REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.871 OF 2009

EQUITY BANK LIMITED……….…......................................……PLAINTIFF

VERSUS

NEPTUNE CREDIT MANAGEMETN LIMITED .... DEFENDANT

R U L I N G

1. On 24th January, 2012 Hon Apondi J dismissed the Plaintiff's suit. That ruling was read and delivered by Hon. Musinga J (as he then was) on 3rd February, 2012. Upon delivering the said ruling, counsel for the Plaintiff applied for leave to appeal and stay of proceedings to prevent a threatened advertisement for winding up proceedings. On the said application, Hon. Musinga J made an order of status quo to be maintained for seven (7) days to enable the Plaintiff lodge a formal application.
2. On 9th February, 2012, the Plaintiff filed a Notice of Motion expressed to be brought under Sections 80, 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Orders 45 and 40 of the Civil Procedure Rules. The same sought six (6) substantive prayers. One of the prayers presumably made pursuant to Section 80 of the Civil Procedure Act under which the application was brought was that:-

"............the ruling and order made/dated 24th January, 2012 and delivered on 3rd February, 2012 dismissing plaintiff's suit and application for interlocutory injunction dated 1st December, 2009 be reviewed and set aside."

3. By a ruling delivered on 13th March, 2012, Hon. Musinga J orders, inter alia, that:-

"There will be a stay of further proceedings in this suit, HCCC NO. 871 of 2009, including the filing of the defendant's bill of costs, pending hearing and determination of the Plaintiffs intended appeal."

4. On 16th May, 2012, the Defendant took out a motion on Notice dated 15th May, 2012 under Sections 1A, 1B, 3, 3A, 80 and 63 (e) of the civil Procedure Act an Orders 45 and 51 of the Civil Procedure Rules. The application sought to, inter alia, review the order of 3/2/2012 and to nullify the order of 13/3/2012. On 31/5/2012, the Plaintiff gave notice of Preliminary Objection to the Defendant's application dated 15th May, 2012. Both the Preliminary Objection and application were argued by way of written submissions dated 9th October, 2012 and 14th October, 2012 by the

Defendant and the Plaintiff, respectively.

5. Having considered the Affidavit on record, submissions of counsel and authorities, this is my decision. I will first determine the Preliminary Objection and thereafter deal with the application. The Preliminary Objection raised three (3) issues. These are, that the application contravenes Order 45 Rule 6 of the Civil Procedure Rules, that the application contravenes Section 6 of the Civil Procedure Act and that the application contravenes the order of 13th March, 2012 that had stayed these proceedings pending the hearing and determination of the Plaintiff's appeal against the Order of 3rd February, 2012.
6. The Defendant attacked the Preliminary Objection as being incompetent. Firstly, that the Preliminary Objection was against the letter and spirit of Article 159(d) of the Constitution which enjoins this court to administer justice without undue regard to technicalities, as well as Sections 1A, 1B and 3A of the Civil Procedure Act, that the grounds set out in the Preliminary Objection do not satisfy the requirements of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (1969) EA 696** as to preliminary Objections, that there was no point of law raised as the objection required ascertainment of facts, contrary to the holding in **NAS Airport Services –Vs- Attorney General of Kenya (1959) EA 53**. Finally, that the objection required the exercise of discretion contrary to law that the Preliminary objection was not founded on any pleading as the suit herein had already been dismissed.
7. The law as to Preliminary Objections is well settled. In the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (Supra)** the Eastern Court of Appeal held at page 701 that:-

   "A Preliminary Objection is in the nature of what used to be a demurrer. It raised 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 ascertained or if what is sought is the exercise of judicial discretion."

At page 700 the court had stated that:-

> ***"..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which .... by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit." (Emphasis supplied)***

8. To this end, I am in total agreement with Counsel for the Defendant as to the nature of a Preliminary Objection. That being the case, does the Plaintiff's objection satisfy the requirements set out in the Mukisa Biscuits case? I have looked at the three points raised by the Plaintiff's preliminary objection. I note that two of the grounds are on the efficacy or competence of the Defendant's motion dated 15th May, 2012 in view of the provisions of Section 6 and Order 45 Rule 6 of the Civil Procedure Act and Rules, respectively. Those to my mind are clearly points of law. There are no facts that are to be ascertained to be able to determine the issues raised in respect thereof. One needs only to look at the record and would be able to determine the same. The third point is whether the Defendant's application dated 15th May, 2012 is in breach of the order of stay granted by the court. That also in my view, is a point of law. Indeed I have looked at the record, I have not seen any facts that are contested. It is a fact that there was a ruling delivered on 3rd February, 2012, that ruling dismissed the Plaintiff's suit, on the application by Counsel for the Plaintiff, the court made an order for the maintenance of status quo pending the filing of a formal application. Those are the undisputed facts. Whether there is a dispute as to the interpretation each party gives to the said set of facts, in my view, does not matter for the purposes of the Preliminary Objection before me. To my mind therefore, I am not in agreement with Counsel for the Defendant's submissions that the Plaintiff's Preliminary point breaches the principles set out in the Mukisa Biscuits case.
9. As regards Article 159(2) (d), it is true that courts are now enjoined by the Constitution to pursue substantive justice rather than entertain mere technicalities. Indeed the court's inherent jurisdiction has further been extended by the enactment of the overriding objective provisions of Sections 1A and 1B. These provisions, in my view, enjoin courts to pursue justice rather than

