



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

**Misc Appli 107 of 2008**

**INDUSTRIAL DEVELOPMENT BANK LTD.....APPLICANT**

**VERSUS**

**WAB HOTELS LIMITED(IN RECEIVERSHIP).....RESPONDENT**

**RULING OF THE COURT**

1. This ruling concerns a preliminary Objection raised by the respondent against the application filed by the applicant vide its Notice of Motion dated 24/01/2008 and filed in court on 8/02/2008. The applicant brought the application under the provisions of Sections 3, 3A and 89 of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 50 Rule 1 of the Civil Procedure Rules seeking **ORDERS THAT:?**

(i) This Honourable Court be pleased to certify this application as urgent and to dispense the services thereof in the first instance for the purposes of the grant of prayer number 2 hereof (*sic*).

(ii) This court be pleased to grant an early hearing date for the hearing and determination of this application inter parties.

(iii) This Honourable Court be pleased to grant the applicant leave/sanction to sell the property comprised in Title Number NAIROBI/BLOCK 75/1031 by Private Treaty.

(iv) The costs of this application be accorded to the applicant in any event.

2. The genesis of the dispute between the applicant and the respondent is a loan facility of Kshs.2,500,000.00 advanced to the respondent in or about December 1998 and the respondent's failure to repay the loan. The applicant says there is now an offer for sale of the charged property for Kshs.40,000,000/= upon the request of one **Joseph Wambua Mutisya**, the guarantor of the principal debt. The applicant says **Joseph Wambua Mutisya** is ready and willing to pay the said sum of Kshs.40,000,000/= for the charged property.

3. Before the application could proceed to interpartes hearing the respondent raised a preliminary objection on a point of law through its lawyer, Mr. F.N. Mutua. The respondent contended that the application as filed offends the provisions of the Civil Procedure Act and rules made thereunder, and is, as such incompetent and incurably defective. At the hearing of the Preliminary Objection, Mr. Mutua argued that the application as filed is in total disregard of the provisions of Order 36 Rule 3A of the Civil Procedure Rules which reads:?

***"3A. Any mortgagee or mortgagor, whether legal or equitable or any person entitled or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons,***

***returnable before the Judge in chambers for such relief of the nature or kind following as may be by the summons specified, and the circumstances of the case may require that is to say, sale foreclosure, delivery of possession by the mortgagor, redemption reconveyance, delivery of possession by the mortgagee.”***

4. Mr. Mutua contended that in light of these provisions, the applicants have no legal cover for bringing this application by way of a miscellaneous pleading. He also argued that section 89 of the Civil Procedure Act requires the applicant to follow each and every procedure to the letter and therefore that the procedure that was open to the applicant is Order 36 Rule 3A of the Civil Procedure Rules.

5. In response, Mr. Masika for the applicant contended that the respondent’s preliminary objection is not only misconceived, but that it is an attempt to delay the expeditious disposal of the applicant’s application. Mr. Masika argued further and said that Order 36 is reserved for simple matters that can be dealt with in a quick and summary manner. He said that because of the nature of such matters, they are to be listed and heard expeditiously before a Judge in chambers.

6. On the law, Mr. Masika submitted that failure to observe the rules under Order 36 of the Civil Procedure Rules is not a fatal defect and in this regard, he relied on the case of **Stephen Kaguku Mariba –vs- Kibe Mariba & Others [2007] e KLR – Court of Appeal Nairobi**. In the Mariba case, the Court of Appeal, relying on its ‘earlier decisions in **Mucheru –vs- Mucheru [2000] 2 EA 455; Bhari –vs- Khan [1965] EA 94, Kibutiri –vs- Kibutiri [1982-88]1 KAR 60 and Kenya Commercial Bank –vs- James Osebe [1982-88]1 KAR 48** set out the scope and general purpose of procedure by way of originating summons in the following words by Sir Ralph Windhami CJ in **Salemohamed Mohamed – vs- PH Saldanha 3**, Kenya Supreme Court (Mombasa):?

