



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL MISC. APPL. NO. 158 OF 2016

ARISON EXPORT IMPORT LIMITED.....1ST APPLICANT

HUELANDS LIMITED 2ND APPLICANT

V E R S U S –

HARIT SHETH TRADING AS HARIT SHETH ADVOCATES.....1ST RESPONDENT

HIGHBURY CONSULTING SERVICES INTENATIONAL LIMITED ... 2ND RESPONDENT

RULING

1. The 2nd Respondent Highbury Consulting Services International Ltd filed a preliminary objection dated 6th June 2016 raising the following grounds:

(a) THAT the suit is incompetent and incurably defective since the basis of the cause of action as alleged by the Applicants is a breach of contract for failure to deliver architectural drawings and the Applicants have failed to annex hereto a copy of the contract which is the basis of the said application; consequently, in the absence of the said contract no legal action can issue.

(b) THAT the suit is incompetent and incurably defective since the basis of the cause of action as alleged by the Applicants is a breach of contract for failure to deliver architectural drawings and consequently, the remedies claimed in the application herein cannot issue.

(c) THAT the said application is illegal and unprocedural and does not lie in law for both want of substance and form since it offends expressly Order 37 of the Civil Procedure Rules.

(d) THAT since the Applicants application dated 11th April 2016 in addition to the foregoing also offends the express provisions of Order 52 Rule &(1) since the Applicants are not seeking for the enforcement of a professional undertaking.

(e) THAT the applications by the Applicants and the subsequent proceedings herein are fatally defective, incompetent, a fundamental flaw, frivolous, devoid of merit and an abuse of the court process and ought to be forthwith struck off with costs to the 2nd Respondent.

2. The Applicants in response, filed the following grounds of opposition:

(1) The preliminary objection is incompetent, mischievous, has no merits, is baseless, frivolous and an abuse of the court processes as it raised issues of facts not law.

(2) The preliminary objection raises issues of facts and it does not meet the legal threshold of what in law qualifies to be a preliminary objection.

(3) A preliminary objection can only raise issues of law not facts.

(4) The issues raised do not qualify to be raised as a preliminary objection in view of the principles set/established in the celebrated case of MUKISA BISCUITS VERSUS WEST END DISTRIBUTORS (1969) EA at page 696 and BANKRUPTCY CAUSE NUMBER 12 OF 2007: KENNETH MAINA KARITE VERSUS JANE NJERI

3. When the matter came up for inter partes hearing on 12th July 2016, learned counsels appearing for both sides submitted on the preliminary objection. The 2nd Respondent argued that the originating summons dated 11th April 2016 is fatally defective, incompetent and an abuse of the court process for reasons that it fails to comply with Order 37 of the Civil Procedure Rules since it does not provide for variation of an undertaking. It is averred that the relief being sought in the originating summons includes a permanent injunction as framed in prayer 4 of the originating summons which can only issue as per Order 40 of Civil Procedure Rules. It is contended by the 2nd respondent that the prayers for injunction cannot issue as prayed under the originating summons and it cited the cases of **(Kennedy Muyesu Munary vs Wangalwa Oundo (2014) eKLR)** and **(John Nyota Muchunu vs John Kagucia & Co. Advocates (2015) eKLR.)** It further argued that the cited provisions by the Applicants, that is Order 52 Rule 7(1) Civil Procedure Rules deals with the nature of an application to enforce an undertaking whilst the application before this court seeks to restrain the enforcement of an undertaking which is not the purpose of Order 52 rule 7 of the Civil Procedure Rules. It concluded that the Originating Summons is not grounded on any legal standing and should be thrown out especially since the originating summons has not been fixed for directions.

4. The Applicants in response submitted that the preliminary objection is incompetent and is only meant to waste the courts time. They argued that the 2nd Respondent is raising factual matters and not the law. They contended that an injunction is issuable as a matter of discretion and added that directions are only required where the main suit is being heard. They argued that a party can still seek enforcement through cancellation and that Article 159 of the constitution of Kenya abhors the raising of technicalities. They relied on the case of **Kenneth Maina Karite vs Jane Njeri, High Court Bankruptcy cause number 12 of 2007.**

5. In its response, the 2nd Respondent stressed that it has raised pure points of law and pointed out that the authority relied on by the Applicants is distinguishable from this case.

6. I have considered the preliminary objection and the grounds of opposition as well as the oral submissions of the parties. The originating summons dated 11th April 2016 which is the subject matter of this preliminary objection was filed by the Applicants and seeks to determine the following questions:

(1) Whether after the professional undertaking given on 8th December 2015 by M/S HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited (the second Respondent herein) was cancelled/terminated through the Applicants' letter/notice dated 26th March 2016 and whether the said professional undertaking became null and void and unenforceable against the Applicants or any of the parties herein.

(2) Whether after the Second Respondent vanished/failed to undertake consultancy services for architectural Designs and Engineering plans for Drive-in-estate on the Applicants' eleven(11) acre piece of land being part of sub-plot LR no.7879/25 (which Architectural designs including all the engineering plans were supposed to be delivered to the Applicants on or before 15th February 2016) the said professional undertaking given on 8th December 2015 by M/S HARIT SHETH ADVOCATES TO Highbury Consulting Services International Limited (the second Respondent herein) lapsed automatically and the same automatically became null and void and unenforceable against the Applicants or any of the parties herein.

