



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Appeal 13 of 2008

STANDARD ASSURANCE (K) LTD:.....:APPLICANT

VERSUS

1. RUTH WANZA MUTHOKA

2. NGONDU NGUU

(sued as next of kin to CYRUS NGUU MILAILI):.....:RESPONDENTS

RULING ON A PRELIMINARY OBJECTION

1. The Notice of Motion dated 31.1.2008 seeks orders that the execution of the decree in **Machakos CMCC No.7908/2007** be stayed pending the hearing of the intended Appeal. On 4.2.2008, this court granted interim orders as prayed and on 12.2.2008, the advocate for the Respondents filed a Notice of Preliminary Objection and raised the following as the grounds to be argued in that regard:-

i. That the applicant is guilty of non-disclosure of material facts.

ii. That the applicant has already settled this case vide cheque number 000624 for Kshs. 641,792/=, a fact within its knowledge, which fact the Applicant has withheld from the court.

iii. That there is nothing to stay and this application is frivolous, vexatious and an abuse of the court process of the honourable court.

iv. That there must be an end to litigation.”

2. Before turning to the arguments made in respect of the Objection, it is important from the outset to state what a proper preliminary objection is. Black’s Law Dictionary defines it in the context of international law as **“an objection that, if upheld, would render further proceedings ... impossible or unnecessary.”** One such objection, it is further explained is **“an objection to the court’s jurisdiction.”** In **Mukisa Biscuit Manufacturing Co.Ltd -vs- West Food Distributors Ltd [1969] E.A. 696**, a matter that involved dismissal of a suit for want of prosecution, Sir Charles Newbold nonetheless went further to elucidate on what a proper preliminary objection ought to be. He rendered himself eloquently as follows:-

“ 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 is to be ascertained or if what is sought is the exercise of judicial discretion.”

3. A casual glance at the four grounds set out above would clearly show that all are matters of fact and no proper point of law in the nature of a true demurrer has been raised. However, the advocate for the Respondent in his submissions pointed me to Section 316A of the Penal Code as inserted by Act No. 4 of 2004. That section provides as follows:-

“(1) Any person who draws or issues a cheque on an account is guilty of a misdemeanor if the person-

a. knows that the account has insufficient funds;

b. knows that the account has been closed; or

c. has previously instructed the bank or other institution at which the account is held not to honour the cheque.

2. Subsection (1) (a) does not apply with respect to a post –dated cheque.

3. Any person who, by deceit or any other fraudulent means, assists a person to obtain anything on the basis of a cheque drawn or issued in the circumstances described in subsection (1) is guilty of a misdemeanour

4. A person who is guilty of a misdemeanour under this section is liable to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding one year, or to both.”

4. The point made was that the Applicant on its properties being attached issued cheques to M/S Whitestone Auctioneers in the names of the advocates for the Respondents but later stopped them before encashment and having committed an offence under section 316A (1) (c) aforesaid it cannot be allowed to benefit from its illegal actions and the Application for stay of execution should be struck out for being an abuse of the process of the court.

5. The advocate for the Applicant has taken the view that in spite of the fact that his clients stopped the cheques from being paid, the circumstances under which it did so have been explained and being matters of fact, a preliminary objection is not the proper way to resolve the issue.

6. The issue before me has caused me some anxiety; on one hand is the Applicant who paid out cheques and before they are cashed, obtains an interim order of stay of execution, lawfully at a prima facie level, then stops the cheques. On the other hand is the Respondent who obtains a lawful judgment, proceeds to execution, receives cheques in payment and before enjoying their worth, finds out that they have been stopped by the Applicant upon the latter obtaining an interim order of stay of execution. Between the two, the Respondent obviously deserves sympathy but the matter before me is whether there is in fact a proper point of law that should lead me to strike out the Application for stay of execution.

7. I have relooked at the words of Sir Newbold in **Mukisa** (supra) and I am convinced that the issues before me even with the invocation of section 316A of the Penal Code are not pure points of law. They are inter-laced with contested facts and one would need to delve into the affidavits filed to determine who of the two is entitled to judicial discretion under Order XLI Rule 4(2) of the Civil Procedure Rules. Once that is the situation and affidavits being restricted to matters of fact as is set out in order XVIII of the Civil Procedure Rules, then no proper Preliminary Objection can be said to have been laid out for my consideration.

8. Having so said, the issues raised in submissions are serious and require further scrutiny by this court and if indeed one party has abused the process of the court to obtain some relief by non disclosure of pertinent and material facts, then the remedy to the aggrieved party would be by the Application dated

31.1.2008 being heard and determined on its merits.

9. In any event, the preliminary objection is overruled with no order as to costs since it is the Applicant who necessitated it by its own conduct.

10. Orders accordingly.

Dated and delivered at Machakos this 3rd day of April 2008

Isaac Lenaola

Judge