



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)

CIVIL APPEAL NO. 215 OF 2010

ISLAM AHMED SAIDAPPELLANT/APPLICANT

VERSUS

TRUSTEES OF KING FEISAL TRUST OF KENYA.....RESPONDENT

RULING

The appellant's application by Notice of Motion of **17th November, 2010** was brought under ss. 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act (cap. 21, Laws of Kenya), and Order **XLI**, Rule 4(1) of the Civil Procedure Rules. The application had two main prayers:

- (i) *“THAT pending the hearing of this application **inter partes**, the Court be pleased to grant temporary stay of the execution of the rent assessment by the Rent Restriction Tribunal made on **9th October, 2009** in RRT (MSA) Case No. 39 of 2009”;*
- (ii) *“THAT the Court be pleased to stay the execution of the rent assessment herein pending the hearing and final determination of this appeal”.*

After the first of those prayers was granted on a temporary basis (by **Mr. Justice Ibrahim** On **18th November, 2010**), the respondent filed a Notice of Preliminary Objection on **30th November, 2010**; the objections were as follows:

- (i) *the appeal had been filed after the expiry of the 30 days allowed under s.79(g) of the Civil Procedure Act;*
- (ii) *leave had not been obtained to file the appeal out of time;*
- (iii) *the “entire application is fatally defective as it is listed on an inexistent appeal”.*

It is this preliminary objection that is coming up for a ruling.

Learned counsel began from the premise that the appeal in question is one challenging a ruling and/or order given by the Rent Restriction Tribunal on **7th September, 2010**; and urged that such an appeal is governed by the terms of s.75(1) of the Civil Procedure Act, which read as follows:

“An appeal shall lie as of right from the following orders and shall also lie from any other order with

the leave of the court making such order or of the court to which an appeal would lie if leave were granted.....”

Counsel urged that an appeal herein is not contained in the Orders specified under Order **XLIII** (1) of the Civil Procedure Rules, or those specified in s.75(1) of the Civil Procedure Act, under which an appeal may be lodged without leave. He submitted that the appellant was required to obtain leave either at the Tribunal or from this Court, before filing this appeal. Counsel submitted that the appeal is fatally defective, for having been filed without leave; and he asked that the appeal be dismissed with costs. Counsel urged that “the failure to obtain leave is a fundamental error that goes to the root of the appeal.”

Counsel for the appellant contested the objection for being made as a *pure point of law*, when the objector’s gravamen necessarily entailed *matters of fact*; the objector had overlooked the fact that, before the Tribunal, “leave to appeal was sought and [was] granted.....immediately upon the delivery of the subject ruling.....”

Besides, counsel urged, even though leave to appeal had indeed been granted, it was not necessary, as this was a matter in respect of which an appeal lies as of right.

Counsel submitted that, the application giving rise to the ruling in question, had been made before the Rent Restriction Tribunal by virtue of s. 5(1) (m) of the Rent Restriction Act (Cap. 296, Laws of Kenya), and was not made under the provisions of the Civil Procedure Act; hence appeals in that respect are governed by s.8 of the Rent Restriction Act.

On that basis, counsel submitted that it was not the case, that the appellant’s Notice of Motion of **17th November, 2010** was fatally defective.

Counsel invoked the Court of Appeal’s decision in ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** [1969] E.A.696 for the proposition (p.701, *per Sir Charles Newbold, P*) that:

“[A preliminary objection].....raises a pure point of law which is argued on the assumption that 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

Counsel submitted that the question whether the appellant had indeed obtained the requisite leave, can only be verified upon production of the Tribunal’s file.

The scenario herein falls perfectly within the apprehensions of the Court of Appeal in the ***Mukisa Biscuit*** case: all the objector achieved was to confuse issues, and to engage the Court’s time unnecessarily; the objector needed to have ***evidence*** on what had transpired at the Tribunal, and, this element remaining unascertained, the prior condition for raising a preliminary objection was not fulfilled.

That the objector filed the Notice of Preliminary Objection without conviction, is obvious – and so, there was no sense of professional duty in thus engaging the Court’s time. On **1st December, 2010** the respondent filed simultaneously the Notice of Preliminary Objection, and a “Notice of withdrawal of Preliminary Objection” of an earlier date [**30th November, 2010**].

The Notice of Preliminary Objection is disallowed, with costs to the appellant/applicant.

DATED and DELIVERED at MOMBASA this 6th day of May, 2011.

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J. B. OJWANG

JUDGE