



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 502 OF 2012

PAPIUS KIRONGOCHI MUHINDI.....1ST PLAINTIFF

BEN GAKERE NYUTHO.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

JAMES NJUGUNA MWANGI.....2ND DEFENDANT

MARY WANGAI WAMAE.....3RD DEFENDANT

KENNETH MBAABU MUCHIRI.....4TH DEFENDANT

GERALD GACHOKA WARUI.....5TH DEFENDANT

RULING

1. The defendants filed a Notice of Preliminary objection without prejudice to their rights to appeal the judgment of the court delivered on 8th February 2017. The preliminary points are in respect of post judgment proceedings and are as follows:-

a) The Deputy Registrar of this Honourable Court lacked jurisdiction to determine the quantum of consequential loss whether called mesne profit, loss of income or loss of profit under the provisions of Order 49 of the Civil Procedure Rules, 2010.

b) Computation of quantum of damages such as mesne profit is a judicial function in terms of the binding decision of the Court of Appeal in Kenya Revenue Authority Vs. Menginya Salim Murgani Civil Appeal No. 108 of 2010.

2. From the counsel respective written submissions dated 7th June 2017 and 7th July 2017 the facts leading to the objection are not in dispute. The issue for determination as agreed by both counsel is whether the Deputy Registrar had the jurisdiction to compute the quantum as directed by the court.

3. In the judgment by Hon. Lady Justice Farah S. Amin dated 8th February 2016 under paragraph 48 subject of the Defendant's Preliminary Objection; the court stated:-

"As to the claim for consequential loss, whether called mesne profit, loss of income or loss or profit. That has been insufficiently quantified and particularized. I therefore order the parties to file their evidence on those issues within 21 days if they are unable to agree the quantum."

4. That following the court's direction or order under the above-mentioned paragraph of the courts' judgment, the plaintiffs filed supplementary list of documents on 29th June 2016 on the evidence on amounts they alleged to be entitled to on record as dividends and interest thereon. The defendant however failed to submit despite the order of the court. The court subsequently directed the Deputy Registrar to compute the figures in terms of paragraph 48 of the aforesaid judgment based on the evidence filed by the parties.

5. The Deputy Registrar by her ruling of 26th October 2016, stated as follows:-

"Orders were issued by Hon. Lady Justice Farah S.M. Amin for me to calculate the mesnes profits and I have considered the documents presented before me by the plaintiff."

6. Subsequently when the plaintiff sought direction, at the mention of the matter as for the incorporation of the computed component of the mesne profits into the judgment, the defendants contended that the computation by the Deputy Registrar in terms of her ruling of 26th October 2016, is a nullity for want of jurisdiction and set forth the contention in the current form of the preliminary objection under my consideration.

7. The court record reveal that the defendant filed Notice of Appeal on 15th March 2016 against the judgment of Honourable Lady Justice Farah Amin dated 8th February 2016. The defendant is further aggrieved by the Deputy Registrar's computation of quantum of damages as per decision of the Judge. The Preliminary Objection is against the Judge's decision in referring the matter to the Deputy Registrar to deal with the claim for consequential loss, whether called mesne profit, loss of income or loss of profit, that had been insufficiently been quantified and particularized; as per the judgment.

8. I have very carefully perused the Defendant's Notice of Preliminary Objection, which was filed after the trial Judge had rendered herself in her judgment; and note the grounds raised would in my view be good grounds on appeal, whether they would succeed or not. I have noted the trial court having delivered its final judgment, what the defendant's Notice of Preliminary Objection, is seeking in essence is for this court to sit on appeal on judgement of a court of concurrent jurisdiction. The defendant is not seeking a review of the judgment. It is trite law that court cannot sit on appeal on a judgment of a court of concurrent jurisdiction. There is no way this court can make a ruling to the effect that the trial Judge acted erroneously to convert a judicial function into ministerial function without being seen to be sitting on appeal on a judgment of a court of concurrent jurisdiction. I have considered all submissions and authorities relied upon by both counsel in support and in opposition of the Preliminary objection. I have also noted that the defendant had as of 15th March 2016 lodged a Notice of Appeal; but both counsel did not in their submissions indicate whether the intended Appeal has been lodged. In view of the above I find the Defendant's Notice of Preliminary Objection to be misplaced. The Defendant should in my view pursue the issues raised in the preliminary objection before an Appellate Court.

9. The upshot is that the Preliminary Objection is dismissed with no order as to the costs.

Dated, signed and delivered at Nairobi this 26th day of July, 2018

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J .A. MAKAU

JUDGE