



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Civil Case 605 of 2010**

**ANNE NJERI MANGI .....PLAINTIFF**

**- VERSUS -**

**NJOMAITHA INVESTMENTS LTD.....DEFENDANT**

**R U L I N G**

1. Before the court is a notice of **Preliminary Objection** dated **22<sup>nd</sup> June 2012**. It is filed under **Order 51, Rule 14 (1)** of the **Civil Procedure Rules**. The Preliminary Objection is premised against the Plaintiff's **Chamber Summons** dated **13<sup>th</sup> June 2012**. The said Chamber summons sought *inter-a-alia* the following prayers:-

- That this court be pleased to set aside the ex-parte proceedings of **23<sup>rd</sup> May 2012** and order the Defendant's application dated **30<sup>th</sup> January 2012** and the Plaintiff's application dated **8<sup>th</sup> February 2012** be fixed for hearing simultaneously on a priority basis.
- That the Defendant be denied audience of court until they comply with the order to deposit **Kshs.50 million** in a joint interest earning account as security for this suit.

2. In its Notice of Preliminary Objection the Applicant has raised the following grounds:-

1. That the grounds upon which the application is premised are not supported by the provisions of the law the application is purportedly brought under.
2. That the application is brought under the wrong provisions of the law.
3. That letter dated **27<sup>th</sup> April 2012** produced as annexure "**DM1**" by Peter Karimi Mughoh is inadmissible in evidence under the '*without prejudice rule*'.
4. That the said letter is void for want of authority.
5. That the supporting affidavit of Anne Njeri Mwangi sworn on **14<sup>th</sup> June 2012** is not duly filed and should be expunged from court record.
6. That the application is devoid of merits and ought to be struck out.

7. That the application is otherwise an abuse of the court process thus ought to be dismissed with costs to the Defendant.

8. And on such further or other grounds to be adduced at the hearing.

3. On **26<sup>th</sup> June 2012** the parties orally submitted on the Preliminary Objection. The Applicant submitted firstly that the application by the Plaintiff annexes documents made on a “*without prejudice*” basis and that these documents should be struck out immediately as it causes embarrassment to the ongoing negotiations between the parties. Mr. King’ara for the Defendant cited the case of **NZAU - VS - MBUNI TRANSPROTTERS LTD. CIVIL SUIT NO. 496 OF 1988 – MOMBASA**, where the court observed *inter-a-alia* as follows:-

**“The rational of the ‘without prejudice’ doctrine is to encourage parties to a dispute to engage in pre-trial and out of court settlement without fear that admissions of certain facts would be used against them to their prejudice.”**

**“Section 23 of the Evidence Act, (Cap 80) renders as inadmissible admissions which the parties either by an express condition or by implication did not intend to be adduced in subsequent pleadings.”**

3. I have considered annexure “**PM2**” attached to the affidavit of Mr. **Peter Karimi Mugoh** dated **13<sup>th</sup> June 2012**. Annexure “**PM2**” is not a letter on a “without prejudice” basis. It is a Hearing Notice dated **4<sup>th</sup> May 2012**. However I have noted that a letter dated **27<sup>th</sup> April 2012** addressed to Wafula Simiyu & Company Advocates and is on “*without Prejudice*” basis has been attached to the said affidavit but is not marked as an exhibit. Mr. Simiyu for the Plaintiff explained that they are not relying on that letter. This then begs the question: **Why was it attached?** No reason is given as to why that letter was attached and not marked. Was it carelessness in Mr. Simiyu’s office? I cannot tell. Be that as it may the purported letter is not a document recognized by this court. It has not marked as an exhibit and it has not been referred to in the said affidavit of Peter Karimi Mugoh. I therefore equally disregard it. I have also noted that the contents of the said letter has a bearing on the suit herein but it has no relevance to the Plaintiffs’ application dated **13<sup>th</sup> June 2012**.

4. Secondly Mr. King’ara submitted that the 2<sup>nd</sup> affidavit by the Plaintiff dated **13<sup>th</sup> June 2012** has not been duly paid for and that it is a fraud on court’s revenue. In answer to this charge Mr. Simiyu submitted that the court clerk simply omitted to stamp the said affidavit, stating that stamping of documents is a court function and that it was upon the court to stamp both affidavits.

From the court record I notice that the entire application was paid for and the firm issued with a receipt dated **14<sup>th</sup> June 2012** for a sum of **Kshs.880/=**. Any anomaly in stamping of the 2<sup>nd</sup> affidavit was clearly negligence on the relevant court official, although the recipient was obligated to verify the same.

5. I do not find it necessary to strike out the second supporting affidavit sworn by the Plaintiff. But even if I were to do that, the application would still be firmly supported by the first affidavit of **PETER KARIMI MUGOH**.

6. The 3<sup>rd</sup> limb of Mr. King’ara’s submissions was that the application is premised on the wrong provisions of the law. Mr. Simiyu denied this allegation. However in my view, this ground is pre-mature at this stage. If it is true, it can be the basis upon which the said application can be denied. This ground ought to abide the hearing of that application.

7. I have observed that the grounds of objection to the Plaintiff’s application dated **13<sup>th</sup> June 2012** are all technical issues. **Section 159** of the Constitution encourages the court to rely less on technicalities in arriving at decisions. This does not mean that the Constitution has thrown away order and procedure. However, in the instant case, the said technicalities which were alleged to have been breached have not been proven.

More importantly, again, there are orders of this court which the Defendant has to date not complied with. It is possible, as contended by the Plaintiff, that this Preliminary Objection proceedings are meant to further delay the suit.

7. For the reasons foregoing I dismiss the Preliminary Objection contained in its notice dated **22<sup>nd</sup> June 2012** with costs to the Plaintiff.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*N/A for the Plaintiff*

*Ndegwa H/B Karule for the Defendant*

*Teresia – Court Clerk*