



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

**Civil Appeal 572 of 2007**

**MUGAMA FARMERS COOPERATIVE UNION LTD.....APPELLANT**

**VERSUS**

**MURATA FARMERS SACCO LTD.....RESPONDENT**

**PWANI FEEDS LIMITED .....INTERESTED PARTY**

**R U L I N G**

By a notice of preliminary objection filed on 12<sup>th</sup> July, 2007, the respondent Murata Farmers Sacco Ltd objects to the chamber summons dated 4<sup>th</sup> July, 2007 brought by the appellant Mugama Farmers Cooperative Union. The grounds of objections are as follows: -

- (a) The appeal and application concern execution of a judgment and the same ought to be made in Milimani High Court Civil Case No. 711 of 1999, Murata Farmers Savings & Credit Society Ltd –v- Mugama Farmers Cooperative Union Ltd, in which a decree has been issued;
- (b) The appeal and application are barred by the *res judicata* rule, similar applications having been heard and dismissed on October 27, 2004 in Milimani High Court Civil Case No. 711 of 1999 and on 31<sup>st</sup> May, 2007 in Cooperative Tribunal Case No.56 of 2005;
- (c) The purported appeal is incompetent;
- (d) The application is defective in form.

The application dated 4<sup>th</sup> July, 2007 is a chamber summons said to be brought under Sections 3, 3A, 63(e); Order XXXIX Rules 2, 2A & 3; Order XLI Rule 4 and Order XXI Rule 22 and Rule 25 of the Civil Procedure Rules. The orders sought include, an order that the respondent by themselves, their servants, agents and employees or any other person or persons authorized by them be restrained by way of an order of injunction issued by this honourable court from taking over the running of all management of appellant's properties LR No.4953/3/V/Thika, LR No.453/508/ Thika, LR No. 4953/679/Thika, LR No.4946/12/Maragua, and Muranga Township Block II/109, 110, 111 and 112 pending the hearing and determination of this appeal. That there be a stay of any further orders from the Cooperative Tribunal respecting the Tribunal Case No.56 of 2005 pending the hearing and determination of this appeal.

The chamber summons dated 4<sup>th</sup> July, 2007 has its roots in the appeal filed by the appellant against the judgment/ruling of the Cooperative Tribunal dated 31<sup>st</sup> May, 2007 in Tribunal Case No. 56 of 2005 between the appellants and the respondent. In that ruling, the tribunal upheld a preliminary objection

raised by the respondents, that the issues raised in that suit were directly and substantially in issue in Milimani HCCC No. 711 of 1999, between the same parties, and that the appellant was merely trying to enforce or execute the consent judgment recorded on 5<sup>th</sup> August, 2002, in Milimani HCCC No.711 of 1999 through the Tribunal case contrary to Section 34 of the Civil Procedure Act.

The respondent contends that the chamber summons and the appeal are both apparently seeking to execute a decree which was issued in Milimani HCCC No.711 of 1999. It was contended that by virtue of Section 34 of the Civil Procedure Act, the application for stay of execution ought not to have been made in the Cooperative Tribunal from which the appeal comes or the High Court. In this regard, the case of **Priscilla Njeri Echaria vs Peter Mburu Echaria HCCC No.663 of 2007**, in which the court upheld a preliminary objection and struck out a suit which was seeking to enforce a judgment was relied upon. It was also submitted that the application before the court was defective as it ought to have been brought by way of a notice of motion since it was seeking an injunctive relief where an appeal has been filed.

It was further contended that the issues in controversy were determined by the Arbitrator in Arbitration Cause No. 1 of 1999, as per the Arbitrator's award which was adopted as judgment of the court in the Milimani HCCC 711 of 1999. Therefore there was no issue to be determined by the Cooperative Tribunal or the High Court.

For the appellant it was submitted that the memorandum of appeal filed by the appellant raises several issues regarding the ruling of the tribunal which includes the tribunal's finding on the issue of *res judicata*. It was submitted that the appellant had a right of appeal provided under Section 81 of the Cooperatives Act. The court was urged to distinguish the three cases i.e.

1. HCCC (Milimani) 711 of 1999, in which the respondent sought injunctive orders to stop the appellant from interfering with the running of the business.
2. Arbitration Proceedings i.e. Arbitration Cause No. 1 of 1999.
3. Cooperative Tribunal Case No. 56 of 2005.

