



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Civil Suit 31 of 2008**

**SUDHABEN AMRITTAL SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**VIPINI KUMAR NATHALAL SHAR ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FARUK SWALEH BAYA ..... 1<sup>ST</sup> DEFENDANT**

**BAYA KADENGE ..... 2<sup>ND</sup> DEFENDANT**

**JOYCE SIDI CHOME ..... 3<sup>RD</sup> DEFENDANT**

**ANTIOCHIA LTD ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, KILIFI ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

Mr. Angima (counsel for the plaintiff) has raised a preliminary objection which is contained in paragraph 19 of the plaintiff's affidavit which states that the replying affidavit is false and ought to be struck out.

He submitted that the replying affidavit dated 26<sup>th</sup> September 2008 introduced an annexure FBX (an official search) purportedly issued by the Land Registrar Kilifi. Then in a supplementary affidavit sworn on 10<sup>th</sup> December 2008 at paragraph 7, the deponent introduced an annexure marked SAS 4, sworn by the Land Registrar Elizabeth Thoya on 10<sup>th</sup> December 2008. In that annexure, the said former Land Registrar identified the annexure FBX (the official search) as a forgery and this was pointed out by the applicant.

In reply the respondent merely introduced another official search, now sworn by a different officer and annexed it as BBV to the further affidavit. It is Mr. Angima's contention that at no time did the respondents address the issue raised by the applicant that the earlier search was a forgery, so their silence is a confirmation that the document is a forgery and respondent should not be allowed to use a forged document to prove his case.

Mr. Angima argues that if the respondent had addressed the issue earlier, then he could have told this court how he came to have those documents. Mr. Angima states that it is not just that the offending paragraph ought to be struck out the entire affidavit as it is tainted and its difficult for this court to choose which paragraph to rely on and which one to reject because a witness is either truthful or not and so court cannot accept part of the affidavit and reject another part since contents of an affidavit is actually evidence.

The preliminary objection is opposed and Mr. Kilonzo (for defendant/respondent) submits that this is not a preliminary objection in the context of the principles enacted in the case of **Mukisa Biscuits v WestEnd Distributor (1969) EALR Vol.1 pg 696 Newbold J pg 701** – as what constitutes preliminary objection has to arise from the pleadings expressly or impliedly and must raise points of law, which are not disputed. He argues that a preliminary objection can only be raised in a matter where facts are not to be ascertained yet in the present case, facts are not settled, and so the point raised here cannot form a preliminary objection and there is no way a preliminary objection can be raised with regard to responses filed by respondent and it is mischievous and lacks merit. At most, Mr. Kilonzo argues, what ought to be done is to expunge the offending paragraph and not strike out the entire affidavit and that the purported fraud cannot be deemed to be proved

simply on the strength of Betty Thoya's affidavit because

- (a) Betty Thoya has not presented herself and lodged a complaint before CID officers on the allegations raised.
- (b) The plaintiff has not made any complainant to police regarding the purported forgery and they cannot now come to court and urge the court to institute investigations, as this will make the court both an investigation and a prosecution and judge – which would contravene the rules of natural justice and put the entire process of justice in jeopardy.

Mr. Kilonzo further points out that the purported offending annexure is not the cornerstone of the plaintiff's response to the entire case – it is simply a search to show that the property in dispute belongs to the 4<sup>th</sup> respondent.

The issues which arise are;

- (a) Is this Preliminary Objection, properly raised, or is it merely an argument which ought to be addressed in the submissions by counsel.

- (b) Is there proof that the contested document is a forgery – and if so does that call for striking out the entire affidavit?

The issue of what constitutes a page 6 was addressed by Sir Newbodd in the **Mukisa Biscuit case** when he stated;

***“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 any fact has to be ascertained or if what is sought in the exercise of judicial discretion.”***

What is raised here is an issue of fact – whether the document respondent seeks to rely on is a forgery. That would as of necessity require calling of evidence, it is a contested part which has not as yet been proved. The mere fact that Betty Thoya disowns the documents, does not necessarily prove it is a forgery – she is not a handwriting expert. She has not reported the matter to police nor are there any pending criminal investigations or proceedings relating to the said document. I think the applicant is inviting this court to assume a role, which is improper, indeed if the document is considered a forgery, nothing stops both the plaintiff and Betty Thoya from so reporting to police so as to institute proper investigations. I find no reason to either expunge the paragraph referred to the document, or strike out the same. The Preliminary Objection does not meet the test in Mukhisa Biscuits, and there is no proof that the document is a forgery. The preliminary objection is dismissed with costs to respondent.

Delivered and dated this 16<sup>th</sup> day of **June 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**