



REPUBLIC OF KENYA



KENYA LAW
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**Safari Stationers(K) Limited v Savla (Civil Case E111 of 2022)
[2022] KEHC 16046 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E111 OF 2022
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

SAFARI STATIONERS(K) LIMITED PLAINTIFF

AND

NISHIT AMRATLAL SAVLA DEFENDANT

RULING

1. The plaintiff herein, Safari Stationers (K) Ltd, sued the defendant Nishit Amratlal Savla through the plaint dated March 25, 2020 seeking the following orders:-
 - A. The principal amount of Kenya Shillings Sixty Three Million, Eight Hundred and Seven Thousand, Seven Hundred and Thirty- Seven and Thirty Eight Cents (kshs 63, 807, 737.38).
 - B. Interest on (A) above.
 - C. Costs of the suit.
2. The plaintiff's case is that it entered into an agreement with the defendant wherein it agreed to supply various stationery items to the defendant through his father's business known as Ribcart Stationers which goods the defendant was to pay for upon delivery.
3. It is the plaintiffs case that it delivered the stationery as agreed and that as at October 1 the defendant has accrued the sum of kshs 74,098,262.34 out of which it paid kshs 10,290,524 thereby leaving a balance of kshs 63,807,737.34 which is the subject of this suit.
4. Through his defence dated April 30, 2022, the defendant denied the plaintiff's claim in its entirety and contended that the plaintiff is not entitled to the orders sought in the plaint.



5. The defendant also filed a Notice of preliminary objection (PO) dated May 1, 2022 which preliminary objection is the subject of this ruling.
6. Through the said preliminary objection, the defendant lists the following grounds:-
 1. The plaintiff filed this in the wrong forum.
 2. This court lacks the requisite jurisdiction to hear this matter as it has been prematurely approached.
 3. The subject matter of this suit is a debt owed by the estate of a deceased person hence purely a succession matter.
 4. The defendant has not been duly appointed as the administrator of the deceased's estate.
 5. The defendant herein lacks *focus standi* as he is not yet he appointed legal representative of the estate of the deceased.
 6. The plaintiff is guilty of non-disclosure of material facts to this honourable court.
 7. The right forum for this matter should have been the Family Division as the estate of the deceased has not yet been devolved to the defendant.
7. Parties canvassed the preliminary objection by way of written submissions which I have considered.
8. The main issue for determination is whether the preliminary objection is merited.
9. What constitutes a preliminary objection was discussed in the case of *Mukisa Biscuits Company Limited v West End Distributors Ltd* [1969] EA 696 as follows:-

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence...

...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
10. Similarly, in the case of *Oraro v Mbaja* [2005] 1KLR 141 as cited in *Panna Dilip Chauchan v Bank of Africa Kenya Limited & Another* [2021] eKLR, it was held:-

“...The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a 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, 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.....Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.....Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
11. In the instant case, I note that the gist of the defendants defence is that it does not owe the amount of claimed in the plaint and that the alleged debt, if any, is owed by Ribcart Stationers whose sole



proprietor is one Amratlal Hirji Savla (deceased). According to the defendant, the amount in question is a debt owed by the deceased's estate and should thus be claimed from the said deceased's estate in a succession cause.

12. With all due respect to the defendant's position and arguments I find that the issues raised in the preliminary objection are not pure points of law, but are factual issues that can only be dealt with and unpacked at the hearing of the case.
13. I further find that this court is seized with the jurisdiction to hear and determine the suit as it is purely a commercial dispute for the payment of goods allegedly delivered to the defendant.
14. My take is that the issue of whether or not the defendant is liable under the contract for the goods allegedly delivered to a different entity is an issue to be determined at the hearing.
15. For the above reasons, I find that the preliminary objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W A OKWANY

JUDGE

In the presence of: -

Mr Muchiri for applicant.

Ms Ndungu for defendant

Court assistant- Sylvia

