

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 1 OF 2013

JANET KERUBO NYABERI.....APPLICANT

VERSUS

ALEXANDER S. MWANZALA.....RESPONDENT

RULING

This ruling concerns a preliminary objection dated 6th May, 2013 seeking orders *inter alia* that the originating summons filed on 15th February, 2013 by the applicant is totally defective and should be struck out. I have carefully considered the said preliminary objection and I have also taken into consideration the written submissions filed by both parties. It is well settled that a preliminary objection may only be raised on matters of law not on matters of fact that require proof by way of evidence. In the case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VS. WEST END DISTRIBUTORS LIMITED** it was held as follows:

“A preliminary objection is in the nature of what used to be a demurer. 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.”

I have looked at this preliminary objection and I find that it does not raise pure points of law. It clearly raises questions of fact which can only be determined through an evidentiary hearing. I find no merit in this preliminary objection and the same is hereby dismissed with costs to the applicant.

Dated and delivered in Mombasa this 16th day of December, 2013

M. ODERO

JUDGE