



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW NO. 5 OF 2010**

**JOHN GITHINJI WANGONDU & 8 OTHERS.....APPLICANTS  
VERSUS  
REGISTRAR OF CO-OP. SOCIETIE & ANOTHER.....RESPONDENTS**

**RULING**

When this matter came up for hearing Mr. Wairoma for the State raised a preliminary objection to the suit herein based on order 53 rule 3 and 4 of the Civil Procedure Act which states as follows:

***“53 (b) an affidavit giving the names and addresses of and the place and date of service on all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing and if any person who ought to be served under this provisions of this rule has not been served the affidavit shall state that fact and the reason why Service has not been effected and the affidavit shall be before the High Court on the hearing of the motion 4(1) copies of the statement accompanying the application for leave shall be served with the notice of motion...”***

Mr. Wairoma for the State is of the opinion that the Applicant has not complied with the stated rule and therefore the same is fatal to the application and is asking the court to dismiss the same.

Miss Nderitu for the applicant opposes the preliminary objection and states that order 53 rule 1 sub rule 2 states that at the exparte stage all that is required is to file a chamber summons application accompanied by statement stating the relief and the ground upon which it is based and an affidavit verifying the facts relied upon. It does not say that you must annex evidence. She is of the view that the preliminary objection cannot be attained.

The issue to be addressed by this court is as to whether the objection by Mr. Wairoma qualifies as such?

I have looked at the guiding principal as set out in the case of ***MUKASA BISCUIT MANUFACTURING CO. LTD. Vs WESTEND DISTRIBUTORS LTD.[1969] E.A 696*** where at page 700 LAW JA stated

***“So far as I am aware a preliminary objection consist of points of law which has been pleaded or which raises by client implication out of pleadings and which may dispose of the suit. Examples are objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration”***

Sir Charles Newbord at page 701B states:

***“preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct, will dispose of one case, it cannot be raised if any fact are or be ascertained to if what is sought is the exercise of judicial discretion”.***

Does the objection before this court fit the above legal point of view?

It appears to me that the issues raised will be necessary to examine the affidavits and to ascertain the facts which to my mind is not what is envisaged by the preliminary objection. Whether or not the pleadings before this honourable court meets the requirements of order 53 rules 3 and 4 of the Civil Procedure Act can only be ascertained by examining facts and as such I find that the preliminary objection is without merit and therefore dismiss the same with costs.

**Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.**

J. WAKIAGA  
JUDGE