



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 894 of 2001

ABDULHALIM MOHAMED SHALLO.....PLAINTIFF

VERSUS

LEONARD HEFFNER.....1ST DEFENDANT

THE AGA KHAN HEALTH SERVICES KENYA LTD.....2ND DEFENDANT

KALAMKA THE PEOPLE LIMITED.....3RD DEFENDANT

R U L I N G

1. On the 16/07/2004, the 1st and 2nd Defendants herein gave Notice of their intention to raise a Preliminary Objection on a point of law. When the matter came up on the 22/07/2004, my brother Hon. Mr. Justice P. Kariuki ruled that the trial Judge would determine whether the preliminary objection could be raised before the main hearing of the case. On 1/12/2005, Hon. Mr. Ojwang J ruled that a preliminary objection could be raised at any stage of the proceedings and that it was not necessary for the party raising the preliminary objection to give elaborate notices of the same. On the basis of the above, Hon. Mr. Ojwang J heard the 1st and 2nd Defendants' Preliminary Objection in part on 1/12/2005. This ruling concerns that preliminary objection dated 30/11/2005.
2. Just to get the record straight, it is necessary at the outset to give a chronology of events as follows:
 - § 30/05/2001 – plaint filed by which Plaintiff sought both compensatory and aggravated damages for alleged defamation
 - § 20/07/2001 – 3rd Defendant's defence filed
 - § 07/08/2001 – Reply to defence filed
 - § 12/03/2002 – Amended Plaint filed
 - § 13/07/2001 – Written Statement of defence of 1st and 2nd Defendants filed
 - § 13/12/2001 – Amended Written Statement of defence of 1st and 2nd Defendants filed
3. A number of interlocutory applications were also filed in between, among them the 1st and 2nd Defendant's application dated 11/06/2004. The Preliminary Objection proceeded on a number of occasions as follows:-
 - § 1/12/2005 – Hon. Mr. Ojwang J heard arguments from the 1st and 2nd Defendants counsel on the Preliminary Objection notice of which was given on 16/07/2004. Due to constraint of time the Preliminary Objection was stood over to 16/02/2006 for response by the Plaintiff.
 - § 16/02/2006 – Further hearing of the Preliminary Objection was stood over to 30/03/2006
 - § 28/03/2006 – the matter was listed before Mugo J when the Plaintiff appeared. Mr. Gikera appeared for 1st and 2nd

Defendants. Plaintiff asked the court for directions as to hearing of the Preliminary Objection which he said should have been heard on 25/10/2005. Court ordered further hearing of the Preliminary Objection before Ojwang J on 30/03/2006.

§ 30/03/2006 – Ojwang J ordered further hearing of Preliminary Objection stood over to 18/07/2006.

§ 18/07/2006 – Plaintiff partially submitted in response to the Preliminary Objection. Further hearing was stood over to 10/11/2006.

§ 10/11/2006 – Plaintiff submitted further before Ojwang J on the Preliminary Objection. Court then ordered that Plaintiff puts in written submissions to complete his response to the Preliminary Objection. Further hearing stood over to 28/02/2007. For some reason, the matter did not proceed on 28/02/2006 as earlier ordered.

§ 31/05/2007 – Matter was again listed before Ojwang J for further hearing. Same could not proceed for reason of time constraint on the court. The matter was fixed for mention before the Duty Judge on 28/06/2007 for directions on further hearing (of the Preliminary Objection).

§ 28/06/2007 – Plaintiff appeared before Visram J (Duty Judge) Defendants did not appear. Parties were ordered to take fresh hearing dates at the registry. Court ordered that proceedings be typed.

§ 19/10/2008 – Parties appeared before me. Mr. Nyaribo, counsel for the 1st and 2nd Defendants informed the court of the status of the Preliminary Objection dated 30/11/2005. Further hearing of the Preliminary Objection was stood over to 19/11/2008.

4. The above summary of chronological events has been necessitated by the fact that the Plaintiff herein has raised the issue of *res judicata* as concerns the Preliminary Objection. I now return to the Preliminary Objection dated 30/11/2005 which contains 3 points as follows:-

(a) ***THAT the Amended Complaint as drawn does not set out with precision the third party to whom the alleged telephone conversation wherein the alleged defamatory remarks were made by the 1st Defendant. (sic)***

(b) ***THAT the Plaintiff has not stated or alleged that the words or the effect of the word complained of injured him in his office profession and/or trade. (sic)***

(c) ***THAT the Amended Complaint as drawn does not disclose any cause of action as against the 1st and 2nd Defendant.***

5. It was contended by learned counsel for the 1st Defendant that both the plaint and the amended plaint as filed do not disclose a cause of action against the 1st and 2nd Defendants. Mr. Nyaribo who appeared before me submitted that the Preliminary Objection seeks to strike out the Plaintiff's suit on grounds that the Plaintiff was in breach of his professional duty to the Defendants and should thus not be allowed to benefit from the said breach. He also submitted that the plaint as filed does not disclose a cause of action for reasons that the actual words alleged to be defamatory have not been set out in the plaint. Mr. Nyaribo also contended that there cannot be vicarious liability against the 2nd Defendant in matters of defamation.

