



REPUBLIC OF KENYA



Chemaiyo v Ossiefuna Construction Company Limited (Environment and Land Appeal E026 of 2022) [2024] KEELC 4535 (KLR) (10 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E026 OF 2022**

JM ONYANGO, J

JUNE 10, 2024

BETWEEN

NICHOLAS CHUMO CHEMAIYO APPELLANT

AND

OSSIEFUNA CONSTRUCTION COMPANY LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. B. Kiptoo (SRM)
delivered on 2.9.2022 in ELD CM ELC CASE NO. 44 OF 2022)*

JUDGMENT

1. The Appellants and Respondents came together as a group and jointly purchased shares in L.R No. 3974 measuring 905 acres owned by Kamukono Farm Limited. It was agreed that each share worth Kshs.1600 was equivalent to 20 acres. It is the Appellant's case that having bought one share and 2 shares respectively, they were entitled to 20 acres for the 1st Appellant and 40 acres for the 2nd Appellant. However, during the course of the survey the Appellants parcels were substantially reduced and given to the 2nd, 3rd, 4th and 5th Respondents.
2. The Respondents filed their Defences and the hearing of the case commenced in the lower court on 16th March, 2022. During the course of the hearing, learned counsel for the Respondents objected to the production of certain documents by the Appellants on the grounds that they had been filed out of time. The trial magistrate nevertheless allowed the case to proceed and the Appellants closed their case. On 18th July, 2022 after the first Respondent's witness (DW1) had testified, the Respondents filed a Preliminary Objection seeking to strike out the Appellants' List of Documents together with the documents attached thereto as well as the Witness Statements. They cited the following grounds:
 - i. That the said documents were filed in contravention of Order 7 rule 5(b), (c) and (d) of the Civil Procedure Rules 2010.



- ii. That the documents were filed out of time without leave of the court and/or outside the limited time granted and/or in tandem with leave of the court (sic).
 - iii. That the documents having been filed on 21st March, 2022, two days to the hearing of the Plaintiffs' case on 23rd March, 2022 were so prejudicial to the Plaintiffs to the extent that the Plaintiffs were not afforded an opportunity to interrogate the documents and thus afford the plaintiffs an opportunity to counter and/or comment on the same.
 - iv. That the filing of the documents two days to the date set for hearing violated the Plaintiffs' right to a fair hearing.
 - v. That the nature of the documents are so extensive that the same ought to have been filed at least 15 days prior to the trial conference as envisaged by Order 7 rule 5 of the Civil Procedure Rules.
3. The court directed that the Preliminary Objection be canvassed by way of written submissions. He nevertheless directed that the hearing proceeds and in the event that the Preliminary Objection was upheld, orders would be given on the fate of the proceedings and documents.
 4. In his ruling delivered on 2nd September 2022, the trial Magistrate upheld the Preliminary Objection and expunged the documents filed on 21.3.2022 from the record. However, he did not give directions on the fate of the proceedings that had been conducted based on the impugned documents.
 5. It is the said ruling that triggered this appeal citing 8 grounds. The appeal was canvassed through written submissions and both parties filed their submissions, which I have considered.

Analysis and Determination

6. I have considered the proceedings of the lower court and the Memorandum of Appeal and in my view the following issues arise for determination:
 - i. Whether the Preliminary Objection meets the threshold of a Preliminary Objection
 - ii. Whether the Preliminary Objection was overtaken by events.
 - iii. Whether the learned trial Magistrate erred in upholding the Preliminary Objection and expunging the documents from the record.
 - iv. Whether the Preliminary Objection is merited.
7. I will start by setting out what constitutes a Preliminary Objection. The Black's Law Dictionary defines a preliminary objection as "...an objection that, if upheld, would render further proceedings before the tribunal unnecessary". It goes on to list an objection to the court's jurisdiction as an example of a preliminary objection. In the now famous case of Mukhisa Biscuits Manufacturers Ltd vs West End Distributors Ltd (1969) EA 696, the court defined a preliminary objection as follows:-

“...so far as I am aware, 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.”



