



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**CIVIL CASE NO 22 OF 2005**

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**CIVIL CASE NO 22 OF 2005**

**RUTH NJERI ZEYHLE::: PLAINTIFF**

**VERSUS**

**EBERHARD ZEYHLE:::1<sup>ST</sup> RESPONDENT**

**RUTH NJERI ZEYHLE:::2<sup>ND</sup> RESPONDENT**

**IN THE MATTER OF SALE OF TITLE NUMBER L.R. NO. 14971/6 & 14971/9 ARISING OUT OF HCCC NO. 22 OF 2005 (FAMILY DIVISION) AND THE ORDERS OF 22<sup>ND</sup> JUNE 2006 APPOINTING M/S YAMBO MERCHANTS & AUCTIONEERS AND TYSONS LTD AND KNIGHT FRANK TO MARKET AND SELL THE MATRIMONIAL HOME AND SUBSEQUENT SALE OF THE MATRIMONIAL PROPERTY BY MATHIAS MBOYA T/A M/S YAMBO MERCHANTS & AUCTIONEERS**

**R U L I N G**

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The background information to the preliminary objection herein is that: On 21<sup>st</sup> day of July, 2009, one M/S Mathias Mboya , Maitha T/A M/S Yambo Merchants and Auctioneers presented a bill for taxation dated 8<sup>th</sup> day of July 2009. A perusal of the heading of the bill reveals that the bill has been presented in the matter of title number LR. NO. 14971/6 and 14971/9 arising out of HCCC NO. 22 of 2005 (Family Division and the orders of 22<sup>nd</sup> June 2006 appointing M/S Yambo Merchants and Auctioneers and Tysons Limited and Knight Frank to market and sell the matrimonial home and subsequent sale of the matrimonial property by Mathias Mboya Maitha T/A M/S Yambo Merchants and Auctioneers. It is an itemized bill drawn at Kshs. 1,772,384/=. The filing of the said bill prompted the filing of two preliminary objections. The first objection is one dated 2<sup>nd</sup> day October, 2009 and filed on the same date. It raises three grounds of objection:-

**1. The Applicant has no locus standi in law to file the Auctioneer Agent bill of costs as the Applicant who was appointed as an agent but not as an auctioneer together with Tysons limited and knight Frank cannot file bill of costs under the Auctioneer Act. There is no provision under the laws of Kenya for an agent to recover fees through a bill of costs unless the court expressly orders so.**

**2. The Applicant's bill of costs is an abuse of the courts' process as the Applicant had previously filed a bill of costs in Nairobi Milimani high court Misc Application No. 157 of 2009 which was dismissed on the 19<sup>th</sup> day of June 2009.**

**3. The Applicant is obviously on a fishing expedition in search of a suitable and/or favourable court.**

The second one is dated 1st day of December, 2009 and filed on the 2<sup>nd</sup> December, 2009. Three objections have been raised. These are:-

*1. That the purported bill of costs is misconceived, incompetent and an abuse of the court process and the same ought to be struck out.*

*2. That the issues as to whether the applicant introduced the seller to the Respondents and thereby being entitled to a commission and the amount payable as commission are matters of evidence which can only be proved by way of a suit filed, heard and fully determined by a court of competent jurisdiction.*

*3. That the buyer has duly paid all commission due to the successful commission agents in the sale and transfer of LR. No. 14971/6 and 14971/9 and nothing is due to the Applicant herein on account of commission or otherwise.*

In the counsels oral submissions, it was argued that the bill cannot hold because the Auctioneer filed a similar bill in the Milimani court vide Misc. Application No. 177 of 2009 in the same manner as advocates files its bill of costs for taxation.

- That upon the filing and service of the said bill, in the Milimani court, it attracted the filing of preliminary objections. That of the 2<sup>nd</sup> Respondent was dated 11<sup>th</sup> day of May 2009. A perusal of the same reveals that the content is word for word as the current preliminary objection presented herein. While that of the 1<sup>st</sup> Respondent is dated 21<sup>st</sup> day of April 2009, and filed on the same date. Objection 1 and 2 are similar in content with the objection raised herein. Objection 3 of the current objection has been added.

