



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HCC MIS APPL.182 OF 2016

POLLEN LIMITEDAPPLICANT

VERSUS

ESTHER WANJIKU THOMAS.....RESPONDENT

RULING

1. The Applicant, Pollen Limited, filed a Notice of motion dated 22nd April, 2016 seeking orders of stay of execution and leave to file an appeal out of time.

2. The Respondent filed the Notice of preliminary objection dated 28th April, 2016 and raised an objection to the application on the following grounds:

“1. That the High Court has no jurisdiction to entertain an application arising from a suit involving an employer and an employee. This is the province of the employment and labour Relations Court.

2. That the application dated 22nd April 2016 in any event is incurably defective and incompetent to the extent that the party suing or initiating the motion is described as the defendant.

3. That the Applicant is neither challenging quantum nor liability, but challenges the refusal by the Lower Court to decline to hear the case *de novo* simultaneously with a challenge to a Judgement not challenged on the known grounds of liability and quantum a scenario that raises an absurdity and is a clear abuse of the court process.”

3. When the matter came up for hearing on 12th July, 2016 the parties agreed to dispose of the same by way of written submissions. The Respondent filed their written submissions but the Appellant did not file any nor attended Court although they were aware of date fixed.

4. I have considered the grounds upon which the preliminary objection is based, the written submissions and the authority cited.

5. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA

stated that:

“...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.”

Sir Charles Newbold P. added as follows at page 701:

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 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.”

6. I have perused this file in its entirety. The documents filed herein include the Notice of Motion in question together with the affidavit in support and the annexures which include a ruling by the Lower Court in an application seeking to set aside *ex parte* proceedings and judgment. The ruling is dated 14th December, 2015. A draft memorandum of appeal is also annexed. I have also perused the replying affidavit filed in opposition to the Notice of Motion in question.

7. From the said perusal of the file herein, this court is not able to discern what kind of dispute exists between the parties. The plaint and the defence do not form part of this court file. It is not possible to tell from this file whether the dispute is an employer employee dispute or not. This court is not able to determine the preliminary objection on either questions of Law or undisputed facts. Consequently, the preliminary objection is dismissed with costs.

Dated, signed and delivered at Nairobi this 13th October, 2016

B. THURANIRA JADEN

JUDGE