



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E 175 OF 2019

KENYA BANKERS ASSOCIATION.....PLAINTIFF

VERSUS

THE CABINET SECRETARY FOR THE NATIONAL

TREASURY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

THE KENYA REVENUE AUTHORITY...3RD DEFENDANT

RULING

The Plaintiff filed suit on 19th August 2019. The 1st & 2nd Defendants filed Defence on 23rd August 2019 and 3rd Defendant filed Amended defence on 30th July 2019.

The 3rd Defendant filed under Certificate of Urgency on 17th September 2019 and raised the following issues for determination;

- a. That the Plaintiff's members are before the Tax Appeals Tribunal challenging collection of taxes from various streams of business income in the banking sector that runs into billions of shillings.
- b. That the pendency of this suit has been used to seek stay of the hearing of the appeals before the Tax Appeals Tribunal contrary to the law.
- c. That delaying the hearing of the matters before the tribunal has a catastrophic effect on the economy of the country as the state needs to know the collectability of the dispute taxes on merits so as to inform its future decisions on matters in similar based facts, circumstances and connotation of the various terms used in tax actions of the various streams of income.

The Plaintiff herein raised a Preliminary Objection dated 21st November 2019, at the hearing of the Third Defendant's Application dated 17th September 2019 on grounds that;

- a. The Application has been raised prematurely and in complete disregard of **paragraph 15(d) of the Practice Directions** Relating to Case Management in the Commercial and Admiralty Division of the High Court of Kenya at Nairobi.
- b. The Application has been overtaken by events as the Tax Appeals Tribunal on 24th October 2019 directed that all the appeals filed by the Plaintiff's members proceed for hearing at the Tribunal.

PLAINTIFF SUBMISSIONS

The Plaintiff submitted that **paragraph 15(d) of the Practice Directions** Relating to Case management in the Commercial and Admiralty Division of the High Court of Kenya at Nairobi ("Practice Directions") provides for making of applications.

In Teresia Njoki Njeru [2005]eKLR, Hon. Justice Lenaola heard an application made under **Order XLI Rule 31(i)** for dismissing an Appeal for want of prosecution, as follows;

“Unless within three months after giving of directions under Rule 8B the Appeal shall have been set down for hearing by the Appellant, the Respondent shall be at liberty either to set down the Appeal for hearing or to apply for Summons for dismissal for want of prosecution.”

Lenaola J. then held that;

“...directions must be taken and only three months after may an Application under order XLI Rule 31 (i) lie.”

3RD DEFENDANT’S SUBMISSIONS

On whether the Preliminary Objections has been raised on a pure point of law, the 3rd Defendant submitted that, the case defining a Preliminary Objection is Mukisa Biscuits Manufacturing Ltd vs West End Distributors Ltd (1969) E. A 696, where the court stated;

“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 pure points of law which [are] 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 and if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

The instant Preliminary Objection is hinged on the ground that the Application has been filed prematurely contrary to practice directions. The question that therefore follows is whether practice directions are/is law. In order to determine that, it is paramount to determine what law is.

Section 3 of the Judicature Act provides for Sources of Law in Kenya. Therefore; practice directions are/is not law.

Part 4 of Constitution of Kenya Articles 109 -116 provides procedure of enacting laws in Kenya by Parliament. The practice directions are not by enacted Legislation by Parliament.

Although Practice Directions should strictly be adhered to, they are handmaidens of justice; they are not law but simply directions that guide the procedure in conducting suits in Court as per the law.

The 3rd Defendant relied on the case of Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001]eKLR, in which Ringera J. (as he was then) expressed his views regarding rules of procedure as follows;

“...Rules of procedure are handmaidens and not mistress of justice and should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it.”

The 3rd Defendant submitted that as provided for under **Article 159 (2) of the Constitution** among the principles that the court is required to observe while exercising its judicial authority; the Courts & Tribunals shall be guided by the following principles; justice **shall not be delayed and that justice shall be administered without undue regard to procedural technicalities**. The principles encapsulated under **Article 159 (2) the Constitution** form backbone of the overriding objective.

The principle of overriding objective is further contained in **Section 1A, 1B & 3A of Civil Procedure Act**.

The 3rd Defendant submitted that of **paragraph 15(d) of the Practice Directions**, the spirit of the directive is to ensure expeditious disposal of matters by discouraging afterthought applications to strike out pleadings being filed after the case management conference has been conducted and not to prevent vigilant litigants from moving the court timeously. That the Plaintiff has completely misunderstood the spirit and intent of paragraph 15(d) of practice directions.

The Court of Appeal pronounced itself with regard to the overriding objective in Attorney General vs Torino Enterprises Limited [2020]eKLR, as follows;

“Two clear constitutional principles, articulated in Article 159 of the Constitution, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in Article 159 (2)(b), demands that justice shall not be delayed, and hence set timelines must be respected. The second principle, in Article 159 (2) (d) demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the court may excuse non-compliance with the timelines it has set. It is also for that reason that the overriding objective demands of the court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merits rather than on technicalities.”

The 1st & 2nd Defendants filed written submissions on the application and not to the Preliminary Objection.

DETERMINATION

The Plaintiff raised Preliminary Objection to hearing the 3rd Defendant’s application because the application was/is premature and in complete disregard of Paragraph 15 (d) of Practice Directions Relating to Case Management in the Commercial & Admiralty Division of High of Kenya.

A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.