upholding obstacles that impede the citizens crave for justice. The question that arises is whether there is a constitutional provision and/or statutory enactment that allows the courts to ignore express legal provisions. Are courts to entertain disputes that are clearly in breach of the law? I don't think so. Courts are there to administer the law. They are not to bend the law for whatever reason. Unless a legal provision is clearly against the constitution or unjust in its application, courts are not to ignore any law on the basis of either Article 159 (2) (d) or Sections 1A and 1B of the Civil Procedure Act. The Defendant did not argue that Section 6 and Order 45 rule 6 are unconstitutional or are unfair in a democratic society. To my view, the two provisions are necessary and are meant to guard against abuse of court process. Accordingly, I reject the Defendant's contention that the Preliminary Objection, which I have shown is anchored on clear provisions of the law, is a mere technicality that is against the spirit of Article 159(2) (d) or Sections 1A and 1B of the Civil Procedure Act.

10. This now brings me to the Preliminary Objection itself. I have already set out above the contents of that objection. On the first point, Order 45 of the Civil Procedure Rules deals with applications for review. The substantive law on review is to be found in Section 80 which is one of the provisions under which the Plaintiff's application of 9th February, 2012 was made. That application sought, inter alia, to review and set aside the order of 3rd February, 2012. The Defendant did not deny that the application by the Plaintiff dated 9th February, 2012 was for review and that its own application dated 15th May, 2012 was for the review of the decisions made on an application for review. Indeed in its submissions dated 9th October, 2012 at page 16 paragraph (g), the Defendant stated:-

> ***"g) On the same Preliminary Objection brought under Section 6 of the Civil Procedure Act, the Defendant/Applicant submits that the matter in issue herein in this Application is a review and setting aside of orders......" (Emphasis supplied)***

11. To my mind therefore, this is a clear admission that the gist of the Defendant's current application is for review. Order 45 Rule 6 of the Civil Procedure Rules provides:-

> ***"6. No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained." (Emphasis mine)***

It is clear from this provision that the law bars any application to review an order made on review.

12. It may be argued that the Defendant's application of 15th May, 2012 seeks two orders. One order is to review the order of 3rd February, 2012 which was not an order on review and the one of 13th March, 2012 which was an order made on review. My take of it is that, the two prayers are sought in a consequent manner and not in the alternative. If they were sought in alternative then probably it could be argued that the application is divisible and that the court may deal with one prayer and leave intact the offending prayer. Now that the prayers were not sought in the alternative, my view is that the prayers are made jointly and application is therefore unseverable and cannot escape the provisions of Rule 6 of Order 45 of the Civil Procedure Rules. In any event, that application by the Defendant was made way after an application for review had been made against the order of 3rd February, 2012 and a decision thereon made on 13th March, 2013.
13. My view is that, Rule 6 of Order 45 is meant to guard against abuse of process. It is good public policy that once a court has been called upon to look at its own decision by way of review, it will be wrong to call on that court to once again reconsider that decision. That will amount to nothing but mounting an appeal to the same court on a decision it has already reviewed. Accordingly, I am of the view that the Defendant's application fell foul of Rule 6 of Order 45 of the Civil Procedure Rules.
14. On the application of Section 6, the Plaintiff contended that the matters raised in the Defendant's application are directly and substantially in issue in an already pending contempt proceedings commenced on 16th February, 2012 being **HC Misc Civil Application No. 105 of 2012**. I have perused the entire record for a copy of the said application but I saw none. The Plaintiff did not introduce the proceedings or pleadings in the aforesaid **HC Misc Civil Application No. 105 of**

2012 either by way of Affidavit or otherwise. It is trite law that he who alleges the existence of a certain set of facts, must prove the same. The Plaintiff did not prove the existence of the alleged **HC Misc. Application No. 105 of 2012** for the court to interrogate the issues therein and juxtapose the same with the issues raised in the Defendant's application under consideration. Accordingly, I find that ground to be without merit and I reject the same.

15. The last objection is that, the application is an affront to the order made on 13th March, 2012 which had stayed the proceedings herein. The Defendant did not address this particular ground. I have seen the ruling of Musinga J delivered on 13th March, 2012. In the penultimate paragraph, the court held:-

> ***"40. Taking into consideration all the relevant factors in this matter and in the interest of justice, I make the following orders:-***

a. ***There will be stay of further proceedings in this suit, HCCC No.871 of 2009, including filing of the Defendant's bill of costs, pending hearing and determination of the Plaintiff's intended appeal."***

16. My reading of the said Order is that these proceedings were stayed until the Plaintiff's intended appeal is heard and determined. A look at prayer 2 of the motion will show that the Defendant is seeking to re-open the proceedings which a court of law has already stayed. Although prayer No. 3 seeks to challenge that order, which in my view may be right, but I have already held that that order was made on a review and cannot be sought to be reviewed. Whichever way one looks at it, the application is untenable and I sustain this ground also.

17. Accordingly, the Preliminary Objection dated 31st May, 2012 is hereby upheld and the Defendant's Motion dated 15th May, 2012 is struck out with costs to the Plaintiff.

DATED and **DELIVERED** at Nairobi this 22nd day of February, 2012.

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A. MABEYA

JUDGE