



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.18 OF 2020

ANTHOPNY MWANGI MAINA.....1ST APPELLANT

JOSEPH MUNENE MAINA.....2ND APPELLANT

V E R S U S

DIVINAH KWAMBOKA NYANG'YA (Suing as the Legal Representative and Administrator of the Estate) OF ELIJAH MWANIKI KINUTHIA (DECEASED).....RESPONDENT

R U L I N G

1. The Plaintiff/Respondent raised a preliminary objection against the Defendant/Applicant's Application dated 21/7/2020 on the following grounds:-

(i) ***THAT*** the said Application is anchored on provisions of law which do not donate any power to this court to grant the orders sought thus making the instant Application fatally defective.

(ii) ***THAT*** the said Application is filed in breach of Section 1A and 1B of the Civil Procedure Act and is undeserving of Court's discretion.

(iii) ***THAT*** the Applicant has approached the court with unclean hands and are guilty of material non-disclosure and are thus undeserving of the orders sought.

(iv) ***THAT*** the Applicants have not met the threshold to warrant the orders sought.

(v) ***THAT*** the Application is bad in law, incompetent, and abuse of the process of Court and improperly before this court and the Applicants are thus not entitled to the remedy sought.

2. The parties were directed to write written submissions in this notice of preliminary objection. The Plaintiffs/Respondent submitted as follows:-

(i) ***THAT*** the Applicant has moved this court under Order 29, Order 40 Rules 1,2,3, and 4 of the Civil Procedure Rules, Order 51 of the Civil Procedure Rules and Section 3, 3A and 63 of the Civil Procedure Act and all enabling provisions of the law.

It was further submitted that an Application for stay cannot competently be brought under the above provision as the correct provision of the law for an Application for stay pending appeal is Order 42 Rule 6 of the Civil Procedure Rules 2010.

(ii) ***It was further submitted that the Applicants have approached the Court with unclean hands and are guilty of material non-disclosure and thus are undeserving of the Orders sought in that the Judgment herein is regular and the Appellant/Applicant's Application herein is tainted with dishonesty, misrepresentation and is a deliberate attempt to mislead the court.***

(iii) ***The Plaintiff/Respondent also submitted that the Defendant/Applicant's Application did not disclose that the certificate of costs in Kericho CMCC 39 of 2019 had already been issued after taxation and further that it is trite law that there cannot be stay of taxed costs because once a certificate of costs is issued, it is final and binding on the parties. Further, that the filing of a reference or the written letter for reasons Under Order 11(1) of the Advocates Remuneration Order does not accord a party on automatic stay of Execution.***

3. The Defendant/Applicant oppose the Preliminary Objection and submitted as follows:-

(i) **THAT** a preliminary Objection is defined in the case of *MUKHISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS (1969) E.A.* at Page 696 as follows:-

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit.... It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct.”

Further, that the Supreme Court re-considered the position of parties resorting to use of preliminary objections and pronounced itself as follow in the case of *INDEPENDENT ELECTORAL BOUNDARIES COMMISSION -VS- JANE CHEPERENGER & 2 OTHERS (2015) e KLR* that **“It is distinctly improper for a party to resort to the preliminary Objection as a sword, for winning a case otherwise destined to be resolved Judicially, and on the merits”.**

(ii) It was further submitted by the Defendant/Appellants that the objection raised is mainly aimed at preventing the Appellant’s case from being heard due to mere procedural technicalities that the Sections sited are erroneous and further that in view of the liberal approach adopted by the Supreme Court the defect is curable and it does not warrant a preliminary objection.

(iii) The Defendant/Appellants further submitted that Justice Ringera (as he then was) when confronted by a similar Application in the case of *GLOBAL TOURS & TRAVELS LIMITED; NAIROBI HC. WINDING UP CAUSE NO.43 of 2000* sad that the Court’s discretion in deciding whether or not to grant stay of proceedings must be guided by any of the following three main principles:-

(a) Whether the Applicant has established that he/she has a prima facie arguable case.

(b) Whether the Application was filed expeditiously.

(c) Whether the appeal would be rendered nugatory.

(iv) The Defendant/Appellants further submitted that the Trial Court delivered the Ex-parte Judgment dated 16/10/2019 without giving the Appellants a chance to be heard which is a total disregard to the laid down principles of natural Justice thus infringing on the Appellant’s right to a fair hearing as enshrined by Article 50 of the Constitution of Kenya 2010.

4. I have considered the submissions by both parties. The preliminary objection is raised primarily on the basis that the Application dated 21/7/2020 is brought under the wrong provisions of law.

5. Article 159 of the Constitution of Kenya mandates this Court and dispense Justice Expeditiously without undue regard to technicalities of procedure.

6. Section 159 (2) (d) states as follows:

“Justice shall be administered without undue regard to procedural technicalities”

7. It is the duty of this Court to rise to its highest calling and do Justice between the parties.

8. In the case of *Githere V. Kimungu [1976 – 1985] E.A. 101*, the Court said that: -

“.....the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case.”

9. The other issues raised is the preliminary objection such as non-disclosure of material facts will require to be ascertained through evidence such as averments in an Affidavit.

10. I find that the preliminary objection 9/9/2020 lacks in merit and I accordingly dismiss it with costs to the Defendant/Applicants.

Delivered, signed and dated at Kericho this 23RD day of October 2020.

A. N. ONGERI

JUDGE