8. In *Mwalungu Mwambui Nyiyo & 201 others v Total Oil Products (East Africa) Limited & another* (2021) eKLR, the court held that:-

“The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd.* (1969) E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-

“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 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 in 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 issue. The improper practice should stop”

Additionally, I have relied on the decision of *Attorney General & Another vs Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision the scope, nature and meaning of a Preliminary Objection inter alia:-

- (i) A Preliminary Objection raises a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion confuses the issues in dispute.”
9. What can be gleaned from the above authorities is that a Preliminary Objection is a motion asking the judge not to entertain the matter or consider the validity of the claims raised in the suit. A Preliminary Objection can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then it would be a breach of the rules of procedure and ought not to be entertained by courts of law. In *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court quoted with approval Law J.A in the *Mukisa Biscuits Manufacturing Case* (Supra), where the learned Judge observed that:

“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.”

10. To ascertain whether the point raised is a pure point of law, the Supreme Court in *Aviation & Allied Workers Union Kenya* (Supra) held that;

“the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record”.

Therefore, a P.O must be raised on the assumption that all facts pleaded by the adverse party are correct. It must not raise substantive issues from the pleadings which must be determined



by court upon perusal of evidence. No preliminary objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

11. In the instant case, the Respondent sought to have the Appellants witness statements and documents struck out on the grounds that they were filed two days to the hearing date without leave of the court contrary to Order 7 Rule 5 of the Civil Procedure rules.
12. The Preliminary Objection was filed more than three months after the documents had been referred to by both parties in the evidence in chief and cross-examination. By the nature of the said P.O the Respondent was seeking the court's discretion on whether or not to expunge the documents from the proceedings. In order to exercise its discretion in the matter, the court would need to confirm when the impugned documents were filed in order to determine whether they were filed out of time. The court would also have to peruse the proceedings to confirm if the trial magistrate granted leave to file the said documents out of time. Once the trial magistrate realized that the Respondent was asking him to exercise his discretion to expunge the documents from the record after the Appellant and his witnesses had testified, he ought to have proceeded with caution.
13. All these factors point to the fact that the Preliminary Objection was not raised on a pure point of law. Additionally, the Preliminary Objection if granted would not dispose of the suit as the court would still need to take the evidence of the Respondent. What this means is that the Preliminary Objection does not meet the necessary threshold of a Preliminary Objection and the trial court should not have entertained it in the first place.
14. Even assuming that the Preliminary Objection was proper, the same was filed three months after the impugned documents were filed and after the Plaintiff and his two witnesses as well as the Defendant had testified. Moreover, the Respondent's counsel had cross-examined the Appellants' witnesses on the said documents. Clearly the Preliminary Objection had been overtaken by events.
15. Interestingly, in his ruling, the trial magistrate in did not state what would happen to the said evidence. Needless to say, it would be futile to expunge the documents from the record and still retain the evidence touching on the said documents.
16. From the foregoing, it is clear that what was raised by the Respondent was not a pure point of law as he was inviting the trial magistrate to exercise his discretion to expunge the impugned document without filing a formal application which would have enabled the court to examine the merits of the application. The so-called Preliminary Objection was ill- timed and it resulted in interrupting and delaying the proceedings.
17. Having carefully considered the Memorandum and Record of Appeal together with the parties' submissions and the relevant law, I am of the view that there are sufficient reasons to interfere with the decision of the trial magistrate. Accordingly, I allow the appeal. The Ruling and orders issued on 2nd September, 2022 are hereby set aside.
18. The trial in the lower court shall proceed from where it had reached before a different magistrate.
19. The costs of the Appeal shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JUNE 2024

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J. M. ONYANGO

JUDGE



In the presence of;

K. K. Korir for the Appellant

R. K Korir for the Respondent

Court Assistant: Brian