- It is on record that the preliminary objections were heard on their merits and a ruling was made.

- The documentation placed before the lower court, have been exhibited to this court vide further affidavit filed on the 28<sup>th</sup> day of July, 2010 as an annexure A,B,C and D.

- There is also a short ruling by the lower court dated 9<sup>th</sup> day of June 2009. The salient features of the same are that the learned Deputy Registrar found the bill a nonstarter because:-

**(a) “It offended paragraph 69 (1) (a) and (b) of the Advocates Remuneration order which requires that the first column of the bill should show items and not dates. For this reason the bill was found to be incompetent and it was liable to be struck out.**

**(b) That the bill had been titled Auctioneers/Agents bill of costs but there was nothing to show that the presenter of the bill was an auctioneer, but assuming he is and in instruction he alleged acted upon were in HCCC NO. 22 of 2005. Then he ought to have filed the bill in the said file.**

**(c) That if the Applicant earned costs as an agent, then she should sue the Respondent by filing a plaint to recover the costs but he cannot be entertained in the case herein.**

**(d) The advocate who filed the Misc. Application appeared to be fighting himself because he conceded that the bill was not filed under the Advocates Act but went ahead to submit that the Applicants fees should be assessed first and then judgement be entered by the high court. The question to be asked is under which law would such a judgement be entered if not under the Advocates Act.**

**(e) That the filing of the bill in the Milimani file was a wasted effort because the Applicant is not an advocate and since as conceded the bill does not lie under the Advocate Act and it was not filed pursuant to the Auctioneer Act and the Risks thereunder, the court found too that the bill was incompetent and thereby struck out.”**

- According to the objectors, the issue of the current bill was settled by the Milimani court and stands non suited.

- The court is asked to be guided by the documentation in the Misc application file and dismiss the current bill.

In response the applicants’ counsel asked the court, to reject the Preliminary objections because they do not satisfy the ingredients for raising a preliminary objection in the first instance, because they are to be proved by matters of evidence.

- Matters of evidence arise the moment the court, is asked to look at the documentation of what transpired in the Misc Application file.

- Contends that the current file is the correct file into which the bill should be presented because the Deputy Registrar in the Miscelaneous file said that this is the proper file in which the bill should have been presented because it is the file in which the services were rendered.

- That they are not precluded from presenting another bill herein because the bill in the Misc application file was struck out on a point of technicality and not dismissed on merits.

- Lastly that the Auctioneer as an agent is entitled to his fees and where there is a disagreement on payment of the same the prayer was to go about the disagreement is to file the bill for assessment.

In response to this, Applicants submissions, counsel for the objector referred the court, to the ruling delivered in the Miscellaneous file. This court has given due consideration to the rival arguments herein and the court, is of the opinion that there are two aspects to the rival arguments. The first one is on a point of technicality whereby the Applicant has argued that the objection calls for adduction of evidence and for this reason it cannot hold as a preliminary objection. The second front is the merit front where the objectors have argued that the issues relating to the presentation of the bill were settled by the ruling in the Miscellaneous file.

The court will deal with the first front first as regards whether the objections satisfy the ingredients of raising a preliminary objection. As submitted by the applicants counsel, the ingredients to be applied when determining whether the ingredients for raising a preliminary objection have been met or not have now been established by case law.

The first yard stick is found in the court of appeal decision in the case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696. LAW J.A.** as he then was at page 700 paragraph DE had this to say:- *“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 pleading and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of the limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration . . .”*

**SIR CHARLES NEWBOLD P.** on the other hand had this to say at page 701 paragraphs A – B, *“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 what is sought is the exercise of judicial discretion . . .”*

Since the handing out of this decision, it has been dutifully followed by not only the court of Appeal itself, but as well as the superior court. There is the case **OF NJOYA AND 6 OTHERS VERSUS ATTORNEY GENERAL AND ANOTHER (2004) I KLR 232** where it was held by Ringera, Kubo JJ and Kasango Ag J held inter alia that:-

