



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 650 OF 2006**

**MUFRANK BUILDERS LIMITED.....APPELLANT**

**VERSUS**

**KIRITI WOMEN TRANSPORT AND HOUSING CO-OPERATIVE  
SOCIETY.....RESPONDENT**

*(An appeal from the original ruling and order of Hon. Mrs. R.N. Kimingi delivered on 28<sup>th</sup> August, 2006  
in Milimani Commercial Courts CMCC No. 10179 of 2003)*

**JUDGMENT**

1. The Appellant sued the Respondent in the Chief Magistrate's Court, in CMCC No. 10179 of 2003 seeking judgment for KShs. 1,783,590/=, costs and interest following an alleged agreement for tender for the construction of commercial/residential building at Murang'a on behalf of the Respondent. In its statement of defence, the Respondent, inter alia, admitted the description of the parties, the existence of the contract of service and the execution thereof as well as the existence of an agreement to pay the Plaintiff's claim by monthly instalments of KShs.20,000/=.
2. On 4<sup>th</sup> August, 2006, the Respondent filed a preliminary objection dated 2<sup>nd</sup> August, 2006 to the effect that the suit was incurably defective and that the Plaintiff ought to be struck out and the suit dismissed with costs. It contended that there was no proper Defendant in the suit as Kiriti Women and Housing Co-operative Society was only registered as a society and is not a legal entity capable of being sued.
3. The Appellant opposed the preliminary objection stating that there was no evidence that the Respondent was registered under the Societies Act (Cap 108) Laws of Kenya and further that, the Respondent having admitted its description in the Plaintiff, it was estopped from claiming otherwise almost four years later. It was also argued that the preliminary objection was res judicata.
4. In response thereto the Respondent submitted that the issues raised in the preliminary objection dated 2<sup>nd</sup> August, 2006 were different from those filed earlier. It was admitted that the Respondent was a registered society as described by the Appellant but that the entire suit was prejudicial to the Respondent in terms of costs.
5. The trial court in a short ruling stated that it had considered the submissions and the authorities relied on by the parties and found merit in the preliminary objection and proceeded to uphold the same.
6. Aggrieved by the said ruling, the Appellant filed this appeal and set out the following grounds:-
  - i. *That the trial magistrate erred in law and fact in finding that the Respondent's preliminary objection had merit.*
  - ii. *That the learned trial magistrate erred in law and in fact in finding that the Appellant's suit was fatally defective and for dismissing it with costs.*

- iii. *That the learned trial magistrate erred in law and in fact in failing to find that the Respondent's preliminary objection filed on 4<sup>th</sup> August, 2008 was res judicata in view of a similar preliminary objection filed on 17<sup>th</sup> January, 2005 and the ruling thereof.*
  - iv. *That the learned trial magistrate erred in failing to give reasons for her finding thus offending the provisions of Order 20 Rule 4 of the Civil Procedure Rules.*
  - v. *That the learned trial magistrate erred in law and in fact in failing to find that the Respondent was estopped by its conduct of admitting its indebtedness to the Plaintiff of repay the debt in instalment.*
  - vi. *That the learned trial magistrate erred in law and in fact in ignoring the Respondent's own admission of its entity and in failing to find that no miscarriage of justice had been occasioned.*
  - vii. *That the learned trial magistrate erred in law and in fact in failing to find that the preliminary objection was raised in bad faith and dismiss it.*
  - viii. *That the learned trial magistrate erred in law and in fact in failing to study the court file*
  - ix. *That the learned trial magistrate erred in law and in fact in overruling Mrs. Meoli's ruling while not sitting on appeal*
  - x. *That the learned trial magistrate erred in law and in fact in awarding costs of the suit to the Respondent.*
  - xi. *That the learned trial magistrate erred in law and in fact in ignoring the Respondent's own defence of admission of indebtedness*
  - xii. *That the learned trial magistrate erred in law and in fact in applying wrong principle of the law and arrived at a wrong and biased decision.*
7. The appeal was canvassed by way of written submissions which were ably highlighted by Learned Counsel.
  8. Ms. Ndungu, Learned Counsel for the Appellant submitted that as at the time of filing the suit, the Defendant was making payments in instalments. She referred to a letter dated 18<sup>th</sup> February, 2002, which was letter headed **KIRITI WOMEN TRANSPORT & HOUSING CO-OP SOCIETY LTD.** and stated that the same was written by the Respondent to her firm prior to the filing of the suit and that at the time, the Respondent was indicated to be a Cooperative Society Ltd. She further submitted that, that was the basis for the Respondent to have been sued as such. It was the Appellant's argument that an incorporated society is a legal entity capable of suing and being sued. Reliance was placed in the case of **Hindu Dispensary (Zanzibar) v. N.A. Patel and Sons (1958) E.A.** It was submitted that the Respondent having admitted the description in the Plaintiff and having not given evidence to the contrary, the trial court was in error to uphold the preliminary objection.
  9. Ms. Ndungu further submitted that Section 12 of the Societies Act makes a society a body cooperate with perpetual succession; that the cash deposit receipts produced in evidence described the Respondent as a cooperative society limited and that the court should have allowed the Appellant to amend the Plaintiff. Counsel relied on the case of **Gatanga Coffee Growers Co-operative Society v. Gitau (1970) E.A. 361** in support of her submissions.
  10. It was Ms. Ndungu's submissions that, since the Court had previously dealt with another Preliminary Objection, it was not open for the Respondent to raise yet another preliminary objection at the trial. Counsel concluded that no reasons for the decision were given in the ruling of the Court contrary to Order 21 Rule 4 of the Civil Procedure Rules.
  11. Mr. Onindo, Learned Counsel for the Respondent opposed the appeal and submitted that, a proper person should be sued and admittance of the description of a party in a pleading does not legitimise/legalise a party. He argued that it was submitted before the trial court that the Respondent was only a society and was not incorporated. That in the Plaintiff, there was no reference to the term limited therefore the letter dated 18<sup>th</sup> February, 2002 was misleading. That the receipts relied on by the Appellant which were referring to Kiriti Women Transport and Housing Cooperative Society did not indicate that the Respondent was incorporated. Counsel submitted that, the Respondent is governed by the Societies Act (Cap 108) and not the Co-operative Societies Act (Cap 490); that under Section 41 of Cap 108, the Society should have been sued through its officers. Counsel further submitted that the issues in the preliminary objection filed on 17<sup>th</sup> January, 2005 were different from those in the preliminary objection filed on 4<sup>th</sup> August, 2008 and the latter could therefore not be termed as being res-judicata. The trial court was defended that it had fully considered the arguments before arriving at the ruling.

12. This being a first appeal, this court is under an obligation to re-evaluate the facts afresh and come to its own independent findings and conclusions as was observed in **Selle v. Associated Motor Boat Company & Others (1968) E.A. 123**.
13. I have carefully considered the entire record as well as the authorities relied on by the parties. In my view, the following issues (grounds) fall for this court's determination:-

- i. *Whether the ruling of the court was in breach of Order 21 Rule 4 of the Civil Procedure Rules.*
- ii. *Whether or not the preliminary objection was res judicata.*
- iii. *Whether or not the preliminary objection met the threshold for preliminary objection.*

14. The Appellant took issue with the trial court's ruling that it failed to satisfy the provisions of the law. The trial court's ruling was as follows: -

**“Ruling**

*Defendants’ objection on Notice of which is dated 2<sup>nd</sup> August, 2006 and filed on 4<sup>th</sup> August, 2006 refers. I have considered the submissions by each counsel and the authorities relied on by counsel for the defendant. The Preliminary Objection is merited is upheld. Plaintiff’s suit herein is struck out with costs.”*

15. It is a general rule that a judgment or ruling should contain a concise statement of the case, the points for determination, the decision and the reasons for such decision. The object of so doing was given by Henry LJ in the English case of **Flanner Vs Halifax Estate Agencies Ltd (200) IALL ER 273** he stated at pages 377 – 378: -

*“(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.*

*(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself...”*

16. I have set out the Ruling of the trial court above. It is clear that the the same contains neither the statement of facts, the points for determination nor the reasons for the decision. The same in my view, falls foul of the requirements of Order 21 Rule 4 (formerly Order XX Rule 4) of the Civil Procedure Rules. The same cannot be described as a ruling of a Court. At best, it is a mere statement devoid of any juristic content. Reading the same one cannot tell what the objection was all about or the reasons for upholding the same.

17. The Law pertaining to the doctrine of res judicata is captured under **Section 7** of the **Civil Procedure Act** which provides as follows:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

18. The Black's Law Dictionary, 9<sup>th</sup> Edition, 2004 defines res judicata at pg 1425 as:-

***“a thing adjudicated. An issue that has been definitively settled by judicial decision...”***

The Learned writers state the three (3) elements that are essential while determining the issue of res judicata as follows:-

- a. an earlier decision on the issue;
- b. a final Judgment on the merits;
- c. the involvement of the same parties.
- s. The question that arises in the instant case is whether or not the preliminary objections raised the same issues and whether the doctrine was applicable in the circumstances. The preliminary objection dated 17<sup>th</sup> January, 2005 was in the following terms:-

***“...the Defendant will at the hearing of this matter raise a preliminary objection on points of law, that the plaint, verifying affidavit and summons to enter appearance as well as the suit herein are incurably defective and the plaint ought to be struck out and the suit dismissed with costs on the following grounds:-***

1. ***The summons offends the mandatory requirements of Order IV Rule 3, Order V Rule 13 and Order V Rule 15 of the Civil Procedure Code requiring that summons be signed.***
2. ***The verifying affidavit offends the mandatory requirements of S. 34 and S. 36 of the Advocates Act Cap 16 requiring that pleadings and affidavits must disclose the drawer thereof...”***

20. While the preliminary objection dated 2<sup>nd</sup> August, 2006 was in the following terms:-

***“...the Defendant will at the hearing of this matter raise a preliminary objection on points of law, that this suit is incurably defective and the plaint ought to be struck out and the suit dismissed with costs on the following ground that there is no proper Defendant in this suit as Kiriti Women and Housing Co-operative Society is only registered as a society and is not a legal person capable of being sued...”***

21. While both objections sought the striking out of the Plaint and dismissal of the suit, the grounds thereof were different. The Objection dated 17<sup>th</sup> January, 2005 was on the grounds that the summons offended the mandatory requirements of Order IV Rule 3, Order V Rule 13 and Order V Rule 15 of the Civil Procedure Rules requiring that summons be signed. The other ground was that the verifying affidavit offended the mandatory requirements of S. 34 and S. 36 of the Advocates Act Cap 16 requiring that pleadings and affidavits must disclose the drawer. On the other hand, the objection dated 2<sup>nd</sup> August, 2006 was predicated upon the ground that there was no proper Defendant in the suit as Kiriti Women and Housing Co-operative Society was only registered as a society and was not a legal person capable of being sued. It may therefore be argued that the preliminary objection dated 2<sup>nd</sup> August, 2006 was not similar to the earlier one.

22. However, Explanation (4) of Section 7 aforesaid provides: -

***“Explanation (4) – any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”***

Since Section 7 applies to applications as it does to suits by dint of Section 83 of the Civil Procedure Act, my view is that the issue raised in the Second Objection should have been raised in the first objection.

23. I hold this view because, what was before court in the first objection was the defective nature of the Plaint. This was the same issue in the second objection. What differed were the grounds. In

this regard, since the ground of the non-suitedness of the Respondent could have been properly raised as one of the grounds in the first objection, I hold that under Explanation (4) aforesaid, that was an issue that was directly and substantially in issue in the first objection. To that extent therefore, the Preliminary Objection dated 2<sup>nd</sup> August, 2006, was res judicata.

24. Did the objection meet the threshold? The court in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** set the definition of a preliminary objection 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...The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had 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 issue. The improper practice should stop..." (Emphasies own).*

25. The Respondent contended that it was a society registered under the Societies Act (Cap 108) Laws of Kenya and therefore not a legal entity. This issue was contested by the Appellant whose argument was among others, that the Respondent furnished no evidence, particularly a certificate to prove that it was registered under the Societies Act and not the Co-operative Societies Act. It should be noted that the Plaintiff had described the Respondent as an entity incorporated under the Cooperative Act, which description had been admitted by the Respondent.

26. In **George Oraro v. Barak Mbaja [2005] 1 KLR 141** where J.B. Ojwang (as he then was) stated as follows:-

*"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."*

*"...It is clear to me that the issue raised by the defendants pertaining to representation of these parties, would require evidence and in which case they cannot be entertained by way of Preliminary Objection as relations cannot be inferred and on that ground alone, this objection cannot be sustained..."*

27. On the foregoing, two issues arise. Firstly, evidence was called upon to prove or disprove the contention that either the Respondent was registered under the Societies Act or the Co-operatives Act. That alone meant that the Preliminary objection fell foul of the threshold set by the Mukisa Biscuit Case. Secondly, since a Preliminary Objection is raised on the basis that the facts as pleaded are correct or on settled facts, the objection as raised was contrary to paragraph 1 of the Defence which had admitted the description of the Respondent as a body corporate registered under the Co-operatives Act. Thirdly, having admitted its description as contained in the Plaintiff, the Respondent was estopped by virtue of Order 2 Rule 6(1) of the Civil Procedure Rules from asserting otherwise. For the Respondent to contend that it was not a body corporate as it had admitted in its defence, it had first to amend its Defence which it had not done. Clearly, the objection could not stand.

28. In view of the foregoing, it is quite clear that the trial court was clearly wrong in how it handled the issue before it. Had it properly directed its mind by writing a reasoned ruling, it would have clearly come to the conclusion that the Preliminary Objection had no merit.
29. Accordingly, for the foregoing reasons, I find the Appeal to be merited. I allow the appeal in terms of prayer Nos. 1 and 3 of the Memorandum of Appeal. The suit is remitted back to the lower court for trial as per the law provided.

DATED, Signed and Delivered at Nairobi this 26<sup>th</sup> day of March, 2015.

**A. MABEYA**

**JUDGE**