



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE NO. 345 OF 2013**

**MALOBA TOTAL PETROL STATION**

**CO. LTD. ....PLAINTIFF/RESPONDENT**

**VERSUS**

**TOTAL KENYA LTD. .... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**VIVO ENERGY KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**BUKHUNGU PETROLEUM LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**TIMOTHY ASOMBA MALOBA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling on a Preliminary Objection taken up on behalf of Vivo Energy Kenya Ltd. against an application by Total Kenya Ltd. dated 30/12/2014 and filed on even date.
2. In that application, filed under Certificate of Urgency, Total Kenya Ltd. had sought an injunctive Order restraining Maloba Total Petrol Station Ltd. from using or utilizing fixtures and equipment on L.R. No. Kakamega Town Block I/548 pending the hearing and determination of the suit.
3. The application was placed before me in Chambers as the Vacation Duty Judge on the same day and I directed that it be served on all the Respondents and set it down for hearing inter-partes on 6/1/2015 before the vacation judge.
4. On 6/1/2015, parties appeared before Mukunya, J. at Bungoma, and agreed to appear before this court on 13/1/2015 for hearing. On the same day, 6/1/2015, a Notice of Preliminary Objection against Total Kenya Ltd.'s application was filed on behalf of Vivo Energy Kenya Ltd. On 13/1/2015 when parties appeared before the Deputy Registrar, they resolved that the Preliminary Objection be heard first and set it down for hearing on 22/1/2015. Directions would then be given on the applications after disposing of the Preliminary Objection.
5. The matter was finally listed before me on 22/1/2015 and all parties except the 4<sup>th</sup> Defendant, Timothy Asomba Maloba, were represented. Mr. Masake for Maloba Total Petrol Station, (the plaintiff), and Mr. Luseno for Vivo Energy Kenya Ltd., (the 2<sup>nd</sup> Defendant), supported of the Preliminary Objection, while Mr. Ojuro for Total Kenya Ltd., (the applicant), and Mr. Mukavale for Bukhungu Petroleum Ltd., opposed the Preliminary Objection.

6. The Notice of Preliminary Objection filed on behalf of Vivo Energy Kenya Ltd. raised five grounds which were couched as follows:

**1) “That this Honourable Court has no jurisdiction to interpret/vary and/or review a judgment and/or decision of the Court of Appeal.**

**2) That the application is a collateral attack on the decision of the Court of Appeal and to that extent it shall have the effect of staying the same.**

**3) THAT the orders sought seek to finally determine an issue that is subject to the hearing of the suit.**

**4) THAT the application seeks to shield and or insulate the applicant from acts of contempt committed on 26<sup>th</sup> December, 2014 which are subject of intended proceedings elsewhere.**

**5) Such other and/or further grounds and reasons as shall be adduced at the hearing hereof.”**

7. When Mr. Luseno rose to argue the Preliminary Objection, he took the court through the background of the dispute herein. The Plaintiffs, I understood counsel to refer to Maloba Petrol Station Ltd., filed an application under Certificate of Urgency in this court dated 25/11/2013, while at the same time, Total Kenya Ltd. filed its own application in Nairobi, being HCCC No. 519 of 2013. Both Applications sought temporary injunctive orders.

8. By an order made on 9/12/2013, the two applications were consolidated and heard together, culminating in the ruling of 11/4/2014. In that ruling, Chitembwe, J. granted Total Kenya Limited’s application for injunction and allowed Bukhungu Petroleum Ltd. to continue carrying on its business on the disputed parcel of land L.R. No. Kakamega Town/ Block I/548, but dismissed the application by Maloba Total Petrol Station Ltd.

9. That ruling provoked an appeal to the Court of Appeal and after hearing the appeal, that court delivered a judgment on 18/12/2014, reversing the ruling by Chitembwe, J. The Court of Appeal dismissed the application for Injunction by Total Kenya Ltd. and allowed the application by Maloba Petrol Station Ltd.

10. Subsequently, on 30/12/2014, Total Kenya Ltd. filed the current application for injunction which is now the subject of the Preliminary Objection under consideration.

11. Mr. Luseno, counsel for the 2<sup>nd</sup> Respondent, in advancing his submissions in support of the Preliminary Objection, argued that the grounds upon which Chitembwe, J. had been asked to grant the application for injunction by Total Kenya Ltd. were on infrastructure belonging to Total Kenya Ltd. that is on the suit property. Counsel contended, that by allowing the appeal, the Court of Appeal essentially affirmed the lease between Maloba Petrol Station Ltd. and Vivo Energy Kenya Ltd. and allowed Vivo Energy Kenya Ltd. to operate a Petrol Station on the premises. Counsel submitted that the current application for injunction by Total Kenya Ltd. is a collateral attack on the judgment by the Court of Appeal and allowing this application would be tantamount to allowing Total Kenya Ltd.’s earlier application dated 25/11/2013 which was dismissed by the Court of Appeal.

12. Mr. Luseno further submitted, that this court cannot sit on an application whose effect is to overturn a judgment of the Court of Appeal. According to counsel, this court has no jurisdiction to do that and cannot purport to sit on appeal over the decision of the Court of Appeal. Counsel relied on the decision of *Musiara Ltd. –vs- William Ole Ntimama [2004] eKLR* in which it was held that where an issue has been determined by a decision of the court. (Court of Appeal), that decision should definitively determine the issue as between those who were party to the litigation.

13. Counsel also submitted, that on the issue of precedent, this court lacks jurisdiction to hear the present application as the same has been heard and determined by the Court of Appeal. He asked that the Preliminary Objection be allowed.

14. Mr. Masake, learned counsel for Maloba Petrol Station Ltd., supported the Preliminary Objection, and associated himself with Mr. Luseno's submissions in support of the objection. It was Mr. Masake's view, that the present application seeks to hear a matter already determined. Counsel submitted that granting the application would be done without jurisdiction since the court was being asked to vary the Judgment of the Court of Appeal.

15. Mr. Ojuro, counsel for Total Kenya Ltd., the applicant herein, opposed the Preliminary Objection and submitted that this court has unlimited jurisdiction to hear matters, like the application before it which is brought under O. 40 r. 1 and 2 of Civil Procedure Rules. Counsel argued that while in the earlier application dated 25/11/2013, Total Kenya had sought (in prayer 4) an order for the removal of equipment by Maloba Petrol Station Ltd. and Vivo Energy Kenya Ltd. from the suit premises, the present application seeks restraining orders against those Respondents from using its equipment that are on the premises.

16. Counsel further submitted, that where there is a suit, Order 40 allows parties to come to court for injunctive reliefs and the Court has wide discretion to grant such reliefs. According to counsel, what was said to be a Preliminary Objection should have been a response to the application. Counsel was of the view that the submissions in support of the Preliminary Objection seemed to suggest that the suit by Maloba Petrol Station Ltd. had been finally determined which was not the case.

17. Mr. Ojuro also faulted the submissions in support of the Preliminary Objection saying that the Preliminary Objection could not in any way be argued to suggest that the application was *res-judicata* as the issues in the present application are fresh. Counsel relied on the authority of *Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors [1969] EA 696*. He also referred to the case of *Samuel Waweru –vs- Geoffrey Muhori [2014] e KLR* and argued that the Preliminary Objection was not a pure point of law as envisaged in those decisions but was based on facts.

18. Mr. Mukavale, counsel appearing for Bukhungu Petroleum Limited, joined hands with Mr. Ojuro and opposed the Preliminary Objection. Counsel submitted that parties are in court because Vivo Energy Kenya Ltd. took over possession of the suit premises and operations of the Petrol Station after the decision of the Court of Appeal. Counsel further submitted, that at the time of the ruling of 11/4/2014, Bukhungu Petroleum Ltd. was operating the Petrol Station and continued to do so even as the appeal was being heard. Counsel contended that since Bukhungu Petroleum Ltd. was a substantive Party in these proceedings, the Court of Appeal decision could not be used to evict it from the premises since no order was made against it. He asked that the Preliminary Objection be disallowed.

19. I have considered the Preliminary Objection, submissions by counsel for the parties and authorities cited both in favour of and against the objection. From those submissions and authorities, the issue I have to decide is whether what is really before me is a Preliminary Objection, and if so, whether it should succeed or not.

20. In the Notice of Preliminary Objection filed on behalf of Vivo Energy Kenya Ltd., the first ground of attack is that this court has no jurisdiction to interpret, vary and/or review a judgment and/or decision of the Court of Appeal. This sounded like a challenge to this court's jurisdiction to hear the application before it. Where such a challenge is raised, the court has a solemn duty to interrogate the matter and decide whether indeed it does or does not have jurisdiction to hear the matter before it. This position was aptly put in the case of *owners of Motor Vessel "Lillian S" VS Caltex Oil (Kenya) Ltd. [1989] KLR 1* where it was held at page 14 as follows;

***“Jurisdiction is everything, without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”***

21. The challenge to this court’s jurisdiction was prompted by the application filed herein on 30/12/2014. That application sought a temporary restraining injunctive order pending the hearing and determination of the suit. Total Kenya Ltd., the present applicant had filed an application in this court which was allowed on 11/4/2014, but was overturned on appeal. The Court of Appeal granted Maloba Petrol Station Ltd.’s application which had also sought an injunction restraining Total Kenya Ltd. from interfering with the performance of a lease entered into between it and Vivo Energy Kenya Ltd.

