



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

(Coram: A. C. Mrima, J.)

CIVIL CASE NO. 24 OF 2015

NGINA GITIBA.....PLAINTIFF

-VERSUS-

SOUTH NYANZA SUGAR COMPANY LIMITED....DEFENDANT

RULING NO. 2

1. This ruling is in respect of the Plaintiff's Notice of Preliminary Objection dated 23/07/2020 (hereinafter referred to as '**the objection**'). The basis of the objection was set out as follows: -

- 1. THAT the Defendant has no right of audience in law before this Honourable Court as it is breach of the judgment issued on 14th February 2019 and is therefore in contempt of Court.**
- 2. THAT the Defendant has no right of audience in law before this Honourable Court as it is breach of the Court Order issued on 8th August, 2019 issued in its favour and is therefore in contempt of Court.**
- 3. THAT the Application as filed is misconceived lacks merit frivolous vexatious and abuse of the Court process.**
- 4. THAT the Application is incurably defective, incompetent, void ab initio, untenable in law and is therefore an abuse of the Court process.**

2. The objection was against the Defendant's Notice of Motion dated 13/07/2020. The said application challenged the legality of the Warrant of Attachment of Movable Property in Execution of Decree for Money and the Warrant of Sale of Property in Execution of Decree for Money dated and issued to M/s Muriri Auctioneers on 11/06/2020.

3. Counsels for the parties made presentations on the hearing of both the objection and the Notice of Motion dated 13/07/2020. This Court directed that the objection be first heard and determined.

4. The objection was orally heard. **Mr. Mugoye**, Counsel for the Plaintiff, supported the objection. He submitted that this Court delivered a judgment in the matter in favour of the Plaintiff on 14/02/2019 which judgment was yet to be satisfied by the Defendant. It was further submitted that the Defendant was well aware of the judgment given that it even fully participated in stay of execution proceedings. The proceedings culminated with the grant of a conditional stay of execution.

5. According to the Plaintiff, the Defendant having failed to satisfy the conditions attached to the stay of execution was under a legal duty to settle the judgment. However, the Defendant was yet to satisfy the decree of this Court. It was submitted that failure to settle the judgment rendered the Defendant in contempt of Court. Having not purged the contempt, it was argued that the Defendant lost its audience before Court in this matter.

6. The Plaintiff pointed out that this Court had powers to punish for contempt of Court under Section 5 of the Judicature Act. Relying on Nairobi Civil Appeal No. 33 of 2012 Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR and Kenya Tea Growers Association vs. Francis Atwoli & 5 Others (2012) eKLR it was submitted that proof of knowledge of existence of a Court Order by a party cited for contempt of Court was sufficient in contempt proceedings.

7. Further submissions were made to the effect that the Notice of Motion dated 13/07/2020 was therefore an abuse of the process of the Court. Citing Nairobi High Court Misc. Application No. 1019 of 2004 Hon. Basil Criticos vs. Attorney General and 2 Others (2016)

eKLR and Nairobi ELRC Petition No. 23 of 2013 Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others (2013) eKLR the Plaintiff submitted that there was every good reason for obedience of Court orders and that those in contempt thereof must be punished. The Plaintiff reiterated its position that the Defendant lost its audience before Court until such a time it will purge the contempt by satisfying the judgment.

8. Counsel prayed that the objection be upheld and the Defendant's Notice of Motion dated 13/07/2020 be struck out.

9. The objection was opposed. Counsel for the Defendant, **Mr. Marvin Odera**, faulted the procedure in bringing up the claim for contempt of Court. He submitted that the Court was not seized of jurisdiction to make such a finding as the procedure in **Section 5** of the **Judicature Act** had not been complied with. According to the Defendant a formal application ought to have been filed but not the objection.

10. The Defendant further submitted that the requirement for leave to institute contempt proceedings was also not complied with. Counsel posited that to allow the objection in the manner filed will be to act irregularly and outside the confines of the law. He pointed out that in all the decisions the Plaintiff referred to the Applicants therein had duly complied with the procedure in **Section 5** of the **Judicature Act**.

11. This Court's attention was drawn to the fact that the Defendant's Notice of Motion dated 13/07/2020 was not opposed to the execution of the decree by the Plaintiff. However, the application challenged untaxed legal costs in excess of Kshs. 30,000,000/= irregularly contained in the warrants in force.

12. The Defendant submitted that the objection was misconceived and prayed that it be dismissed with costs.

13. In a rejoinder the Plaintiff submitted that there was no longer a legal requirement for leave to institute contempt proceedings. It was also submitted that the objection was a proper way in which contempt proceedings could be initiated and that the procedure in **Section 5** of the **Judicature Act** was as well another valid process. The Plaintiff prayed that the objection be allowed.

14. I have carefully considered the objection, the submissions and the decisions referred to by the parties. It is now for this Court to ascertain the validity of instituting contempt proceedings by way of a preliminary objection.

15. A look at the law on preliminary objections is of essence. **Law, J.A.** in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say: -

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....

16. My brother **Mwita, J.** in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in clearer terms when he stated that: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

17. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J (as he then was)** in **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the **Mukisa Biscuits case (supra)** went on to stay that: -

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. 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....

18. I will now subject the foregone to the objection at hand. The basis of the objection was that the Defendant was in contempt of Court by not satisfying the judgment. The Defendant posited conversely. It contended that it was not in disobedience of the Court's judgment as the Plaintiff has been at liberty to levy execution, but within the law. According to the Defendant, the rationale behind its application was the manner the sum of over Kshs. 30,000,000/= was allowed as legal costs in the warrants in force yet the said legal costs had neither been agreed nor taxed.

19. The facts as fronted by the Plaintiff are therefore disputable. They must first be ascertained. The manner in which the objection was couched called on this Court to investigate the facts and settled them one way or the other. The objection is hence not a pure point of law.

20. With such a state of affairs the objection is not well founded. As well put by **Ojwang, J (as he then was)** '..... 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'.

21. I now find and hold that the Notice of Preliminary Objection dated 23/07/2020 cannot be rightly dealt with as such. The objection was a false start.

22. Having so found, dealing with the other issues raised by the parties in the objection will only be academic. I choose to end this matter here. I will however give further directions for purposes of dealing with the pending application.

23. These are the final orders of this Court: -

a. The Notice of Preliminary Objection dated 23/07/2020 is hereby dismissed. Costs to abide the outcome of the Notice of Motion dated 13/07/2020.

b. The Notice of Motion dated 13/07/2020 shall be heard by way of written submissions.

c. To that end, the Plaintiff/Respondent shall file and serve her response thereto, if any, within 14 days.

d. The Defendant/Applicant shall be at liberty to file and serve a Supplementary response, if need be, together with written submissions within 14 days of (c) above. In the event the Plaintiff/Respondent fails to comply with (c) above the Defendant/Applicant shall thereafter file and serve its written submissions within 14 days of the failure.

e. The Plaintiff/Respondent and the Proposed Party shall file and serve written submissions within 14 days of (d) above.

f. This matter shall be fixed for highlighting of submissions on 21/10/2020.

g. As this ruling has been delivered electronically via the parties' email addresses, leave is hereby granted to any party wishing to appeal the decision.

h. There shall be a stay of the execution of the Warrant of Attachment of Movable Property in Execution of Decree for Money and the Warrant of Sale of Property in Execution of Decree for Money dated and issued to M/s Muriri Auctioneers on 11/06/2020 for recovery of the sum of Kshs. 69,566,427/= from the Defendant pending the determination of the Notice of Motion dated 13/07/2020. For clarity, the sale of the Defendant's factory premises and/or other properties scheduled for 15/08/2020 is hereby stayed pending the determination of the Notice of Motion dated 13/07/2020.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 06th day of August 2020.

A. C. MRIMA

JUDGE

Ruling delivered electronically through: -

1. law@mugoyeassociates.com for the firm of Messrs. Mugoye & Associates Advocates for the Plaintiff.

2. okongowadangomigori@gmail.com for the firm of Messrs. Okong'o Wandago & Company Advocates for the Defendant.

3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE