



REPUBLIC OF KENYA



**Awal Limited v Malonza & another (Miscellaneous Civil Suit 699 of 2019)
[2023] KEHC 27270 (KLR) (Civ) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL SUIT 699 OF 2019

JN NJAGI, J

DECEMBER 15, 2023

BETWEEN

AWAL LIMITED APPLICANT

AND

MUTUKU MALONZA 1ST RESPONDENT

JOSEPH NZAMALU MUTUNGI T/A HIGH SPEED TYRES .. 2ND RESPONDENT

RULING

1. This court on the 15th December 2022 delivered a ruling in which it dismissed an application by the Respondents herein where they were seeking that the court dismisses the Applicant's application dated 30th September 2019 for want of prosecution. The court however ordered the Applicant to fix the application dated 30/9/2019 for hearing within 3 months from the date of the delivery of the ruling failure to which its application "will stand dismissed."
2. The Applicant, Awal Limited, did not fix its application for hearing within the time given by the court. They instead turned in court on the 20th March 2023 and fixed the application dated 30/9/2019 for hearing on 16th May 2023 and subsequently fixed it for hearing on 16/6/2023.
3. It is upon that development that the Respondents herein, Mutuku Malonza, filed a Notice of Preliminary Objection dated 1st August 2023 on the grounds that:
 - a. The application offends the clear and unequivocal directive and order of the High Court issued on 15th December 2022 and it therefore stands dismissed by operation of the said Order.
 - b. No application has been filed nor any Orders sought for the extension of time to prosecute the application dated 30th September 2019.



- c. The filing and service of written submission by the Applicant in the circumstances amounts to gross abuse of the Court process.
4. The respondents seek for termination of the proceedings in the present cause on grounds that the court is now functus officio and lacks jurisdiction to hear and determine the application dated 30th September 2019.
5. The Preliminary Objection was canvassed by way of written submissions. The Applicant submitted that they checked the cause list for 15/12/2022 and found a notice indicating that the judge who was dealing with the matter was away hearing an election petition and that all matters listed for that day had been taken out and rescheduled for 15/3/2023. That he logged in on 15/3/2023 but the judge did not sit. They thereafter listed their application for hearing on 3/6/2023 and subsequently 3/7/2023. That the matter was later on mentioned before Justice Meoli who informed them that there was already a ruling in the file.
6. The applicant submitted that they were not aware of the directions and orders of the court. That mistakes of counsel should not be visited on a client and in that respect cited the cases of *Chemwolo & another v Augustine Kubende* (1986) eKLR and *Shah v Mbogo* (1967) EA 166.
7. The respondent on the other hand submitted that the guiding principles on Preliminary Objection is as was expounded in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors* (1968) EA 696 where Law JA stated as follows:
- “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 a contract giving rise to the suit to refer the dispute to arbitration.”
8. Sir Charles Newbold P in the same case observed as follows:-
- “ The first matter related 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 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.
9. The respondents submitted that the Order of 15/12/2022 is not a disputed fact and therefore that the P.O is within the principles established in *Mukisa Biscuit Co.* case.
10. The Respondents submitted that it is a principle that litigation must come to an end. They cited the case of *Benson Ngugi v Francis Kabui Kinyanjui & 3 Others*, Court of Appeal No.1 of 1986 (unreported) where Gachuhi JA stated that:
- “ in law, any litigation has to come to an end. Once a decision has been reached by a competent Court, it cannot be reopened to be started all over again unless the decision reached has been set aside. Any decision reached, if not set aside, it can only be challenged on appeal and cannot be challenged in any inferior Court, tribunal or in the same Court except in case of



review. The law will not allow any dispute between the same parties or between those who claim through them to reopen the dispute while the judgment still remains on record.”

Determination

11. I have considered the grounds in support of the Preliminary Objection and the written submissions filed by the respective advocates for the parties. The primary issue for determination is whether the Notice of Preliminary Objection dated 1st August, 2023 has merit.
12. The Black’s Law Dictionary defines a Preliminary Objection as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
13. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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... 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”.
14. In *Attorney General & Another v Andrew Mwaura Githinji & another* [2016] eKLR, the court explained the scope, nature and meaning of a Preliminary Objection as follows:-
 - (i) A Preliminary Objection raised 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 raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
15. In view of the foregoing, I shall seek to establish whether the grounds outlined in the Preliminary Objection dated 1st August 2023 have met the threshold set out in the aforementioned cases.
16. The first ground contends that the application offends the clear and unequivocal directive and order of the High Court issued on 15th December 2022 and it therefore stands dismissed by operation of the said Order. In my view, this ground does not raise a pure point of law. It does not state the mandatory provision of the law which has been offended. The ground is rather an averment that has to be proved through evidence. In the premises, I find that strictly speaking, this ground is not a proper ground to be raised in a Preliminary Objection.



17. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

18. In the case of *Oraro v Mbaja* [2005] eKLR, Justice Prof JB Ojwang J. (as he then was), succinctly addressed the issue of preliminary objection as follows:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

(As cited in *Biosystems Consultants v Nyalii Links Arcade* (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling). The facts which form the basis of the P.O. in this matter call for proof and are strictly speaking not proper ground to be raised in a Preliminary Objection.

19. The second ground is to the effect that no application has been filed nor any Orders sought for the extension of time to prosecute the application dated 30th September 2019. I am of the considered view that this ground does not constitute a proper ground to be raised in a Preliminary Objection as it requires a detailed examination of the facts.
20. The last ground avers that the filing and service of written submission by the Applicant in the circumstances amounts to gross abuse of the Court process. The Respondents argue that the court is functus officio over the matter. In the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR the court stated the following on the scope of the doctrine of functus officio;

“It is clear that the doctrine of functus officio does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.”

21. This court has not issued any final orders in the matter. I therefore do not consider the court to be functus officio over the matter as the court retains jurisdiction to hear any application in the matter until final orders are made in the case. I do not see any abuse of the court process in the proceedings.
22. In view of the foregoing, I find that the Preliminary Objection dated 1st August 2023 has no merit. The same is dismissed with costs to the Applicant.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MARSABIT THIS 15TH DECEMBER 2023



J. N. NJAGI

JUDGE

In the presence of:

Mr. Odipo for Applicant

Mr. Kitulu for Respondents

Court Assistant – Amina

30days Right of Appeal

