



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 201 OF 2009

**JEREMIAH O. SAMBA
 BENSON M. MOGAKA ALL t/a
 MERVE COMMERCIAL & INSURANCE AGENCY**

.....**PLAINTIFF**

-VERSUS-

KENINDIA ASSURANCE CO. LTD

.....**DEFENDANT**

RULING

Two applications dated 10th November, 2009, and 2nd June , 2010 respectively were scheduled for hearing interpartes before me on 28th June, 2010. However on that day, **Mr. Meroka**, learned counsel for the plaintiff, took up a preliminary objection in terms that the ex-parte judgment had previously been entered in this suit against the defendant. Subsequently, the defendant filed an application dated 10th November, 2009, seeking to set aside the ex-parte judgment aforesaid. For some reason a similar application dated 21st January, 2010 was again filed. The two applications came for hearing on 25th February, 2010. On that occasion and by consent of the parties, the application dated 21st January, 2010 was withdrawn with costs to the respondent. The defendant and plaintiff then recorded a consent with respect to the application dated 10th November, 2009. The terms of the consent order were that “.....
(1) Accounts being taken on commission earned by the plaintiff upto 31/12/2007 together with particulars of any payments made by the defendant to the plaintiff in settlement of the commissions earned to that date. (2) There be a reconciliation meeting on 19th March, 2010 at the offices of the defence counsel. (3) The reconciliation report be filed in court on or before 22/3/2010 when the matter shall be mentioned for further orders and or directions. (4) Costs in the cause” The period for compliance with the said consent order expired on 22nd march, 2010. On that day however, the defendant sought 2 more weeks to comply but never did so. It was the submission of counsel for the plaintiff therefore that the application dated 10th November, 2009 having been dealt with by way of the consent order recorded as aforesaid, was compromised and therefore **Res judicata**. It could not be litigated upon again since the consent order had not been set aside. In support of his submissions counsel belied on list of authorities in a bundle he had filed in court.

In response, **Mr. Milimo**, learned counsel for the defendant submitted that **res judicata** is inapplicable in the circumstances of this case as the application had not been previously canvassed. The defendant’s application was never compromised as claimed by the plaintiff. The application is seeking an exercise of discretion. That cannot be the basis of a preliminary objection. Counsel relied on the following authorities in support of his submissions

1. Muiruri .v. Kimemia (2002) KLR 677
2. Eunice Kaega .v. Gerald Maina Mwangi & Anor NBI HCC no. 683 of 1999 (UR)
3. Sanitam Services (E.A) Limited .v. Anip

4. est Kenya Limited & Anor; NBI HCCC.No. 1889 of 200 (UR).

As I understand it, the plaintiff's preliminary objection is hinged on the ground that the application dated 10th November, 2009 having been compromised by the consent recorded therein; it cannot thus be recanvassed before this court again. To counsel for the plaintiff, it is *res judicata*. The defendant thinks otherwise. It will therefore fall on this court to interpret the extent and purport of the said consent order. The hallmark of a preliminary objection as I understand it is that it is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by either side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mururi** (supra).

It is obvious from the above that there is a disagreement between the parties as to the intend, purport and effect of the consent order. Given that scenario, **Newbold P**, could not have been far off the Mark again when he stated in the case of Mukisa Biscuite Co. .v. West End Distributors (1969) E.A 696 that *".....A preliminary Objection is in the nature of what used to be a demurrer. It raises pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained....."* As it is clear from the submission of both learned counsel, the facts upon which the preliminary objection is founded are not agreed. Whether the application was compromised by the consent order recorded and is therefore *Res judicata* has to be ascertained before a determination can be made. It will turn on the interpretation of the consent order by court. It follows therefore that the point taken by **Mr. Meroka** clearly lacks merit. For those reasons the preliminary objection is misconceived and must be disallowed with costs. It is so ordered.

Ruling dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA
JUDGE