



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION NO. 1178 OF 2007**

**INVESCO ASSRANCE CO. LTD.....PETITIONER**

**VERSUS**

**COMMISSIONER OF INSURANCE & OTHERS.....RESPONDENTS**

**RULING**

1. The application which gave rise to his ruling was made by the Commissioner of Insurance herein seeking that the consent orders entered in this petition be set aside. The main ground for seeking the setting aside of the said consent was that the same was entered into without hearing persons affected by the same consent.
2. Before the application could be heard, the Petitioner raised the following preliminary objections:
  - (a). **That the provisions cited in support of the Application do not confer on the Court jurisdiction to issue the order sought, the consent decree having been made under constitutional provisions.**
  - (b). **That the application is prematurely filed before complying with the mandatory provisions of the relevant laws.**
  - (c). **That the application as drawn and filed is incompetent and violates the provisions of the law under which it is purportedly brought and is totally unknown in law and an abuse of the Court process as a review of a consent decree cannot be made in the circumstances of this case.**
  - (d). **That no effort has been made to serve or include the cited and interested parties who were part and parcel of the proceedings.**
3. Together with the said objections, the petitioner also filed a notice of intention to cross-examine **Lucy M. Kambuni** and **Sammy Makove** the deponents of the supporting affidavits on their said affidavits.
4. I have considered the said matters as well as the submissions filed by the various parties relating to the preliminary objections and the notice to cross-examine the said deponents. In NBI High Court (Civil Division) Civil Case No 102 of 2012 - **Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another** I expressed myself, *inter alia*, as follows:

**“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be**

entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court's task would be to determine what are the agreed facts contained therein whether expressly or by legal implication."

5. In arriving at that decision, I relied on the celebrated case of Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696. In that case Law, JA was of the following view:

"A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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."

6. As for Newbold, P:

"A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".

7. I also cited Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 where it was held that:

"The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) 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 or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."

8. Dealing with the same issue, Ojwang, J (as he then was) in Oraro vs. Mbaja [2005] 1 KLR 141 expressed himself as follows:

"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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... 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. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”...The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”

9. In the present case it is contended that the provisions of the Civil Procedure Rules do not apply to constitutional petitions. That contention, it is my view is a pure point of law that can be taken as a preliminary objection hence the same was properly taken in these proceedings. In this case, what is sought is the setting aside of a consent order. It is trite that consent orders can only be set aside on the grounds which justify the setting aside of contracts. Further the Court in exercising its discretion to set aside a consent order exercises its inherent powers. In **Brooke Bond Liebig (T) Ltd. vs. Mallya [1975] EA 266**, it was held that:

“Even if procedure by separate suit is provided for setting aside consent judgements, and the court is not convinced as to this, a court is not precluded from giving effect to its decision under its inherent powers, especially where time and expense can be saved. Rules of procedure are designed to give effect to rights of the parties and once parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiation of the proceedings. It has to be made clear that this does not mean that the rules of procedure should not be complied with – indeed they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no prejudice has been done to the parties... *Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court...or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

10. It is therefore my view and I so hold that the Court has inherent jurisdiction to set aside its orders granted by consent where the circumstances permit.
11. This inherent power is, however not conferred upon the Court by a particular legislation but inheres in every court hence the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers. See **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675.**
12. Similarly, it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences and that the Court retains a residual power in no longer in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

**“.....the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”**

13. In the same vein **Kimaru, J in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** held:

**“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”**

14. However, in **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
15. The upshot of the foregoing authorities is that the failure to cite a particular provision of the law does not preclude the Court from invoking its inherent powers to ensure that the ends of justice are met in appropriate circumstances.
16. Even if there was doubt as to whether the Court can invoke its inherent jurisdiction, in **Meme vs. Republic Nairobi HCM CR. Application No. 495 of 2003 [2004] 1 EA 124; [2004] 1 KLR 637** it was held by **Rawal & Njagi, JJ & Ojwang’ AJ** that:

**“At a very basic level the Court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental**

## **Right and Freedoms of the Individual) Practise and Procedure Rules.”**

17. It is therefore my view that the mere fact that the Applicant cited the provisions of the **Civil Procedure Rules**, even assuming they are inapplicable, does not deprive the Court of the jurisdiction to entertain a matter which it can entertain in the exercise of its inherent jurisdiction. Such an issue being procedural is curable pursuant to the provisions of Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.
18. The next ground was that the application was premature. First, this Court was not adequately addressed on this issue to enable it make an informed decision thereon. Secondly, the issue of prematurity of the application ought to be raised at the hearing of the application as it goes to the merit of the application.
19. The third ground was that review of a consent cannot be made in the circumstances of this case. This Court is yet to be addressed on the circumstances of the case and therefore to uphold the objection based on the non-existent of the circumstances warranting the setting aside of the consent before the Court is even addressed on the same would amount to not only putting the cart before the horse but a violation of the rules of natural justice.
20. The last was ground based on non-service of parties to the proceedings. In my view, such an issue, even if true, may not dispose of the application. A decision on who to serve in the proceedings is an exercise of judicial discretion depending on whether the orders sought are likely to affect that party. Therefore and as has been held above, a preliminary objection ought not to be raised if what is in contention is an exercise of judicial discretion.
21. Having considered the grounds of objection herein, it is my view that the last three are not proper grounds of objection while the first one has no merit.
22. With respect to cross-examination on affidavits, cross-examination on the affidavit is a discretionary power conferred upon the court by the provisions of Order 19 Rule 2 of the **Civil Procedure Rules**. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent's affidavits otherwise if the courts become too willing to allow cross-examination, the already limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined. This was held by **Ochieng, J.** in the case of **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limtied (2) [2006] 2 EA 6**.
23. In fact in **Lawson and Anor vs. Odhams Press Ltd. and Anor. (1948) 2 All ER 717**, it was held that Cross-examination on an affidavit in support of interlocutory application is to be allowed only in special circumstances.
24. I also agree that the decision in **G G R vs. H-P S [2012] eKLR** states the general rule with respect to cross-examination. According to the learned Judge:

**“The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. It would appear that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed (sic), bad motive among others are raised, cross-examination of a deponent of an Affidavit may be ordered. This also extends to where there is a conflict of Affidavits on record or where the evidence deponed (sic) to is conflicting in itself. Further, the order for cross examination is a discretionary order but as is in all discretions, the same must be exercised judiciously and not whimsically. There should be special circumstances before ordering a cross examination of a deponent on an Affidavit. The court must feel that adequate material has been placed before it that show that in the interest of justice and to arrive at the**

**truth, it is just and fair to order cross examination.”**

25. The foregoing statement is the general position with respect to cross examination particularly in purely civil matters. However, different considerations apply when the same discretion is being exercised in judicial review proceedings. The exercise of that discretionary power in such cases is placed on a higher pedestal than in ordinary civil cases. Such discretion, as was appreciated by **Korir, J** in **R. vs. Constituency Development Fund Board & Another ex parte Robert Iltaramwa Ochale & 5 Others [2012] eKLR**, though can be exercised under the inherent power of the Court, ought to be invoked sparingly taking into account the fact that allowing cross examination would lead to unnecessary delays in determining judicial review matters and hence the logic behind its policy that such proceedings be fast and quick fix to challenges encountered by citizens in their interaction with the administration defeated.

26. This position is restated by **Wade and Forsyth: Administrative Law**, 9<sup>th</sup> Edn. at page 648 where it is stated that:

**“a feature of prerogative remedy procedure which remains unaltered is that evidence is taken on affidavit, i.e. sworn statement in writing rather than orally. It is possible but exceptional for the court to allow cross-examination on the affidavit.”**

27. Similar observations were made in **Kibaki vs. Moi & Another Election Petition No. 1 of 1998** where the Court in dismissing the application for cross-examination of a deponent expressed itself as hereunder:

**“In exercise of its ordinary jurisdiction, the High Court is vested with discretionary power to allow the cross-examination of a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If the facts of the deponent are not disputed cross-examination will not be allowed.”**

28. In this case the notice of intention to cross-examine deponent was drawn in the following terms:

**“NOTICE IS HEREBY GIVEN that the Petitioner herein shall at the hearing of the Application dated 3<sup>rd</sup> October 2013 seek to cross-examine the deponent of the affidavits in support thereof to wit Sammy Mutua Makove and Lucy Muthoni Kambuni sworn on the 3<sup>rd</sup> October, 2013 and shall as such require their personal attendance in court on the material day for such purposes.”**

29. It is clear that the notice issued was very economical on the substance of the cross examination or as to the reasons for which the same was sought. Whereas it is true that under Order 19 rule 2(1) as read with rule 9 of the **Civil Procedure Rules**, an application to cross-examine a party may be made orally, the authorities are clear that such an order can only be made in exceptional circumstances. In my view it is upon the applicant to show that exceptional circumstances do exist hence the need for the applicant to adduce material upon which the Court may find so. A bare notice to cross-examine without more cannot be said to disclose such exceptional circumstances especially in proceedings which are ordinary conducted by way of affidavit evidence.

30. In **Simon Kitavo Nduto & Another vs. Owenga Anjere Civil Appeal No. 170 of 1995**, it was held that a wrong statement of fact made in an affidavit makes that statement worthless and may in certain circumstances amount to perjury. If that is the Petitioner's contention, then the same can be dealt with by way of submissions instead of going the unusual route of cross-examining the deponent whose affidavits are alleged to be self-contradictory. This is not to rule out cross-examination on self-conflicting affidavits, but just to state that apart from mere allegation of self-conflicts in the affidavits, the Applicant ought to go further and show in what manner the said conflicts can be said to constitute exceptional circumstances which cannot be dealt with in submissions. I am afraid that the Petitioner herein has failed to satisfactorily show this.

31. Having considered the issues raised herein, it is my view and I so hold that both the preliminary objections and the notice to cross-examine the deponents are unmerited. The same fail and are dismissed with costs to the 1<sup>st</sup> Respondent.

**Given at Nairobi this 13<sup>th</sup> day of June, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Mwangi for the interested parties and holding brief for Mr Luseno for the Law Society of Kenya**

**Cc Mutisya**