The law that prescribes **Case Management is Order 11** more specifically **Rule 3 Civil Procedure Rules 2010** which provides;

“With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall -

- (a) consider compliance with Order 3 rule 2 and Order 7 rule 5;**
- (b) identify contested and uncontested issues;**
- (c) explore methods to resolve the contested issues;**
- (d) where possible secure parties’ agreement on a specific schedule of events in the proceedings;**
- (e) narrow or resolve outstanding issues;**
- (f) create a timetable for the proceedings;**
- (g) change the track of a case;**
- (h) consider consolidation of suits;**
- (i) identify a test suit and order stay of other suits.**

(2) In addition to any other general power the court may at the case conference—

(a) deal with any interlocutory applications or create a suitable timetable for their expeditious disposal;
.....

(o) make any such orders as may be appropriate including—

- (i) striking out the action or defence;**
- (ii) making an award of costs;**
- (iii) striking out of any document or part of it; or”**

The Constitution, Civil Procedure Act which outlines the Overriding Objective & Civil Procedure Rules encompass the law on filing, processing and finalizing Civil Cases cases/matters. The Practice Directions are guidelines expounding on adherence to the Procedural law on expediting while ensuring justice in hearing and determination of cases in the Justice system.

The filing by the 3rd Defendant of the pending application of 17th September 2019 is not incompetent to be heard under the Procedural Law

As outlined above, the instant application is pending. **Order 11 Rule 3 CPR 2010** is clear that the Court should ensure expeditious disposal and case management of cases through Case Conference by dealing with Interlocutory applications and may strike out an action or defense or any document.

The Practice Directions are detailed processes and procedures to direct parties while in compliance with the procedural law to ensure adherence and expedite hearing of the matters.

Therefore, in the instant case, the 3rd Defendant’s application is not premature, the procedural law and Practice directions do not outline timelines within which Interlocutory applications should be filed and served heard and determined. The procedural law prescribes when and how such applications ought to be heard; the interlocutory applications ought to be heard during Case Conference/Management stage.

Clearly, parties in the instant case closed pleadings. The period and opportunity to conduct Case management has not lapsed. The parties

are within their right and in line with the procedure to have the application heard during Case Management by the Court.

On whether the 3rd Defendant's application has been overtaken by events the 3rd Defendant submitted that through its application it was calling upon this Court to interrogate the Plaintiffs suit and make among other the following determinations;

- i. Whether the Plaintiff has the *locus standi* to institute the suit and it so,
- ii. Whether the Plaintiff's suit raises any **reasonable cause of action** and/or **triable issues** as against the Defendants
- iii. Whether the Plaintiff's suit conforms to the provisions of section **6 and 7 of the Civil Procedure Act** (that is whether the suit is *sub judice* and/or *res judicata*) and
- iv. Whether the Plaintiff's suit is **frivolous, vexatious and otherwise an abuse of court process.**

The 3rd Defendant submitted that though the Tribunal gave directions that the Appeals before it proceeds for hearing, the tribunal is not issuing decisions on the same. In a decision rendered by the Tribunal on 18th December 2019 in **Tax Appeals Tribunal Appeal No. 161 of 2017, Equity Bank Kenya Limited versus the Commissioner of Domestic Taxes** the Tribunal in Paragraph 91 held as follows;

“cognizant of the that there is a similar case involving the parties on similar issues of excise Duty pending determination in the High Court of Kenya at Nairobi, to wit, Commercial and Tax Division, Civil Suit No. E 175 of 2019, Kenya Bankers Association vs Cabinet Secretary for National Treasury, the Attorney General and Kenya Revenue Authority and with concurrence of the parties herein the Tribunal has hereby decided that in order to avoid duplicity of proceedings and determinations it will defer the analysis and ruling on the issues until the matter is fully determined. The tribunal will therefore not delve into the issues hereinabove on the said tax head.”

The 2nd Part of Preliminary Objection is that the 3rd Defendant's application is overtaken by events as the Tax Appeals Tribunal on 24th October 2019 directed that all the appeals filed by the Plaintiff's members proceed for hearing at the Tribunal. On 28th August 2020, the Plaintiff served the Court with the decision of **Tax Appeal 45 of 2017 Cooperative Bank of Kenya Ltd vs Commissioner of Taxes**, that the Tax Appeals Tribunal heard and determined one of the appeals.

This is not a pure point of law and hence not quite a Preliminary Objection. It is one of both facts and law. The law is provided on how and where to proceed with the cases. Each party is entitled to access to justice **Article 48** and fair hearing **Article 50 of COK 2010** and ought to move the Court (s) or forum appropriately. At this stage of Preliminary Objection, this Court cannot determine the question of law & fact raised pending further information from the parties to inform how and where the matter ought to be heard first and which matter ought to be heard; hear and determine the application on its merits with Case Management of the suit or compromise the application and have the suit heard and determined on its merits.

This is because the Plaintiff and 3rd Defendant have given this Court parallel and/or contradictory position on whether the matters by individual banks with KRA are proceeding at the Tax Appeals Tribunal or not. Hence the instant application is pending for hearing and determination.

DISPOSITION

- 1. For these reasons the Court finds the Preliminary Objection without merit and is dismissed.**
- 2. Each party to bear own Costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28 TH JANUARY 2021 (VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

NAZIR MALIK FOR THE APPLICANT

LEPARAN LEMISO FOR THE 3RD RESPONDENT

COURT ASSISTANT: TUPET

COURT: Further mention on 22nd February 2021 by all parties/counsel with a view to discussing the way forward.

M. W. MUIGAI

JUDGE