



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 12 OF 2019

SIMBA PLATINUM LTD.....PLAINTIFF/APPLICANT

VERSUS

1. SIMBA COACH LIMITED

2. SIMBA LOGISTICS LIMITED.....DEFENDANTS/RESPONDENTS

AND

ASHA WANJIKU ALLI.....INTERESTED PARTY

RULING

1. This Ruling is in respect of the Interested Party's Notice of Preliminary Objection dated 29/9/2020 in which she raises the following grounds:

1) That the Plaintiff/Applicant lacks *locus standi* to sue under Order 45 rule 1(a) and (b) in relation to the motor vehicle registration number KBQ 631 C as the same belongs to SIMBA POA LIMITED who is now defending the same as a Respondent in Civil Case number 269 of 2016 at the Naivasha magistrate's court.

2) THAT the suit is misconceived, scandalous, frivolous, vexatious and a blatant abuse of the court process.

2. The Preliminary Objection is as a result of the Notice of Motion Application dated 21/9/2020 by the Plaintiff/Applicant requiring in summary that this court reviews its ruling dated 6/6/2019.

3. The Plaintiff/Applicant in response to the Preliminary Objection filed a Further Affidavit sworn by Feroz Osman on 12/10/2020. In the said affidavit, the Plaintiff/Applicant avers that the Preliminary Objection is not properly before the court as it is not based purely on law but raises contested facts.

4. The Preliminary objection was canvassed by way of written submissions and counsel for the Interested Party filed her submissions on the 9/12/2020, while the Plaintiff/Applicant filed their submissions on 17/12/2020.

5. The 1st and 2nd Defendant/Respondent did not file any responses to the Preliminary Objection dated 29/9/2020.

Analysis and Determination

6. Having considered the pleadings and the written submissions of the parties, the only issue that arises for determination is whether the preliminary objection dated 29/9/2020 is merited.

7. The Interested Party has raised a preliminary objection under the provisions of **Order 45 Rule 1(a) and (b) of the Civil Procedure Rules** on the lack of *locus standi* by the Plaintiff/Applicant to file for review on a claim that the Plaintiff/Applicant does not own the motor vehicle KBQ 631 C, the subject matter of the suit herein. The Interested Party relied on the cases of **HC Misc Application No. 58 of 1997 Hon. Raila Odinga v Hon Justice Abdul Majid Cockar** and **GBM Kariuki Misc Cr. Appl. No. 6 of 1994** to support their claim that the Plaintiff/Applicant has no known interest in the subject vehicle in the case herein.

8. On the other hand, the Plaintiff/Applicant submitted that the Preliminary Objection herein should be dismissed in *limine* for raising a contested issue that is not based on law.

9. The subject matter of the case herein is a motor vehicle KBQ 631 C in which the Plaintiff/Applicant claims to own, whilst the Interested Party claims the said Motor Vehicle is owned by Simba Poa Limited.

10. The Plaintiff/Applicant are thus opposing the Notice of Preliminary Objection on the ground that it does not meet the threshold of a preliminary objection and they rely on the case of **Mukisa Biscuit Manufacturers Ltd v Westend Distributors [1969] E.A 696 AT PAGE 700** to define what amounts to a proper Preliminary Objection before a court.

11. The Court of Appeal in the case of **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** stated:

“...A Preliminary Objection 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...”

12. In the case of **Hassan Ali Joho & another V Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR**, the Supreme Court stated that:

“...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”.

13. In the instant case the averments of the Interested Party that the motor vehicle KBQ 631 C is owned by Simba Poa Limited and not the Plaintiff/Applicant calls upon this court to require the parties prove ownership through the process of evidence.

14. In the case of **Oraro v Mbaja [2005] 1 KLR 141 Ojwang J, (as he was then)** expressed himself as follows: -

“...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...”

15. The Interested Party herein has attached various documentations to the Notice of Preliminary Objection dated 29/9/2020 which evidently shows that the court is required to examine evidence as adduced by all the parties herein (Plaintiff/Applicant and the Interested Party).

16. In **J N & 5 others v Board of Management, St. G. School Nairobi & another [2017] eKLR** Mativo J, observed correctly in my view, as follows:

“... a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, 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...”

17. In this case, it is my finding that to establish whether the Plaintiff is the actual owner of the subject motor vehicle as it alleges need further interrogation of the documentary evidence presented. As such there is no mutual agreement that the subject motor vehicle does not belong to the Plaintiff so as to enable the court uphold the Preliminary Objection and declare the Plaintiff as having no interest that can be enforced. In my view, the issue as to whether the Plaintiff is the owner of the subject motor vehicle cannot be said to be a demurrer capable of dismissing/disposing the suit at this interlocutory stage and has been wrongfully taken out as a point of law.

18. For the above I find that the Preliminary Objection dated 29/9/2020 is not merited. Accordingly, the same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 16th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D. O. CHEPKWONY