



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 88 OF 2016

KENYA BREWERIES LIMITED.....1ST PLAINTIFF

EAST AFRICAN BREWERIES.....2ND PLAINTIFF

VERSUS

KEROCHE BREWERIES LIMITED.....DEFENDANT

RULING

1. The 4th defendant **DIRECTOR DEPARTMENT OF WEIGHTS AND MEASURES** (hereinafter weights & measures) and the **ATTORNEY GENERAL (AG)** the 5th defendants have raised a preliminary objection dated 29th October 2019. I need to start by setting out what is a proper preliminary objection, and I will not belabour in explaining in my own words. Justice John M. Mativo eloquently dealt with that in the case **J.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR** thus:

“11. Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others*[2][2] where it was held that:-

“The objection as to the legal competence of the Plaintiffs to sue.....and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts...”

12. Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows:-[3][3]

“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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....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.”(Emphasis added)

13. Thus, 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.”

2. Though that quote is lengthy it captures what a counsel should bear in mind when raising a preliminary objection. I am afraid to say that more and more parties are raising preliminary objections as though it is another avenue to argue their defence. This is what I find the

weights & measures and A.G. have done in this case.

3. The objections raised as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the 4th & 5th defendants herein shall at the earliest opportune time raise and argue a preliminary objection that the suit as filed against the 4th & 5th defendants be dismissed with costs to the Defendant on grounds:

1. **THAT** the mandate of 4th Defendant is a devolved function under the Forth Schedule of the Constitution of Kenya.
2. **THAT** the mandate of the 5th defendant under the constitution of Kenya and The Office of the Attorney General's Act, 2012 is to advise and represent the national government only.
3. **THAT** the acts complained of by the plaintiff in the counterclaim relate to county officers that fall under the ambit of the county government.
4. **THAT** the 4th & 5th defendants are not legally liable for the acts of officers within the county governments.
5. **THAT** the 4th & 5th Defendants are improperly enjoined in the suit.

Let me try and summarise the submissions made in support of that objection.

4. Learned counsel referred the court to Article 186 of the constitution which counsel read together with Fourth Schedule thereof. This counsel said that those provisions outlines the functions of county and national government. That the acts complained of having occurred in the year 2015, the functions of the county government had been transferred to the county government by the Transitional Authority. That the acts complained of in the pleadings do not relate to the functions of Weights & Measures nor to the A.G. Counsel ended her submissions by saying:

“On that basis we are saying we should be struck out of the suit since we are improperly enjoined.”

5. Learned counsel for the plaintiff in the counter claim, **KEROCHE BREWERIES LIMITED** (hereinafter Keroche) argued that section of Weights and Measurements Act give weights & measures jurisdiction to handle matters of that office.

6. Precisely what I mentioned at the beginning of this ruling is what the movers of the preliminary objection have led me to. The movers want this court to determine that they are wrongly sued and that the court do strike them out of this case. If one considers what has been discussed in the case **J.N. & 5 Others v Board Management St. G. School Nairobi** (*supra*) one will realise that what the movers of the preliminary objection seek from this court is out of limb of what is a proper preliminary objection.

7. To clarify what I am alluding to I will refer to Keroche's Defence and counter claim, which is the pleading that joined weights & measures and A.G in this case as 4th and 5th defendants in the counter claim. Keroche pleaded that the plaintiffs (Kenya Breweries Limited and East African Breweries Limited) “influenced the officers of the fourth defendant (weights and measures in the counterclaim, situated in Nyeri and Laikipia counties who.....harass the defendant (Keroche), its distributors and retailers.” Further Keroche pleaded “the third defendant in the counter claim procured the fourth defendant (weights and measures).....to institute sham criminal proceedings against the defendant (Keroche).

8. That pleading of how the weight & measures were used to harass Keroche is repeated over and over in the pleadings.

9. How then can this court entertain a preliminary objection which looks to this court to consider the constitutional provisions and then determine it is wrongly sued. Isn't that party inviting this court to exercise judicial discretion and determine it is wrongly sued. The fact is that Keroche has identified the officers of weights & measures as the ones who were used by the plaintiffs to harass it. That being Keroche's pleading, weights & measures and A.G must accept that as a fact whether or not the law provides that the work of weights and measures was developed under the new constitution. The argument that they are wrongly joint can only be raised in a defence. That is all. Not in a preliminary objection which is supposed to assume the facts as pleaded are correct, as in this case, that weights & measures harassed keroche. That jurisprudence is the sum total of the celebrated case of **Mukisa Biscuit Manufacturer Ltd v Westend Distributers Ltd (1969) E A 696** as per law JA, thus:

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.

Sir Charles Newbold P in that case stated:-

"...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. It is because of the above I find that the preliminary objection dated 27th October 2019 is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of March 2020.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiffs

.....for the Defendant