



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPL. NO. 19 OF 2014

IN THE MATTER OF AN APPEAL

BETWEEN

ABDULRAZAK HUSSEIN OMAR.....APPELLANT

-V E R S U S-

PATRICK M. NYAMU T/A

GLOBAL WOODS AND AGRO-HARDWARE.....RESPONDENT

(Being an appeal against the entire decision contained in the Rulings and the orders to be extracted therefrom given by the Principal Magistrate, Voi (Hon. Nyakundi) dated 9th January 2014, 15th January 2014 and 24th January 2014 in Voi SPMCC No. 175 of 2013)

RULING

1. Although this action is entitled as a Miscellaneous matter what indeed it is, is an appeal against various orders made in Voi Magistrate's Court in the **Civil Case No. 175 of 2013**. The Appellant, **ABDUL HUSSEIN OMAR**, is aggrieved by orders made in that case before the Voi Principal Magistrate's Court which orders required him to deliver to Voi Principal Magistrate's Court the Motor Vehicle registration No. KBG 583K.
2. Appellant obtained from this Court on 30th January 2014 the stay of the proceedings before the Voi Court.
3. On 30th April 2014 this Court also made an order that the Appellant was to deliver the aforesaid motor vehicle to the Voi Magistrate's Court.
4. It is in that background that Respondent Patrick M. Nyamu T/A Global Woods and Agro-Hardware moved this Court by the Preliminary Objection dated 17th June 2014. The objection is as follows-

“TAKE NOTICE that the Respondent herein shall raise a Preliminary Objection against the Applicant’s application dated 1st May 2014 and pray that the same be struck out with costs on the following grounds-

- i. **The Applicant has not complied with the Court order of 30th April 2014 ie the suit motor vehicle has not been delivered to Voi Law Court by the Applicant hence he has no right of audience.”**
5. Although Respondent in that Objection indicated that he was seeking the striking out of the Appellant’s application when however his Learned Counsel submitted in favour of that Objection he submitted that because Appellant had not obeyed this Court’s order of 30th April 2014 Appellant should be denied audience before Court and or that Appellant’s pending application be adjourned until there is obedience.
6. Respondent also relied on his affidavit sworn in this matter on 26th August 2014. By that affidavit Respondent deponed-
 - **THAT as of today 25th August, 2014 the Applicant herein, ABDULRAZAK HUSSEIN OMAR Had not delivered the motor vehicle registration number KBG 583K to the Chief Magistrate’s Court Voi as ordered by this Honourable Court on 30th April 2014 and I have personally confirmed this position,**
 - **THAT I therefore pray that the said Applicant be denied audience in this Court and, further, that the interim order of 30th January 2014 in his favour be discharged forthwith and unconditionally.**
7. Appellant opposed the Objection and relied in that opposition to case C.A.K CIVIL APPLICATION NO. NAI 224 OF 2006 STANDARD FINANCIAL SERVICES & ANOTHER –Vs- MANCHESTER OUTFITTERS (SUITING DIVISION) LTD (Now known as KING WOLLEN MILLS LTD & 2 Others). The Court of Appeal in that case discussed what a proper Preliminary Objection is. As per KIAGE J.A the Learned Judge had this to say-

“My own way of looking at the matter is that a preliminary objection is essentially a pre-emptive strike against the pleading or proceeding objected to. In raising it, the objector essentially invokes the Court’s summary jurisdiction to deal with the issue raised liminally and reject the challenged pleading, application, suit or proceeding without having to hear it on its merits. That being the true nature and effect of a preliminary objection properly understood, I apprehend that it is to be upheld only in the clearest of cases where there really can be no valid argument or dispute both as to the correctness of what is asserted and as to the consequence of it, which is that what is sought to be struck out is entirely unsustainable. Then only can the drastic move be justified. It would follow that if the issue being raised is one that calls for serious disputation, then a court would be remiss to dispose of it at the threshold without the advantage of full merit-based argument by both sides. This implicates the natural justice requirement of *audi alteram partem* and is in consonance with the Court’s bounden constitutional duty to do substantial justice untrammelled by technicalities of procedure.”

8. In that case the Court referred to the celebrated case of MUKISA BISCUIT CO. –Vs- WEST END DISTRIBUTORS [1969]E.A. 696 which I too will refer to as follows-

“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. This improper practice should stop.”

9. What the Respondent seeks from this Court is two-fold. Firstly that the Court do find Appellant has failed to obey the Court order of 30th April 2014. Secondly on finding that to be a fact the Court to proceed to strike out the Appellant’s application or adjourn the matter and then deny Appellant the right of audience.

10. Bearing in mind the above references to the above cases it becomes clear that Respondent is inviting this Court to enter into an investigation on whether Appellant did or did not obey the order of 30th April 2014. Such invitation of fact finding does not fall within the ambits of what is regarded as a proper Preliminary Objection. That is what was stated in the case of **MUKISA BISCUIT** that preliminary objection cannot be where what **“if fact has to be ascertained or if what is sought is the exercise of judicial discretion.”** If this Court was to engage itself to determine as a fact that Appellant has not delivered the car and if the Court in exercise of its discretion was to deny Appellant audience this Court would run foul of that holding of that case.

11. It is because of that that the Preliminary Objection dated 17th June 2014 is hereby dismissed with costs to Appellant.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE