



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 126 OF 2014

MILIKI LIMITED PLAINTIFF

V E R S U S

PATRICK MUKIRI KABUNDUDEFENDANT

RULING

1. For consideration in this Ruling is the Defendant's Preliminary Objection dated 27th October 2014.
2. The Preliminary Objection which I need to say was drafted and filed by Defendant acting in person is in the following terms-

“TAKE NOTICE that the Defendant PATRICK MUKIRI KABUNDU will at the hearing hereof oppose the NOTICE OF MOTION application filed on 14th October 2014 and suit. The Defendant will rely on the following GROUNDS-

1. The High Court lack jurisdiction to entertain this suit.
2. The suit is fatally defective and is without merit.
3. The suit herein is an abuse of Court process.

REASONS WHEREFORE the Defendant prays that the suit herein be dismissed with costs.”

3. It is essential to set out what is a proper Preliminary Objection as held in the celebrated case 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.”

4. Bearing that holding in **MUKISA** case (supra). It is only the first limb of objection that is indeed a proper objection on a point of law. The other objections rely on disputed facts and ought to have been ground for an application and not to a Preliminary object.

5. The basis upon which the first limb was argued by the Defendant is that the Plaintiff was wrong to have filed this action before this Court, rather than at the Business premises Rent Tribunal (BPRT) as provided under Cap 301.

6. The Plaintiff very rightly opposed the Objection on the ground that it sought injunctive orders in this case, which orders are not available at the BPRT. There are many legal authorities supporting the Plaintiff’s response to the objection.

7. In the case **PATRICK B. MAKARI –Vs- MRS DORIS OLOUCH ABIERO (2004)eKLR** the High Court held-

“Having perused through the pleadings and the application before this Court, I find that the Plaintiff’s claim before the High Court is for an injunction, a remedy that only the High Court can grant, and one that he cannot seek before the BPRT. Accordingly, this suit is properly before this Court.”

The Court of Appeal in the case **MOMBASA GAS SUPPLIES LIMITED –Vs- THE REGISTERED TRUSTEE AND TWO OTHERS CIVIL APPEAL NO. 258 OF 2003** it was stated-

“Further, we note that the Plaint filed by the Appellant was seeking as we have reproduced above, a declaration and an injunction. The Tribunal has no jurisdiction to entertain such a claim. That being so, we think that it was not an abuse of the court process when the appellant sought the intervention of the superior Court to protect it against any further notice seeking what it felt was rent far in excess of what it maintained was agreed between the parties.”

8. From the above authorities and indeed considering the Act of Parliament which set up the BPRT, Cap 301, the BPRT does not have jurisdiction to entertain prayers of declaration or for injunction.

9. Accordingly the Preliminary Objection dated 27th October 2014 is dismissed with costs to Plaintiff.

10. It is clear that there is need to dispose of two pending applications in this matter.

11. Accordingly at the reading of this Ruling a date will be given for the hearing of the applications dated 14th October 2014 and 19th October 2014. Those two applications shall be heard together.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE