REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL CASE NO. 207 OF 2015

SAFARICOM LIMITED.....PLAINTIFF

VERSUS

CYPRAIN NYAKUNDI.....DEFENDANT

RULING

The plaintiff herein obtained orders against the defendant by way of temporary injunction prohibiting the defendant, his servant's, agents or employees from publishing or causing to be published any statement defamatory of the plaintiff in any manner whatsoever and in particular in relation to the articles published by the defendant on his blog. The order was served upon the defendant and or his counsel on record but the plaintiff alleged that, on 2nd June, 2016 in flagrant breach of the said order the defendant proceeded to publish a defamatory article against the plaintiff, its staff members and other members of the public.

On 6th June, 2016 the plaintiff filed an application seeking an order that, the court do issue a Notice to Show Cause directed at the defendant inviting him to show cause as to why he should not be cited for contempt for disobeying court orders. In the event of failure to show cause, the defendant be committed to jail for contempt of court.

Upon service of the said application the defendant filed a Notice of Preliminary Objection to the effect that the application does not comply with the requisite steps for contempt proceedings as set out in part 81 of the Civil Procedure Amendment No. 2 Rules 2012 that replaced order 52 of the Rules of the Supreme Court of England in its entirety.

The Notice of Preliminary Objection further stated that no order of committal or other orders can be made against the defendant either as sought or at all, because no order alleged to have been breached has ever been served upon the person sought to be committed whether personally as required; the contempt proceedings have not been served on the person to be committed whether personally as required or at all and that the order obtained by the plaintiff and sent to the defendant's counsel did not have a notice of penal consequences endorsed thereon.

Following that Notice of Preliminary Objection the plaintiff filed a replying affidavit sworn by one Daniel Ndaba the Principal In-House Counsel, Litigation Management at the plaintiff's office. The thrust of the said reply is that the said Notice of Preliminary Objection raises factual questions as opposed to pure points of law and can therefore not be sustained. Further, whether or not proper service was effected belongs to the realm of arguments in the substantive application which can only be proved through evidence. It is therefore a waste of time to entertain the said objection.

There are other issues raised in the replying affidavit which however go to the province of the main

arguments in the application. Both learned counsel have filed submissions which I have read including the cited authorities. In the case of **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors (1969) EA** page 696 Law JA at page 700 stated 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".**

In the same case, at page 701 sir Charles Newbold P. stated as follows,

> **"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 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."**

Looking at the thrust of the defendant's objection it is clear that service of the order is a question of fact not law. Therefore his first and second grounds do not aid him. On the issue of whether or not the said order contained a notice of penal consequences, knowledge of the order has been said to be sufficient because in any case it is the body of the order that reflects on what the defendant is supposed to do or not to do. In any case it can hardly be said that the issues raised by the defendant can dispose of the application filed by the plaintiff.

The raising of preliminary objections which are meant to delay the expeditious disposal of matters should be discouraged. In the Supreme Court of **Kenya Civil Application No. 36 of 2014 Independent Electroral and Boundaries Commission Vs. Jane Cheperenger and 2 others** the learned judges had this to say,

> **"The occasion to hear this matter accords us an opportunity to make some observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merits firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing, scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for wining a case otherwise destined to be resolved judicially, and on the merit….**
>
> **In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a cause is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest."**

There are many other cases that have expounded the subject of preliminary objections. The bottom line however is that, if such a step will not dispose off the matter before the court it should be dismissed. With regard to the defendant's Notice of Preliminary Objection in this matter, I find that it lacks merit and should be dismissed. The parties shall now argue the substantive application on a date to be agreed. The costs shall be in the cause.

Dated and delivered at Nairobi this 28th day of September 2016.

A. MBOGHOLI MSAGHA

JUDGE