



**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE No. 335 of 2010**

**GOMBATO (1975) LTD. ....PLAINTIFF/APPLICANT**

**-VERSUS-**

**1. NATIONAL BANK OF KENYA LTD**

**2. WATTS ENTERPRISES.....DEFENDANTS/RESPONDENTS**

**RULING ON A PRELIMINARY OBJECTION**

Against the background of the suit by plaint dated **29<sup>th</sup> September, 2010** the plaintiff filed Chamber Summons of even date, brought under s.69A(1)(a) of the Transfer of Property Act; s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya); Order XXXIX, Rules 1, 2, 3 & 9 of the earlier edition of the Civil Procedure Rules; and Rule 15(d) of the Auctioneers Rules, 1997. The applicant sought a permanent injunction against the defendants by themselves, their servants, agents, workers, employees, proxies and/or any other person howsoever from selling and/or transferring title in respect of land parcel No. 8547/9, Ukunda, Kwale, pending the hearing and determination of the suit. The applicant also sought Orders requiring 1<sup>st</sup> defendant/respondent to render an account of monies received from the plaintiff/applicant.

The defendants, through their *Advocates, M/s. Mutisya Bosire & Co., Advocates*, on **19<sup>th</sup> November, 2010** filed a notice of preliminary objection on points of law. The defendants contended that:

*(i) the suit is res judicata in the light of Mombasa CMCC No. 496 of 2004, Gombato (1975) Ltd. v. National Bank of Kenya Ltd involving the same parties and issues and which had been dismissed; hence the suit contravenes s.7 of the Civil Procedure Act (Cap.21);*

*(ii) the suit is sub judice, in the light of a pending suit, in Mombasa HCCC No. 549 of 2000, Gombato (1975) Ltd v. National Bank of Kenya Ltd. – involving the same parties and issues; and so the suit contravenes s.6 of the Civil Procedure Act (Cap.21).*

Learned counsel, **Mr. Mutisya** made submissions on his clients' objections to the suit: he urged that the plaintiff herein had filed Mombasa CMCC No. 496 of 2004, **Gombato (1975) Ltd. v. National Bank of Kenya Ltd**, which was dismissed; and hence the instance suit contravenes s.7 of the Civil Procedure Act (Cap.21) which makes provisions on suits *res judicata*. The plaintiff also filed Mombasa HCCC No. 549 of 2000, **Gombato (1975) Ltd. v. National Bank of Kenya Ltd** involving the same parties and issues, and this is still pending in Court: and therefore, counsel urged, the instant suit contravenes the *sub judice* rule, provided for in s.6 of the Civil Procedure Act.

Learned counsel contends, inappositely, with respect, that “[the] plaintiff did not file any affidavit to

answer [or] respond to any of the above objections”, and that on that account “[the] defendants’ preliminary objection... succeeds, and the plaintiff’s application and entire suit should be struck out and dismissed with costs.”

Without prejudice, at this very stage, to the burden of those prayers as the Court may later find them to be, learned counsel errs, as a matter of law, when he invites an affidavit-response. Depositions in an affidavit certainly belong to the category of *evidence*; but the law pertaining to *preliminary objections*, in its essence, is now embedded in the Court of Appeal decision in **Mukisa Biscuit Manufacturing Co. Ltd. v. East End Distributors Ltd** [1969] E.A. 696, in which **Sir Charles Newbold, P** stated:

**“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.”**

This Court, therefore, expects the plaintiff-applicant to respond to the objection not by evidence, but by rebutting argument founded on applicable *legal principle* – and that is all. It is on that basis that the Court must evaluate the applicant’s answer, before determining the objection.

Learned counsel, **Mr. Kiume Kioko** for the applicant, submitted that the *res judicata* principle is inapplicable in this matter: because his client’s earlier suit, CMCC No. 496 of 2004, **Gombato (1975) Ltd v. National Bank of Kenya Ltd** involved a different property from the one in issue in HCCC No. 335 of 2010; in issue in CMCC No. 496 of 2004 is L.R. No. 8517/Ukunda/Kwale, whereas the suit property in HCCC No. 335 of 2010 is L.R. No. 8517/9/Ukunda/Kwale: out of the original title, L.R. No. 8517/7/2/Ukunda/Kwale, “*various plots were created*”; and “*therefore the plot currently in issue is [quite] different from the one in CMCC No. 496 of 2004.*”

**Mr. Kiume**, furthermore, urged that “*the issue raised in CMCC No. 496 of 2004 is quite different from the issues raised in the present case*”; the present case being for *injunction*, and a rendering of *accounts*. In CMCC No. 496 of 2004 the issue had been for the *release of title document*, in respect of L.R. No. 8517/Ukunda/Kwale.

Counsel submitted that in the current suit (HCCC No. 335 of 2010), the plaintiffs plead that the defendants have attempted to sell the suit premises without first giving *statutory notice*; and the plaintiff is also seeking a rendering of *accounts* by the defendants.

Counsel submitted that the *sub judice* rule is inapplicable as between HCCC No. 335 of 2010 and HCCC No. 549 of 2000: because the two suits carry different prayers – HCCC No. 549 of 2000 seeks to restrain the defendant from auctioning and/or advertising for auction the suit premises; and in that suit there is no prayer for *accounts*.

For effect, learned counsel urged that, as a matter of law, “*each attempt to advertise [the suit property] for sale raises its own cause of action and each attempt is independent of the other and, therefore, the issues as raised are different from one another.*”

Counsel submitted that, not all the points of objection herein are of the nature of *law*; and that the points of *fact* therein “*may be canvassed during [the] hearing of the application for injunction inter partes or by way of viva voce evidence.*”

While the objectors supposed that the plaintiff/applicant would meet their objections by adducing *evidence*, the applicant has relied wholly on points of law, save for factual matters on pleadings that already form part of the Court record. I am of the opinion that the applicant’s approach is in compliance with the law relating to preliminary objections, but the defendant’s position is not similarly compliant.

On the claim of *res judicata*, as part of the objection, a perusal of the relevant case-pleadings shows that the plaintiff in Mombasa CMCC No. 496 of 2004 had sought as the sole substantive prayer, “*Release of*

*the plaintiff's title deed on Plot No. 8517/Ukunda Kwale unlawfully held by the defendant"; and in Mombasa HCCC No. 549 of 2000 the sole substantive prayer was for: "An injunction restraining the defendant whether on its own or [by] its appointed agents, servants and/or [assigns] from advertising and/or selling the plaintiff's property situate*

*at Plot L.R. No. 8517/9/Ukunda Kwale."*

From the evaluation herein, it is clear that the preliminary objection is not well-based in law, and that neither the doctrine of *res judicata* nor that of *sub judice* applies to bar the plaintiff's suit in the main cause, or the application made thereunder.

Consequently, the preliminary objection is dismissed with costs to the plaintiff/applicant.

This matter shall be listed for mention within 14 days of the date hereof, for the purpose of giving directions on the hearing of the Chamber Summons of **29<sup>th</sup> September, 2010**.

**Orders accordingly.**

**SIGNED at NAIROBI .....**  
**J.B. OJWANG**  
**oderoJUDGE**

**DATED and DELIVERED at MOMBASA this 24<sup>th</sup> day of February, 2012.**

**MAUREEN ODERO**  
**JUDGE**