



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 185 of 2010

CATHERINE NDUKU MUTUNGA PLAINTIFF

VERSUS

EQUITY BANK LTD. DEFENDANT

R U L I N G

By an application dated 23rd March, 2010 and brought by way of Chamber Summons taken under **Order XXXIX (sic) Rules 1, 2, 3 and 9 of the Civil Procedure Rules; Sections 3 A and 63 (e) of the Civil Procedure Act** and all other enabling provisions of the law, the Plaintiff seeks against the Defendant two orders of an injunctive nature. The first one asks for restraining orders pending the hearing and determination of the application, while the second one also prays for restraining orders pending the hearing and determination of the suit.

To that application, the Defendant filed a notice of Preliminary Objection base on the following grounds –

1. ***That the plaint is ex facie incompetent.***
2. ***The suit does not raise any cause of action and/or any reasonable cause of action.***
3. ***The application is ex facie incompetent and bad in law***
4. ***That this honourable court does not have jurisdiction to grant the orders sought.***

At the hearing of the application Ms. Mwau appeared for the Defendant/Applicant while Mr. Sagana appeared for the Plaintiff/Respondent. Ms. Mwau's preliminary objection took two main fronts. The first one was that the plaint in this matter is incompetent as it does not disclose such a cause of action as, *inter alia*, a tort or breach of contract. With full knowledge that there was no such cause of action, the Plaintiff nevertheless sought prayers of an injunctive nature while there was no prayer in the plaint for the enforcement of any right.

Secondly, it was Ms. Mwau's case that the Court lacks jurisdiction to grant the orders sought. This was because the application sought to invoke the Court's jurisdiction under **Rules 1, 2 and 3 of Order XXXIX** which does not exist. And if we were to go by Arabic numerals, **Order 49** deals with enlargement of time, and applications under that **Order** should be brought by notice of motion under **Order L**. Therefore, she argued the **Rules** relied upon cannot support the application. She finally contended that even if the application had been brought under **Order XXXIX**, the circumstances do not fall under auspices of **Rules 1, 2 and 3** thereof. She therefore asked the Court to dismiss the application and the suit with costs.

In his response, Mr. Sagana for the Respondent submitted that the Preliminary Objection does meet the criteria for Preliminary Objections as laid down in **MUKISA'S CASE**. Secondly, he referred to paragraphs 10 to 14 of the plaint and submitted that the same raises a cause of action. Thirdly, he submitted that **Order XXXIX** was a typographical error and was meant to be **Order XXXIX**.

He therefore asked the Court to invoke **Sections 1 A and 100** of the **Civil Procedure Act** to amend the reference to **Order XXXIX** to read **Order XXXIX** by deleting one “X”. He urged the Court to overrule the Preliminary Objection and allow the parties to proceed with the hearing of the application.

In her short reply Ms. Mwau argued that a Preliminary Objection was entirely on matters of law and therefore met the requirements set out in **MUKISA’S CASE**. She also argued that the orders sought were not in tandem with the orders relied upon. She finally submitted that **Section 100** of the **Civil Procedure Act** does not give the Court jurisdiction to frame issues for the parties or craft pleadings for the parties.

After considering the application, the grounds on which the Preliminary Objection is raised and the arguments of Counsel, the issues for determination are whether the plaint herein is incompetent; whether the suit raises any cause of action or reasonable cause of action; whether the application is incompetent and bad in law and; whether this Court has jurisdiction to grant the orders sought. The answers to these issues are fairly clear. The request by learned Counsel for the Defendant that the suit be dismissed with costs for not disclosing a reasonable cause of action cannot be sustained. The only way by which a suit can be struck out for failure to disclose a reasonable cause of action is by a formal application by Chamber Summons and not by a Preliminary Objection. In **MUKISA BISCUIT MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD. [1969] E.A. 696**, Law, J.A. said at page 700 –

“... So far as I am aware, 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. ...”.

It is my considered view that apart from the issue of jurisdiction, the points argued by Ms. Mwau are not *ejurisdem generis* with the perception of Law, J.A. as to what constitutes points of law which may dispose of a suit. Regarding jurisdiction however, I note that her argument is based on reference to **Order XXXIX** which, according to Mr. Sagana, was a typographical error and which was meant to be **Order XXXIX**. In the first instance, there is no such number in Roman numerals as **Order XXXIX**. It does not exist. It cannot translate to Arabic 49 as alleged by Ms. Mwau which in Roman numerals is written as **XLIX**. I therefore agree with Mr. Sagana that this was a typographical error which was meant to read **Order XXXIX**. It could not have been intended to be otherwise.

For the above reasons I find that the Preliminary Objection does not measure up to the standards envisaged by Law, J.A. in **MUKISA’S CASE** for the purpose of dismissing a suit or an application. The arguments raised in the said Preliminary Objection ought to be argued in the context of the entire application. The said Preliminary Objection has no merit and it is hereby struck out with costs. The Applicant should serve the Respondent with a complete copy of the application in readiness for the hearing thereof.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of May, 2010.

L. NJAGI
JUDGE