6. It was also contended by learned counsel for the 1st and 2nd Defendants that the Verifying Affidavits in support of original plaint was not endorsed as required by sections 34 and 35 of the Advocates Act and that for this reason, the said affidavit should be struck out and with it the whole plaint, including the amended plaint. Learned counsel also contended that the Plaintiff himself caused the publication of the alleged defamatory words and that he should not be allowed to benefit from his own mischievous acts.

7. On his part, the Plaintiff submitted that the instant Preliminary Objection is *res judicata*, having been filed three times over. From the record, I note the following:-

- (a) **On 15/03/2004 the 1st and 2nd Defendants through the firm of Mohamed Madhani & Company Advocates filed a Notice of Preliminary Objection, pursuant to orders of the court made on 26/02/2004 with the same grounds as the instant Preliminary Objection.**

It is not clear from the record however whether that Preliminary Objection was heard and determined.

- (b) **On 16/07/2004, the 1st and 2nd Defendants through the same firm of Advocates filed a Notice of Preliminary Objection on the ground**

- (a) **THAT the Amended Complaint as drawn does not disclose any reasonable cause of action as against the 1st and 2nd Defendants.**

Again, it is not clear from the record whether this Preliminary Objection was heard and determined. The typed proceedings do not give any clue as to what may have happened.

- (c) **On 30/11/2005, the instant Preliminary Objection was filed.**

8. Secondly, the Plaintiff argued that the purported points of law are actually points of fact and that these can only await determination at the full trial and not at this preliminary stage. He referred the court to **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] EA 696**. The court therein defined a Preliminary Objection in the following words at page 701 of the judgment:-

“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 is the exercise of judicial discretion.”

The above is the law governing Preliminary Objection’s and I shall apply it in this case.

9. The Plaintiff has also raised the issue of *res judicata*, arguing that Hon. Lady Justice Mugo dismissed the instant Preliminary Objection on 25/10/2005. He also argues that the 1st and 2nd Defendants did not comply with the time limit given by Ochieng J on 26/02/2004 to file their Preliminary Objection within 14 days from that date. From the record, the Preliminary Objection filed pursuant to the orders of Ochieng J was filed on 15/03/2004, which indeed was some 17 days after Ochieng J gave the order. In the Plaintiff’s view this Preliminary Objection should fail on grounds of *res judicata* and failure to comply with orders of Ochieng J issued on 26/02/2004.

Regarding the order by Mugo J on 25/10/2005, the Hon. Judge dismissed the Defendant’s application dated 11/06/2004 and not any Preliminary Objection. This issue is therefore settled in that the dismissal order of 25/10/2005 was against the application dated 11/06/2004 and not against the instant Preliminary Objection.

10. In reply to the Plaintiff’s submissions, Mr. Nyaribo, learned counsel for the 1st and 2nd Defendants submitted that the issue of various Preliminary Objection’s having been filed by the 1st and 2nd Defendants is not correct. He also submitted that a Preliminary Objection can be raised at any stage of the proceedings. He urged the court to allow the Preliminary Objection.

11. I have now considered the pleadings and the submissions made. I have also considered the authorities cited to me by both parties in this matter. I commend both the Plaintiff (acting in person) and learned counsel for the 1st and 2nd Defendant for putting up a very spirited fight. After considering all the above, I have reached the conclusion that the only two issues for determination are whether (a) in light of the **Mukisa Biscuit** case (above) this Preliminary Objection is maintainable and (b) whether non-compliance with sections 34 and 35 of the Advocates Act as regards the Plaintiff’s Verifying Affidavit is fatal to the Plaintiff’s suit.

12. On the first issue, I am of the view that the 1st and 2nd Defendants preliminary Objection has not satisfied the conditions set out in the **Mukisa Biscuit** case. A Preliminary Objection raises a pure point of law and not of mixed law and fact. The arguments that have been placed before me by learned counsel for the 1st and 2nd Defendants clearly show that there are mixed points of law and fact. These are facts which need to be ascertained at a full trial before the court can reach the conclusion as to whether or not the Plaintiff's claim is sustainable. There is no assumption here that the facts pleaded by the Plaintiff are correct. On this ground therefore, the Preliminary Objection must fail.

13. On the second issue, and in light of the decision in **HCCC No. 371 of 2003 – Eccon Construction & Engineering Ltd. –vs- Giro Commercial Bank Ltd & Another**, I do find that the Plaintiff in fact already rectified the omission in the verifying affidavit by filing a proper Verifying Affidavit with the Amended Plaint on 12/03/2002. If he had not done so, and in the interests of justice, I would still have allowed the Plaintiff to withdraw the defective affidavit and to make the necessary amendment.

14. In the result, I find no merit in the Preliminary Objection. The same is dismissed with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of April, 2009.

R.N. SITATI

JUDGE

Delivered in the presence:-

Plaintiff in person

Mr. Nyaribo (present) for the Defendant

Maina – court clerk