(3) Whether or not the court should cancel and/or nullify the terms and conditions of the professional undertaking in issue herein/the professional undertaking given on 8th December 2015 by HARIT SHETH TRADING AS HARTI SHETH ADVOCATES to Highbury Consulting Services International Limited (the second Respondent herein)

(4) Whether or not this Honourable court should issue a permanent injunction restraining the Respondents jointly and/or severally, their agents and/or servants and/or employees from acting on and/or effecting and/or executing the terms and conditions of the professional undertaking in issue herein/the professional undertaking given on 8th December 2015 by HARIT SHETH TRADING AS HARIT SHETH ADVOCATES to Highbury Consulting Services International Limited.

(5) Whether the first Respondent can effect/act actualize the professional undertaking in issue herein after it was cancelled/terminated by the Applicants.

(6) Whether the Respondents have any valid and/or legal basis of objecting to the cancellation/termination of the professional undertaking herein.

(7) Who should pay costs of the application.

7. In a nutshell, the Applicants claim is that they instructed the 1st Respondents to issue a professional undertaking to the 2nd Respondent on their behalf. In particular, they aver that the terms and conditions of the said professional undertaking were that the 2nd Respondent was going to be paid Kshs.30,000,000/= after it undertook consultancy service for the supply of Architectural Designs and Engineering plans for Drive-in-Estate on the Applicants' eleven (11) acre piece of land next to the schools, on the sub plot LR 7879/25 belonging to the Applicants. They averred that the architectural designs and the engineering plans were supposed to be delivered to the Applicants on or before 15th February 2016. The Applicants are aggrieved since they allege that after the giving of the professional undertaking by the 1st Respondent, the 2nd Respondent vanished and the Applicants have not heard from them since then.

8. It is trite law that a preliminary objection can only be raised on matters of law and not facts. In the case of **Mukisa Biscuits versus West End Distributors (1969) EA 696** the court held inter alia:

“A preliminary objection is in the nature of what used to be 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”

9. In grounds 1 and 2 of the preliminary objection, the 2nd Respondent alleges that the suit is incompetent since the basis of the cause of action as alleged by the Applicants is a breach of contract for failure to deliver architectural drawings. In my view, it is obvious that this case has arisen from an alleged breach of contract between the parties. The existence or non-existence of a contract is not a matter of law but that of fact. A preliminary objection can only stand where there is a presumption that the facts pleaded by the other side are correct and therefore there would be no need to ascertain any facts. In this case having looked at the Originating Summons on the face of it, the court will have to establish whether or not there was a contract between the parties. On the matter in respect of professional undertaking, the court will have to decide whether or not it was cancelled.

In essence the preliminary objection on these two grounds must fail due to the fact that they are matters of fact and not law, since there is a contention on the undertaking and the terms of contract.

10. On the 3rd ground where the 2nd Respondent alleges that the application is illegal and unprocedural and does not lie in law since it offends Order 37 of the Civil Procedure Rules for failure to provide for variation of an undertaking especially given that the relief sought includes a permanent injunction as

framed in prayer 4 of the originating summons and that the same can only issue under Order 40 of the Civil Procedure Rules. Order 37 of Civil Procedure Rules provides for who may take out the Originating Summons and in respect as to which matters. The order provides for Summons to be taken out by executors or administrators of a deceased person, trustees under any deed or instrument and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representatives of a deceased person. In addition summons can be taken out by the vendor or purchase of land in connection with it the contract of sale of land. Other parties that can take out summons includes; mortgagee, mortgagor. Applicants for matters arising in caveats and Adverse possession, person seeking extension of limitation period, applications lodged under the repealed Registered Land Act, Chattels transfer Act, controversial partnership memberships, matters of deed or wills and variation of trusts.

11. In this case the Originating Summons lodged prays for determination of prayers highlighted in paragraph 6 above which prayers are purely based on contractual obligations and honouring of a professional undertaking. It is evident that the cause of action arising herein may not be premised under Order 37 of the Civil Procedure Rules. However it must be noted that the summons is also brought under other provisions cited therein which are relevant. In my view, this ground appears to be more of a technical objection which cannot be encouraged under Article 159 of the Constitution of Kenya, 2010.

12. The other preliminary objection raised by the 2nd respondent is to the effect that the application dated 11th April 2016 offends the express provisions of Order 52 rule 7(1)b of the Civil Procedure Rules since the applicants are not seeking for the enforcement of a professional undertaking. The respondents are of the view that this argument cannot stand because in the Originating Summons they have raised questions touching on whether or not the professional undertaking was cancelled. In my humble view this preliminary point raises a serious issue which needs thorough interrogation which cannot be exhausted through a preliminary objection. A substantive application could have brought out the facts in support of the objection. Even assuming that this court upholds the preliminary objection on this ground, the court can only strike out the summons. That alone will not prevent the applicants from filing another application which will cause a further delay.

13. The applicants if well advised may as well seek to amend the Originating Summons to cure the defect. For the broad interest of justice I decline to uphold this preliminary objection in favour of hearing the merits of the summons instead.

14. In the end the preliminary objection is dismissed. Costs shall abide the outcome of the Originating Summons.

Dated, Signed and Delivered in open court this 16th day of August, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondent