



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CONSTITUTION APPL. NO. 1 OF 2012

FRANCIS JAMES NDEGWA.....APPLICANT

versus

2NK SACCO.....RESPONDENT

RULING

1. By a notice dated 2nd April 2012 the Applicant gave a notice of preliminary objection on a point of law to the effect that the replying affidavit dated 11th June 2012 was out of time because notice of motion was served to the respondent on 20th March 2012.
2. The Applicant therefore prays that the replying affidavit dated 11th June 2012 be dismissed with cost and judgment entered in favour of the Applicant as prayed.
3. **HISTORY**
4. For the purpose of this ruling it is in the interest of justice that the history of this matter be set out.
5. On 19th March 2012 the Applicant filed a notice of motion under certificate of urgency under Article 36(1) 3(a) and (b) of the Constitution of Kenya 2010 for an order that the Respondent be ordered to issue the Applicant with the mandatory introductory letter for acquisition of TLB Licences so as to comply with the Legal Government Directions.
6. The application was on 20th March 2012 certified urgent and fixed for interpartes hearing on 29th March 2012 which happened to be a date when the court was on vacation.
7. On 11th June 2012 when the matter was fixed for hearing before Justice Sergon then at 11.40 am the Applicant was not in court and the application was duly adjourned with cost to the Respondent.
8. On 20th June 2012 the Applicant filed another certificate of urgency which on 21st June 2012 was placed before Justice Sergon who ruled that the application was not urgent and hearing date thereon ordered to be fixed at the registry.
9. On 10th July 2012 the Applicant filed a further application under certificate of urgency for review of the ruling of Justice Sergon ordering the hearing date of the application herein to be fixed at the Registry which application was fixed for interpartes hearing on 26th November 2012 when I ordered that since there were two applications seeking the same orders pending before this court the same amounted to an abuse of the court process and advised the Applicant to make an election as to which application he wanted to proceed with.
10. On 26th February 2013 Directions were issued that the application be heard by way of oral evidence and hearing date thereof fixed at the registry. I further advised the Applicant to seek proper legal advice on the nature of this application herein.
11. On 11th August 2013 the parties herein fixed by consent the hearing of the petition by way of oral evidence for 16th December 2013 when the Applicant raised the preliminary objection the subject matter of this ruling.
12. **ISSUES FOR DETERMINATION**
13. The only issue for courts determination is whether the Applicant's preliminary objections herein

- qualify as a preliminary objection on point of law and further whether the same has merit.
14. Preliminary objection is a point of law that when taken would dispose of the suit. In the leading case thereon of MUKISA BISCUIT MANUFACTURING CO. LTD vs WESTEND DISTRIBUTORS LTD [1969] EA 696 Law Ja states that
 15. *“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by close 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.*
 16. The alleged objection before the court is that the reply was filed out of time and should be struck out and dismissed.
 17. **SUBMISSION**
 18. It was submitted by the Applicant that since the reply was filed out of time he is entitled to apply for judgment in default of appearance under section 7 rule 1 of the Civil Procedure Act and therefore the Respondent should not be heard.
 19. It was submitted by Mr. Karweru for the Respondent that in a petition the advocate does not file an appearance but files a notice of appointment of advocate and a reply which he had done on 29th March 2013 and 11th June 2012 respectively and that thereafter the petition is fixed for hearing directions having been given.
 20. **DETERMINATION**
 21. Having listened to the submission by the parties herein it is clear to my mind that the alleged preliminary objection herein does not meet the legal requirement of a preliminary objection on point of law noting that even if the same were allowed it would not dispose of the suit herein.
 22. It should also be pointed that the Applicant having filed a constitutional reference the rules of the civil procedure as to service of summons to enter appearance and filing of appearance to does not apply the same.
 23. The court having given direction on the mode of hearing of the petition herein in the presence of the Applicant and the Advocate for the Respondent and the parties having taken directions on the mode of hearing, I therefore agree with the submissions by Mr. Karweru that the preliminary objection herein is an abuse of the court process and does not qualify as a preliminary objection.
 24. The preliminary objection herein is therefore dismissed with cost to the Respondent payable before the main petition herein is fixed for hearing.
 25. Dated and delivered at Nyeri this 27th day of February 2014.

J. WAKIAGA

JUDGE

Court:

Ruling read in open court in the presence of Mr. Karweru and in the absence of the Applicant.

J. WAKIAGA

JUDGE

27/2/2014