the defence pleads the power of attorney.
11. A cursory glance at the pleadings indicates that triable issues of fact have been raised by both parties. For instance, whether the power of attorney was used fraudulently or in excess of authority; whether the 1st plaintiff was to be consulted despite the existence of the power of attorney; whether the plaintiffs have *locus standi* to institute the proceedings; whether the defendants acquired the suit property *bona fides*; whether a donee can exercise a power attorney to the exclusion of the donor and successfully challenge the authority of the donor. It is our considered view that these issues cannot be summarily disposed off by way of preliminary objection. As was stated in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and *prima facie* the claim in this suit cannot be deemed to be

incontestably hopeless and be summarily dismissed by way of preliminary objection.
12. **Article 159 (d)** of the **Constitution** enjoins Courts to administer substantive justice and not to give undue consideration to technicalities and procedural justice. The rules of natural justice dictate that no person shall be condemned unheard. The appellants desire that the plaint be struck out by way of preliminary objection. This is against the grain and spirit of **Article 159 (d)** of the **Constitution** and the basic tenets of the rules of natural justice which require all parties must be heard – *audi alterem partem*. Further, Courts are mandated not to give undue regard to technicalities through the overriding objectives as enshrined in **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and as stated in **Douglas Mbugua Mungai -vs- Harrison Munyi – Civil Application No. Nai. 167 of 2010 :-**

“We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly” As was stated in Stephen Boro Gitihia- vs- Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009.

“The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”

In **DT Dobie & Co.(Kenya) Ltd. -vs- Muchina, Civil Appeal 37 of 1978,** this Court expressed itself as follows:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....”

13. We adopt the dicta in the D.T. Dobie case and the overriding objective governing the exercise of jurisdiction by this Court; we note that the critical facts in this case are disputed and for these reasons, this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nyeri this 10th day of December, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR