



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 390 of 2012

AINU SHAMSI HAULIERS LTD.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

The plaintiff in this suit filed a Notice of Motion dated 1<sup>st</sup> August 2012 expressed to be brought under the provisions of Order 40 rules 1, 2, 4(i) of the Civil Procedure Rules, 2010, the High Court Vacation Rules, Section 3A and 63E of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:

1. **THAT the application be certified as urgent and be heard ex parte in the first instance.**
2. **THAT an interim order do issue restraining the Defendant from interfering, seizing, impounding and or in any way dealing with Motor Vehicle Registration No. KAU 460R, KAU 423F, KAU 542M, KAU 104K, KAU 543M and KAU 661Z till determination of this application.**
3. **THAT an interim order do issue restraining the Defendant from interfering, seizing, impounding and or in any way dealing with Motor Vehicle Registration No. KAU 460R, KAU 423F, KAU 542M, KAU 104K, KAU 543M and KAU 661Z till determination of this suit.**
4. **THAT the costs of this application be provided for.**

On being served with the said application the respondent filed a Notice of Preliminary Objection on Points of Law dated 8<sup>th</sup> August 2012 in which it raised the following issues:

1. **THAT the suit is bad in law, misconceived, incompetent and fatally defective, as the relief sought cannot issue against the Respondent, as they would contravene Section 3(2) of the Kenya Revenue Authority Act, Cap 469 as read together with Section 16 of the Government Proceedings Act, Cap 40.**
2. **THAT in any event, the entire suit herein is premature and cannot be heard as no Notice of Intention to sue has been served against the Respondent in accordance with Section 13A of the Government Proceedings Act Cap 40.**
3. **THAT the orders sought are misconceived, incompetent and fatally defective, as the relief sought cannot issue against the Respondent, as the same is a statutory function expressly set out in**

the Law.

4. **THAT the orders sought are misconceived, incompetent and fatally defective, as the relief sought cannot issue against the Respondent Defendant in a standard Civil Suit and should have instead been canvassed under the province of Judicial Review.**

5. **THAT the entire suit against the Respondent herein is a gross and blatant abuse of the Court process and the same should be dismissed entirely with costs to the Respondent**

The said points were by consent of counsel prosecuted by way of submissions and are the subject of the present ruling.

In its submissions the respondent contends that the plaintiff did not serve on the Defendants a notice of intention to sue as is mandatory under section 13A(1) of the Government Proceedings Act. Relying on **Swift Commercial Establishment Ltd vs. Kenya Revenue Authority, High Court Civil Case No. 588 of 2007** and **Kidayu Ole Lepet and 9 Others vs. Nkuruna Masikonde and 11 Others [2005] eKLR** in which **Hudson Laise Walimbwa vs. Attorney General HCCC No. 2714 of 1987** was cited, it is submitted that section 3(2)(a) of the Kenya Revenue Authority Act Cap 469 as read with section 13A(i) of the Government Proceedings Act, Cap 40 Laws of Kenya no proceedings against the Government under the Government Proceedings Act can lie or be instituted before the statutory notice has been given and expired. In this case it is submitted that what the applicant has done is to ambush the respondent to Court and hence the suit is incompetent and ought to be struck out or dismissed for want of prosecution

It is further submitted that the applicant is abusing the court process by means of seeking delaying tactics on the imminent payment of taxes lawfully due to the Respondent and it is only fair and just that in the circumstances to allow the Respondent undertake its statutory duties unhindered and to safeguard much needed government revenue.

On the part of the respondent it is submitted that it is trite law that a preliminary objection must state pure points of law in exclusion of the facts and the cases of **Oraro vs. Mbaja [2005] eKLR and Wilfed Korir vs. Faridin Suleiman & 4 Others [2012] eKLR** are cited for this proposition.

It is further submitted that judicial review is best suited for instances where there is a decision by a public body. In this case a decision is yet to be made and hence this court can exercise its original and unlimited jurisdiction in trying this suit. It is further submitted that this issue calls for evidence to be adduced before this Honourable Court and therefore a preliminary objection raised herein should be struck out.

The first issue for determination is the circumstances under which a preliminary objection can be entertained. In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696**, Law, JA was of the following view:

**“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

As for Newbold, P:

**“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.**

However in **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** it

was held that:

**“The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of *res judicata* are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion”.**

Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion.

In Wilfed Korir vs. Faridin Suleiman & 4 Others [2012] eKLR I expressed myself as follows:

**“With respect to the second ground, it is correct that under section 13A(1) of the Government Proceedings Act it is mandatory that for legal proceedings to lie against the Government, a 30 day period notice must be given. How then does one prove that a notice was given? In my view, a preliminary objection is not the appropriate procedure to adopt when it is alleged that a statutory notice was not served since to controvert the same would necessarily require the opposite party to adduce evidence of service. Where it is alleged that no such notice was served, it is prudent that a formal application supported by an affidavit be made unless it is admitted that no such notice was actually served”.**

In that decision I relied on Oraro vs. Mbaja [2005] 1 KLR 141 in which Ojwang, J(as he then was) expressed himself as follows:

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with**

disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"... The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute".

In this case it is alleged that no notice was served before the suit herein was instituted. Whether or not a notice was served is a matter of fact which if not admitted requires evidence to be proved or disproved. In Grace Ndegwa & Others vs. Hon. Attorney General civil Appeal No. 228 of 2002 Omolo, JA, Onyango Otieno & Deverell, AJJA while dealing with the same section 13A aforesaid expressed themselves as follows:

**"As clearly spelt out in section 72 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya, in a case where a form is prescribed by written law, all instruments or documents which purport to be in that form shall not be void by reason of a deviation from the form if the same document does not affect the substance of the document or is not calculated to mislead. The courts have a duty to look into the spirit of the document and whether the document served its purpose... Where one of the reliefs sought is a declaration that the retrenchment programme is discriminatory, defamatory, illegal, null and void section 13A(1) of the Government Proceedings Act does not cover such a relief which means that the Appellants needed not to issue notice of intention to sue in respect of declaratory relief and that being the case, the Court cannot strike out parts of the reliefs sought and leave other parts...The practise of applying guillotine to cases through preliminary objection before the full hearing should be discouraged and a Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal as normally a suit is for pursuing it...Although rules are there to allow for striking out a case by way of a preliminary objection or by way of a substantive application and Civil Procedure Rules and all other rules for ensuring orderly conduct of cases have to be complied with fully, in such cases, the Court should ensure that where the spirit or purpose of the document is clear, a litigant should be allowed to pursue his substantive claim as long as no prejudice will be suffered by the other party".**

Accordingly I reject the preliminary objection raised in so far as it seeks to terminate the suit and the application based on the notice.

With respect to the issue whether or not the plaintiff ought to have instituted judicial review proceedings, the issue was not pursued in the submissions by the defendant. Accordingly I would not like to comment on the same.

On the issue that the suit is an abuse of the process of the Court, it is my view that such issues are better dealt with in the application itself or by way of an application seeking to strike out the suit since they go the merits of the case.

I have said enough to show that the preliminary objections raised herein are unmerited. The same are dismissed with costs to the plaintiff

Dated at Nairobi this 28<sup>th</sup> day of November 2012

**G.V ODUNGA**  
**JUDGE**

Delivered in the presence of:

Mr Wanderi for Mr Nyangweso the Respondent