22. It has therefore been argued on behalf of Vivo Energy Kenya Ltd. that this court has no jurisdiction to hear the application dated 30/12/2014, because doing so will amount to interpreting, varying and/or reviewing the Judgment of the Court of Appeal given on 18/12/2014.

23. Was this really a Preliminary Objection? Although ground one of the Notice of Preliminary Objection is couched in a language that would appear to make it look like one, I do not think it is. The law on Preliminary Objections is now settled and there is no dispute as to what a Preliminary Objection is or should be.

24. In the case of *Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] EA 696*, Law, JA defined a Preliminary Objection at page 700 as follows;

***“So far as I am aware, 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....”***

25. Sir Charles Newbold, P. added the following words 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues...”***

26. Taking a cue from those words, I do not think what was argued before me was indeed a proper Preliminary Objection as defined above. Looking at the Notice of Preliminary Objection, the points raised therein cannot be said to be really jurisdictional points of objection. Those points sounded more of grounds of opposition/objection than a Preliminary Objection on a point of law. They could properly be argued during the hearing of the applications. This can also be seen from the 5<sup>th</sup> ground on the Notice of Preliminary Objection, where it is said that further grounds were to be advanced at the hearing. Those grounds were not disclosed and remain unknown.

27. A Preliminary Objection properly understood, taken out and successfully argued, has the singular effect of disposing of the entire application or suit summarily. It should address points of law that are clear, unambiguous and indisputable. Those points must have been pleaded or should arise by implication from the pleadings. They should not appear to address contested issues of fact that require ascertainment. Ojwang’ Ag. J. (as he then was) deciding in *B –vs- Attorney General [2004] 1 KLR 431*; also held as follows;

***“A Preliminary Objection should be founded on pure points of law, and should be truly prefatory and Prepatory to the issues of substance in the claim in question; such a claim may***

***also touch on uncontested facts on the basis of which a decision by the court will dispose of the whole matter coming before it limine.***”

28. It is my considered view, that what was raised before me went beyond the Parameters of a Preliminary Objection. As to whether hearing the application dated 30/12/2014 will amount to interfering with the judgment of the Court of Appeal, is a matter that will have to be demonstrated during the hearing of that application. Both Mr. Luseno and Mr. Masake also at one point appeared to argue that the present application may be *res-judicata*, while Mr. Ojuro and Mr. Mukavale held a different view. That point does not appear in the Notice of Preliminary Objection and therefore could not be pursued at this point without requiring the court to ascertain the veracity of that argument as a matter of fact.

30. And as can also be seen from the Notice of Preliminary Objection such other points as the application being a collateral attack on the decision of the Court of Appeal; that the order sought seeks to finally determine an issue that is subject to the hearing of the suit; and that the application seeks to shield the applicant from acts of contempt of court, demonstrate to what extent these are matters of fact, than Points of law, capable of being taken out as a Preliminary Objection.

31. Mr. Luseno cited the decision of the Court of Appeal in ***Musiara Ltd. –vs- William Ole Ntimama*** (Supra) on the finality of decisions of the Court of Appeal to buttress his arguments. With respect, that decision can be distinguished with the matter before me. In that decision, the Court of Appeal was being asked to use its residual jurisdiction to re-open an appeal and reverse a decision by A. B. Shah, JA. on grounds of likelihood of bias, on a concluded appeal. That is different from the matter before me because in the present application, counsel will have to demonstrate factually how the hearing of the application will go against the decision of the Court of Appeal given on 18/12/2014 and only then can this court decide whether the decision of the Court of Appeal, though on an interlocutory appeal, finally determined the issue between the parties.

32. To my mind, and as it should be understood, the objective of raising a Preliminary Objection is to bring an action, or application to a swift disposal without waiting for such a matter to proceed to hearing, but should never be intended to delay the hearing of the matter.

33. The conclusion I reach, with tremendous respect, is that the Preliminary Objection filed on 6/1/2015 and argued on 22/1/2015 was not well founded, and should not have been taken in the manner it was. Consequently, it is dismissed with costs to Total Kenya Ltd. and Bukhungu Petroleum ltd.

***Dated and delivered at Kakamega this 16<sup>th</sup> day of February, 2015***

**E. C. MWITA**

**J U D G E**