



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**CIVIL SUIT 489 OF 2005**

**ORIENTAL COMMERCIAL BANK LIMITED(formerly known as DELPHIS BANK LIMITED) ...PLAINTIFF**

**VERSUS**

**RUSTAM HIRA t/a RUSTAM HIRA ADVOCATE....**  
.....**DEFENDANT**

**R U L I N G**

At the hearing of the Notice of Motion dated 16<sup>th</sup> August 2007 and filed in court on 19<sup>th</sup> September 2007 the Advocate for the Plaintiff/Respondent attempted to raise a preliminary Objection to the said Notice of motion. This was on the 19<sup>th</sup> February 2008. He had not given notice of raising such a preliminary Objection and naturally caught counsel for the Defendant/Applicant by surprise and off-guard. He, counsel for the Defendant immediately objected to the said Preliminary Objection being so raised – without notice. Counsel for the Plaintiff/Respondent submitted that there is no provision for such notice under the Civil Procedure Act and the Civil Procedure Rules and so he was in order to raise the Preliminary Objection as he did. His counter part stated that it was a matter of courtesy to give notice of such Preliminary Objections and it had been the practice in the courts for a long time. Of course the court overruled counsel for the Plaintiff/Respondent and required him to serve notice of his preliminary Objection. That led to the matter being adjourned to 27<sup>th</sup> February 2008 when the Preliminary Objection would be heard.

And so on the 27<sup>th</sup> February 2008 Counsel for the Plaintiff/Respondent having served the Notice of his raising a Preliminary objection urged the said Preliminary Objection. The objection is that the Application is incompetent and fatally defective for non compliance with the Rules it is purportedly brought under. He submitted that the Notice of Motion seeking to strike out the suit for want of prosecution does not comply with the law and therefore cannot stand. He stated that order 16 Rule 5(a) does not apply to proceedings in the High Court because of pre-trial proceedings. The said **order 16 Rule 5 (a)** states:-

**“If, within three months after the close of pleadings;”**

Counsel for the Plaintiff/Respondent proceeded and submitted that because of that rule no suit can be set down for hearing unless and until discovery is made. For that position he referred the court to the authority of **WILLEM FREDERICK ERADUS W. F. & ANOTHER –VS- S.S. SOKHI &**

**ANOTHER CA NO. 17 OF 1984.** He submitted that since this suit has never come for hearing, order 16 5(d) under which it is also brought does not apply and for this he referred me to the authority of **EXPRESS DARGER CO. LTD –VS- KENYA CULTURAL CENTRE HCCC NO. 670 OF 2001.** He submitted further that the application is incurably defective and should be struck out and here quoted the case of **SAGOO –VS- BHAJI [1990] KLR 459** wherein Mbito J, as he then was, followed the case of ERADUS (Supra). Counsel finally submitted that as the suit was now set down for hearing on 10<sup>th</sup> June 2008 there was no inordinate delay and referred the court to the case of **TRUST BANK LIMITED –VS- VAGUARD LIMITED & OTHERS HCCC NO. 223 OF 2001.**

Learned counsel for the Defendant/Applicant submitted that a preliminary Objection lies only if there is a pure point of Law and referred the court to the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD –vs- WESTEND DISTRIBUTORS [1969] EA 393.** He submitted further that the arguments advanced by the Advocate for the Plaintiff/Respondent would have been raised at the hearing of the Notice of Motion. He argued that conduct such as shown by counsel for the Plaintiff/Respondent in raising this Preliminary Objection is what was described in the **Mukisa case** (supra) as improper practice. He added that all the cases quoted by the Advocate for the Plaintiff/Respondent refer to summons for directions and since the requirement for taking out summons for directions was deleted from the Rules Book way back in April 2000, their relevance is worth nothing. He stated that the court could ignore order 16(5) (d) in the heading of the Notice of Motion and invoked the inherent jurisdiction of the court. He prayed that the Plaintiff's Preliminary Objection be dismissed.

Giving consideration to the matter in issue here I can but only repeat and quote what Sir Charles Newbold P. deprecating the increasing practice of raising preliminary objections said in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WESTEND DISTRIBUTORS LTD** at page 701:-

**“The first matter relates to the increasing practice of raising points which should be urged in normal manner, quite in properly by way of preliminary objection. A preliminary objection is in the nature of what used to be called 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 issues. This improper practice should stop.”**

I fully adopt the above words into this matter. Raising an objection on a spent provision of the Law and quoting cases to court whose relevance is totally irrelevant is to attempt to mislead the court. It will not aid the party raising it. It will merely delay the finalization of the suit. The authorities quoted to me are in respect of resisting an application to dismiss a suit for want of prosecution. The arguments made in raising the preliminary objection and those authorities are properly made at the hearing of the Notice of Motion itself. The court was not told when discovery was finally made. There is nothing done by way of discovery between 19<sup>th</sup> September 2007 when the Notice of Motion was filed and 15<sup>th</sup> February 2008. when the suit herein was fixed to be heard on 10<sup>th</sup> June 2008, yet the court was told that no hearing date would be taken until discovery was made. So then the question, when did pleadings herein close? becomes relevant. The Notice of Motion was first fixed to be heard on 11<sup>th</sup> February, 2008. On that day an adjournment was sought on behalf of the Plaintiff/Respondent on account of late service of authorities by the Defendant/Applicant. Three days later on 15<sup>th</sup> February 2008 a hearing date was taken exparte. Was this done with the intention of derailing the Notice of Motion? The upshot of all done herein is a tendency to delay the hearing of the Notice of Motion. The Preliminary Objection serves the same purpose of delaying the finalization of the matter. It is an improper practice that should stop. In the circumstances herein and in conclusion I would dismiss the Preliminary Objection with costs.

**DATED and DELIVERED** in open court at **NAIROBI** this 4<sup>th</sup> day of April, 2008

In the presence of :-

Mr. Gichuki Kingara for the Plaintiff/Respondent

Mr. Were for the Defendant/Applicant

**P. M. MWILU**

**JUDGE**

**4<sup>TH</sup> APRIL, 2008**