***“Such procedure is primarily esigned for the summary and ‘ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the court’s own execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI which provides that they shall be heard in chambers unless adjourned by a Judge into court.”***

7. The court, in reaching the conclusion that failure to comply with Order 36 was not fatal to the proceedings fell back on the provisions of Order 36 Rule 10 of the Civil Procedure Rules which empowers the court to convert a proceeding commenced by Originating Summons into one commenced by plaint if such change is found to be expedient.

8. Mr. Masika also cited **Boyes –vs- Gathuru [1969] EA 385** in which the application was brought in an incorrect form and was entitled “***Miscellaneous Civil Suit No. 82 of 1968***” and was headed, “***Chamber Summons***” though it was conceded that the reference to a suit was wholly inappropriate. The Court held that the case of the wrong procedure did not invalidate the proceedings because:?

- (a) it did not go to jurisdiction; and
- (b) no prejudice was caused to the appellant.

9. In the case of **Githere –vs- Kimungu [1976-1985]EA 101**, the court considered a procedural error or blunder on a point of law and noted:?

***“that the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and that the court should not be so bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice, this is a particular case, and this a principle in which a court must remember when judicially exercising its discretionary powers.”***

10. Mr. Masika, also cited the case of **Welcome Properties –vs- Karanja & 2 Others, [2001] KLR 402** in which it was held that a procedural defect does not oust the jurisdiction of the court and

unless injustice or prejudice is shown, defects of form and other procedural lapses cannot vitiate proceedings. In **Industrial Development Bank Ltd. –vs- Greenland Dairy Ltd.** – Misc. Application No. 546 of 2005, the court allowed an application similar in nature to the present application.

11. In essence Mr. Masika argued and contended that the alleged omission of procedure did not go to the jurisdiction of this court and that no prejudice is caused to the respondent by the failure to comply with Order 36 Rule 3A of the Civil Procedure Rules. He also argued that the use of the word “*may*” under Order 36 Rule 3A means that it is not mandatory that an applicant must comply. If he so chooses to adopt the summary procedure, it would not be held against him. In response Mr. Mutua distinguished all the authorities relied upon by Mr. Masika for the applicants and urged the court to find that the said authorities are not relevant save that if the court finds that the respondent would suffer prejudice if the application proceeded as it is then the objection should be upheld. Mr. Mutua also urged the court to stick by the principle of stare decisis and “***unless the decisions of the Court of Appeal can be distinguished from the case under review on some other principle such as the obiter dictum,***” this court is bound by the decisions of the Court of Appeal (see **Mwai Kibaki –vs- Daniel Torotich Arap Moi Civil Appeal No. 172 of 1999 – Court of Appeal.**)

12. Regarding what amounts to a preliminary point of law Mr. Masika referred this court to the case of ***Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1969] EA 696 in which SIR CHARLES NEWBOLD, P*** defined what a preliminary point of law is at page 701 thus:-

***“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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues. This improper practice must stop.”***

13. I have now considered the respondents preliminary objection in light of the principles of law set out above. I do find and hold that the preliminary objection lacks merit. What the respondent in questioning is not a matter of substance but merely one of want of form. I think that a mere want of form or failure to cite the relevant section or rule under which an application or other pleading is brought by a party in curable under Orders 6 rule 12 and 50 rule 12 of the Civil Procedure Rules. Order 50 Rule 12 of the Civil Procedure Rules provides:-

***“12. Every order rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”***

14. In any event, section 100 of the Civil Procedure Act (cap 21) gives the court a general power to amend any defect or error in any proceeding in a suit for the purpose of determining the real question or issue raised by or depending on the proceeding.

15. In the result, I find no merit in the preliminary objection raised by the respondent. All that the preliminary objection has achieved is to waste time and to increase the costs in the matter. The preliminary objection is dismissed with costs to the applicant.

It is so ordered.

**Dated and delivered at Nairobi this 10<sup>th</sup> day of April, 2008.**

**R.N. SITATI**

**JUDGE**