REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 169 of 2007

1. **HARMINDER SINGH NANDRA** (Suing as the personalrepresentative of the Estate of Baaj Singh Nandra and also suing on his own behalf)**……..……...1st PLAINTIFF**

2. **WEBUYE WOOD PRODUCTS COMPANY LIMITED……..2ND PLAINTIFF**

VERSUS

1. **BARCLAYS BANK OF KENYA LIMITED ….....…….1st DEFENDANT**

2. **BENJAMIN KISOI SILLA T/A LEGECY AUCTIONEERING SERVICES LIMITED.....2nd DEFENDANT**

RULING

By way of Notice of Motion dated and filed in Court on 18th day of April 2008 and brought under Order XLIV Rule 1 (1) b and 1 (2) among other rules of the Civil Procedure Rules and all the enabling provisions of the law. The Application is seeking the following orders:

1. That the Honourable Court be pleased to review and vacate its orders issued on the 26th day of February 2008 discharging the injunction against the parcel No. Ndivisi/Much/1591.

2. That the Court be pleased to add the name of one Jonathan Welangayi Masinde as a 3rd Plaintiff

3. That costs of this application be in the cause

The Application is grounded on that all the outstanding debts has been paid and that a portion of the property is registered in the name of Jonathan Welangayi Masinde who is willing to be enjoined in the suit herein. That the said Jonathan Welangayi Masinde is a necessary party to be in the suit. There is an affidavit in support of the Application sworn by the said Jonathan Welangayi Masinde in which he confirmed that in Paragraph 4 that he is the registered proprietor of a piece of land forming part of the land in this suit. He annexed a copy of a title to prove ownership of the portion he claims. In essence, the Applicant is seeking within the same application an order reviewing orders issued on the 26th day of February 2008 discharging the injunction and at the same time, he wants to the suit papers be amended in order to introduce a new party namely Jonathan Welangayi Masinde.

The Application is vehemently opposed by the Defendants. Grounds of opposition dated 5th June 2008 were filed. The Respondents filed on the same day of 5th June 2008 a Preliminary Objection against the Application. The Respondents want the Application be struck out on point of law. The parties filed list of authorities in court in support and in opposition of the Preliminary objection.

As usual, matter started with Mr. Ngugi prosecuting the preliminary objection. He submitted that the Application is defective and unsustainable at law. He also submitted that the Application is incontestably defective as there is no decree or order issued or annexed to the Application for purpose of being reviewed.

The Learned Counsel further argued that it is mandatory legal requirement for the applicant to extract the order he wants to be reviewed and produce it before the court to be acted upon by the Honourable Court. In support of this line of argument, the learned counsel relied on the case *Gulamhussein Mulla Jivanji and another –vs- Ebrahim Mulla Jivanji and another (1929-1930 KLR 41).* He also relied on the case of *Agriculture Syndicate Limited –Vs- Paramount Bank Limited* (HCCC No. 586 of 2001) (unreported at the time). In his view, the application must fail because it is not clear who is making the application. He wondered how an applicant who is yet to be enjoined in the suit can ask for review of orders made earlier. Mr. Ngugi further submitted that the 2 prayers cannot be dealt with in the same application. The prayers are of different nature and in respect of different causes of actions and parties. The Learned Counsel also argued that the mix up is inappropriate and cited the case of *Bahiriya Petroleum Ltd –vs- Gulf Oil Company Limited & Another (HCCC No. 400 of 2001)*. All in all, Mr. Ngugi urged the court to uphold the preliminary objection and dismiss the application.

Mr. Gumbo, the learned counsel for the applicant challenged the preliminary objection. In his view, extracted decree is not mandatory requirement in an application to review court orders but that it is mandatory in appeals. The learned Counsel opined that since the orders were made by me, I can go ahead and review it. He cited Section 80 of the Civil Procedure Act and argued that the Section does not make it a requirement to extract and annex order in an application for review. Mr. Gumbo differed with Mr. Ngugi on the applicability of *Gulamhussein Mulla Jivanji and another –vs- Ebrahim Mulla Jivanji and another (1929-1930 KLR 41on the present application*. In his view, this particular decided case applies only to appeal and not to reviews.

Mr. Gumbo believes that this is not a preliminary objection because it delves into realm of facts which cannot be dealt with without hearing the Application. The learned counsel further urged the court to disregard Respondent's submission that a person who is not a party cannot make an application for review. Mr. Gumbo submitted that the 2 prayers could be combined within one application as his client did in this application. The Learned Counsel cited the case of *Njoroge –vs- Mbiti (1986) KLR 519* in support of his argument. In this particular case, the Court of Appeal held *inter alia* that:

"On the other hand, a wider discretion is provided in bringing applications for review under sanction 80 of the civil procedure act and order XLIV of the civil procedure rules, both of which do not make reference to the term "parties in a suit" probably because it is desired to cater for persons who have not right of appeal"

In Mr. Gumbo's view, the holding in this case makes the preliminary objection untenable. He further submitted that applicant is a right party to be in the suit because he is protecting proprietary interest and therefore he has locus standi in the matter. That the applicant cannot be wished away as has sufficient interest in the matter and that to avoid multiplicity of suits in, it is appropriate to allow the Applicant in the matter. The Learned Counsel for the Applicant further submitted that there is no prejudice to the Respondents if the Applicant is enjoined in the suit. He urged the court to dismiss the Preliminary Objection dated 5th June 2008 with costs to the Applicant.

Mr. Ngugi made a brief rebuttal of the Mr. Gombo's submission. He asserted that it is mandatory under Order 44 of the Civil Procedure Rules that decree must be drawn, extracted and annexed in an application for review. That the order which being reviewed must extracted brought before the Court. The Learned Counsel submitted that the preliminary objection does not contain contentious issues and therefore valid

point of law.

I have considered the rival arguments put forward by the two learned counsel appearing for the parties herein. I have also considered the authorities relied upon in support and in opposition of the preliminary objections. I have to commend both counsels for their incisive research. The statutory and the case law relied upon by the counsel were very useful. The 1st issue I wish to address is whether the Respondents' preliminary objection raises preliminary points of law. The findings and holdings in *MUKISA BISCUIT MANUFACTURING CO. LIMITED –VS- WEST END DISTRIBUTORS LIMITED (1969) EA 696* the leading authority on this point.

The purported preliminary objection in the **Mukisa case** was an application for summary dismissal of the suit for want of prosecution. The trial court overruled the application after hearing the Appellant`s counsel, but without calling upon the opposite counsel to reply; and without reading its reasons in open court. The Court then gave judgment in the substantive suit. Upon appeal of that judgment, the issue of the original preliminary objections was raised afresh. The Appellant`s counsel contended that the matter (of summary dismissal of the suit for non-prosecution), had been raised under the guise of a preliminary objection – when it was not. It should have been raised in the form of an application by way of motion – accompanied by affidavits, and a reply by the plaintiff giving reasons for the delay in prosecuting the suit. The Court (LAW, JA) emphasized that the proper form should have been by way of a motion, and not a preliminary objection – which it was not. He underlined the essence of a preliminary objection as being:

*"**A point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit**"*.

The President of the Court (SIR CHARLES NEWBOLD) – mindful of the paucity of "facts in that case, and the inevitable dispute as to what were the facts" – gave a succinct elaboration of this point, thus:

"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 and 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. The Court considers that this improper practice should stop."

It is abundantly clear from the above, therefore, that the adoption of a wrong procedure, disadvantages the Applicant and the Respondent, as well as the judicial process itself.

It is equally clear that the improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues.The Court must, therefore, insist on the adoption of the proper procedure for entertaining applications for preliminary objections. In that way, it will avoid treating, as preliminary objections, those points that are only disguised as such; and will, instead, treat as preliminary objections, only those points that are pure law: which are unstained by facts or evidence, especially disputed points of fact or evidence or such like.

Applying the above test on the preliminary objection raised herein by the Defendants, the issues which arise are whether the Applicant prayer to be enjoined in the suit be confronted with a point of law that will enable the court to disregard the facts he deponed to in his affidavit in support of the application and whether an applicant who is yet to be allowed in the suit can bring an application for review and whether court can review an order which was not extracted and annexed to the application for review. It is my considered opinion that the Applicant ought to have drawn, extracted and annexed the Court order in his Application for the purpose of it being reviewed. It was oversight on his part. However, I doubt as to whether the Application is founded on proper grounds for review as set out under Order 44 of the Civil Procedure Rules thought that is a matter the parties may deal with in the hearing of the application itself. Nevertheless, I would exercise court's discretion and refuse to strike out the application on this point partly because technicalities should not override the general purpose of litigation. On the other 2 points, it is my holding that the Applicant is not precluded from bringing an application for review if he has good

ground as was rightly held in *Njoroge –vs- Mbiti (1986) KLR 519.*

Despite the plausible argument made by the learned counsel for the Defendants Mr. Ngugi which can still be useful in reply to the Application during the *inter parte* hearing, I do hereby hold that the Preliminary Objection fails to meets requirements set out in *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696*. I therefore overrule the Preliminary Objection dated 5th June 2008. Costs shall be in the Application.

It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2012

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Nyaroto for the Appellant