



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Case 225 of 1993**

**NAGENDRA SAXENA.....PLAINTIFF**

**VERSUS**

**MIWANI SUGAR MILLS LIMITED.....DEFENDANT**

**AND**

**MIWANI SUGAR CO.[1989] LIMITED**

**(in Receivership).....1ST INTERESTED PARTY**

**CROSSLY HOLDINGS LIMITED.....2ND INTERESTED PARTY**

**JOHN GITAU KIMANI**

**T/A JOGI AUCTIONEERS.....3RD INTERESTED PARTY**

**R U L I N G**

This case has a long history, but the events that led to the present objection can be traced to the application dated 22/2/12 by the defendant. In the application by way of motion it was sought that the Registrar of Titles or the Principal Registrar of Titles does cancel entries Nos.30, 31 and 32 registered against the title to land reference No.7545/3 (L.R.No.21038) that were made pursuant to orders given on 24/12/07. The defendant further sought that the order emanating from this application be served upon the Registrar of Titles or the Principal Registrar of Titles for compliance. The application came for hearing before Justice Chemitei on 6/12/12. The respondents were absent. The court noted that they had been served but had not opposed the application. The same was subsequently granted as prayed.

On 6/3/13 the 2nd Interested Party filed a motion seeking to have vacated the proceedings of 6/12/12, the subsequent ruling and its orders. They related to the defendant's application as shown in the foregoing. The motion was based on various grounds, including the following:

- a) the application dated 22/2/12 was heard and determined in the absence of all the other parties;
- b) it was not disclosed to the court that, among other things, there was a pending HCCC No.459 of 2008 at MILIMANI between the parties over the same property; and that the 3rd Interested Party had not been substituted; and

c) the application had been filed by an advocate who had no authority from the defendant.

On 11/3/13 the 1st Interested Party filed a notice of preliminary objection to the application by the 2nd Interested Party. The objection was based on the following grounds:

“The applicant is in contempt or in breach of the order of the court made on 10/4/2008 and served on its counsel on 23/4/2008 (copy annexed) and as such it has no right to file and prosecute the present application or to be otherwise heard in the proceedings until the order is complied with or the contempt purged. In further support of this objection the defendant will demonstrate that the applicant manufactured a court order dated April 23rd 2008 (copy annexed) in order to facilitate the contempt. The defendant shall pray that the application dated March 6th 2013, be struck out and/or the *ex- parte* order dated March 6th 2013, be set aside.”

It is material to point out that following the motion dated 6/3/13 Justice Chemitei granted an *ex-parte* order staying the execution of the order issued in the application dated 28/8/12 until the matter was heard inter-partes.

Mr. Nowrojee for Mr. Gakoi for the plaintiff, Mr. Onsongo for the 3rd Interested Party and holding brief for Mr. Nyuthe for the 2nd Interested Party and Mr. Otieno for the defendant and 1st Interested Party agreed to argue the preliminary objection. Mr. Nowrojee, Mr. Otieno and Wangai Nyuthe filed written submissions on the same. I have considered everything that counsel submitted on the objection.

According to HALSBURY'S LAWS OF ENGLAND, 3rd Edition, volume 30 at page 17, any pleading can raise any point of law. A point of law so raised is called an objection. Such a point of law can be heard as a preliminary issue between the parties. The preliminary objection assumes as true the facts alleged by the other party and declares that those facts are not sufficient to raise the legal inference or to afford the ground of relief for which the other party contends.

In the celebrated MUKISA BISCUIT CO. LTD .V. WEST END DISTRIBUTORS LTD [1969] E.A. 696 at page 700, Law J. A. 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 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 in the same case at page 701 observed that:

“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 question that is important for the court is whether in raising the preliminary objection the 1st Interested Party was admitting that all the facts alleged in the supporting affidavit by the 2nd Interested party in the application dated 6/3/13 were true. When I listened to Mr. Otieno and read his submissions, it was quite clear that all the facts raised were being challenged. The evidence improperly introduced in the submissions challenged every aspect of the application. It meant therefore, and I agree with Mr. Nowrojee and Mr. Onsongo on this point, that the determination of the objection entailed delving into and resolving disputed facts.

The 1st Interested Party's objection was on the ground that the 2nd Interested party was in contempt of or in breach of the court order made on 10/4/08 and served on its counsel on 23/4/08 and as such had no right to file and prosecute the present application. It was further contended that the 2nd Interested Party was in contempt by manufacturing a court order dated 23/4/08. Whether or not a party is in contempt of a court order has to be proved by way of evidence. In fact, according to the Court Appeal in MUTITIKA .V. BAHARINI FARM LTD [1985] KLR 227, the evidence required is more than that which

is required in an ordinary civil case, and almost, but not exactly, that which is required to prove a criminal case. The 2nd Interested Party has not been found guilty of contempt, and therefore evidence has to be led to prove it. The fact that the 1st Interested Party annexed a copy of served order and a copy of the order of 23/4/08 to the notice of preliminary objection was an acknowledgement that evidence was required to prove contempt. Was contempt one of the facts alleged in the application by the 2nd Interested Party? Can contempt be assumed as true from the facts alleged?

I have not been able to find that there is merit in the preliminary objection given the application, and the history of the suit, between the parties. I dismiss the objection with costs

Dated, signed and delivered this 13th day of May 2013.

**A. O. MUCHELULE**

**J U D G E**