*“ A preliminary objection consists of a pure point of law which has been pleaded or which arises by a clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit., 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 is the exercise of judicial discretion ”*

The case of **B VERSUS ATTORNEY GENERAL (2004) IKCR 431** where Ojwang J held inter alia that:- *“A preliminary objection should be founded on pure points of law and should be truly prefatory and preparatory to the issues of substance in the claim in question. Such an objection may also touch on uncontested facts on the basis of which a decision by the court would dispose off the whole matter coming before it in limine”.*

Also the case of **ORARO VERSUS MBAJA 92005) I KLR 141** also decided by Ojwang J., where it was held inter alia that:- *“A preliminary objection correctly understood, is a point of law which must not be blinded with factual details liable to be contested and in any event to be proved through the process of evidence”.*

This court, has made due consideration of the afore set out case law principles and in this courts opinion, in order for a preliminary objection to hold, it must satisfy the following ingredients:-

- (a) It has to be a pure point of law.
- (b) It is raised on the understanding that the facts pleaded by the other side are not disputed. The facts pleaded by the opposite party must be agreed.
- (c) It must not be one which requires evidence to establish it.
- (d) It must be one if successful will dispose off the proceedings.
- (e) It must be one which has been pleaded or one which has arisen on the course of proceedings.

This court, has applied these ingredients to the objection raised by the 1<sup>st</sup> Respondent and the court proceeds to make the following findings on the same:-

1. Ground 1 does not hold because the issue of lack of locus standi though a legal point of law, it has to be considered not in isolation but in conjunction with the facts of the applicant presenter of the bill not being an appointed agent Auctioneer together with Tysons limited and knight Frank and when so considered, it fails the test because evidence is required to establish the Applicants relationship with the named identities scrutinize the same and then determine whether the Applicants is an agent in the first instance, and then in the second instance establish that he was acting as an Auctioneer or not as an auctioneer.
2. Ground 2 does not hold because one needs to peruse the record in Miscellaneous application number 157 of 2009 to determine whether the application was struck out or dismissed.
3. Ground 3 also does not hold because evidence is required to be interrogated in order to determine whether the applicant is on a fishing expedition in search of suitable count or not.

Turning to the objections raised by the 2<sup>nd</sup> Respondent, the court makes the following findings on the same:-

1. Ground 1 does not hold because the misconception, incompetence and abuse of the court process is not explicit on the face of the bill filed. One needs to interrogate evidence in order to determine the factors or facts which go to establish existence of misconception, incompetence and abuse of the due process of the court.
  2. Ground 2 also does not hold because it requires evidence to determine whether the applicant introduced the seller to the Respondent.
- (ii) To determine whether the Applicant is entitled to a commission and if so how much?
  - (iii) To determine whether the issues raised by the Applicant are matters which can only be determined through a suit not by way of affidavit.

3. Ground 3 also does not hold because evidence is required to establish whether the buyer has paid all the commission or not, to whom was this commission paid and who the agent successful agent was?

By reason of what has been stated above, both preliminary objections have been ousted because they do not satisfy the ingredients for raising a preliminary objection in the first instance. And in the second instance the presentation of the bill a second time has now been faulted because indeed the Deputy Registrar in the ruling of 19/6/2009 observed that the bill should have been filed in the file where the instructions to the Auctioneer were given. 3rdly the bill was struck out and not dismissed as alleged. This court has judicial notice of the fact that striking out a process does not lead to the finality of the said proceeding. It paves the way for another one because in most cases striking out is mostly on points of technicalities. Whereas a Dismissal of a process is usually final in nature and its effect is that it can only be upset by way of setting aside the order or by appealing against it to have it upset by way of appeal.

Having faulted the objections it means that the issue of whether the bill stands or not will have to be reargued because making a finding on that on its merits the court will be pre-empting the outcome of the merit arguments. The final result of the assessment is that both preliminary objections are dismissed with costs to the Respondent to them.

**DATED, READ AND DELIVERED AT NAIROBI  
THIS 28<sup>TH</sup> DAY OF OCTOBER 2010.**

**R.N. NAMBUYE  
JUDGE**