It was submitted that there were some issues raised in the case before the Cooperative Tribunal which were not raised in the HCCC at Milimani or the Arbitration proceedings. It was submitted that it was for the court of appeal to determine whether the Cooperative Tribunal Case was properly struck out. It was further submitted that the preliminary objection was raised prematurely, as no record of appeal has been filed nor have any directions been given under Order XLI Rule 8B of the Civil Procedure Rules.

As regards the form of the application, it was submitted that the application was primarily premised on Order XXXIX of the Civil Procedure Rules, which provides for bringing of such application by way of chamber summons. It was contended that the application was multipurpose since there was also a prayer for stay of execution. Referring to Order VI Rule 12 of the Civil Procedure Rules it was submitted that no technical objection can be raised to pleadings for want of form. The court was referred to the case of **Boyes vs. Gathure 1969 EA 387** for the proposition that a wrong procedure does not necessarily invalidate the proceedings. The court was also referred to **Civil Appeal No. 122 & 123 of 1997 Machakos Ranching Co. Ltd Vs Joseph Kyalo Mutiso & Another**, where Shah J.A had this to say regarding failure to comply with mandatory rules relating to numbering of the record of appeal: -

***"I am of the view that where no prejudice is caused to the objector the application ought to be sustained and heard.....want of compliance with procedural rules (unless fundamental and going to the jurisdiction of this court) do not and cannot call for striking out of an application of the kind that is before me. It is the duty of the court to strive to do justice between the parties undeterred by technical procedural rules."***

It was submitted that the preliminary objection was not appropriate in this instance as there were many issues which required ascertainment. For instance whether the matter before the Cooperative Tribunal

was the same as that in Milimani HCCC 711 of 1999, or whether it is the same matter as the Arbitration Cause or the Civil Appeal. In this regard, the case of ***Eunice Karimi Kibunja vs Mwirigi M'Ringera Kibunja Civil Appeal No.103 of 1996***, was cited. It was pointed that the Cooperative Tribunal Case arose from the ruling of Ibrahim J. in HCCC (Milimani) No.711 of 1999 in which Ibrahim J. dismissed the application because there was no decree extracted. The court was further asked to note the affidavit of Ephantus Wanjohi filed in support of chamber summons dated 4<sup>th</sup> July, 2007 which raises various other issues. The court was therefore urged to overrule the preliminary objection.

Pwani Feeds Ltd, who is a tenant in the appellant's property known as 4953/679/Thika Municipality, was on 1<sup>st</sup> October, 2007 granted leave to appear in this appeal as an interested party. Counsel for the interested party maintains that the appeal is competent and should be allowed to see the light of day. It was contended that the issue of ownership was not determined in HCCC (Milimani) No.711 of 1999. It was submitted that Section 7 of the Civil Procedure Act only relates to a matter which has been fully heard and issues determined. It was submitted that the principle of *res judicata* could not apply as the ruling appealed against was a consequence of a preliminary objection and not a full hearing determining issues. It was contended that no prejudice will be suffered by the respondent because of the wrong form of the appellant's application.

What is before me being a preliminary objection, the description of a preliminary objection as given by Law, J.A. and Sir Charles Newbold, P in the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd*** is instructive:

***“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....”***

***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 preliminary objection raised by the respondent as I understand it, appear to be anchored on Section 7 and 34 of the Civil Procedure Act. It is not based entirely on pleadings i.e. memorandum of appeal but relies on facts deponed to in the affidavit in support and in reply to the chamber summons dated 4<sup>th</sup> July, 2007. The facts relate to Milimani HCCC No.711 of 1999, Arbitration Cause No. 1 of 1999 and Cooperative Tribunal Case No. 56 of 2005. Although these suits involve essentially the same parties as the current appeal, some of the facts are contentious. For instance, the parties are not agreed as to whether the issues raised in all the three suits are the same and whether all the issues have been determined. This is a matter that would require ascertainment by the court.

Secondly, it is evident that the preliminary objection which has been raised before me is a duplication of the preliminary objection which was raised before the Cooperative Tribunal in Tribunal Case No.56 of 2005. The ruling of the Tribunal in the preliminary objection is subject of the appeal now pending before this court. To deal with the issues raised in the current preliminary objection is in actual fact to delve into the merits of the appeal. That would be prejudicial and premature at this stage.

Thirdly, in the chamber summons dated 4<sup>th</sup> July, 2007, the appellant has sought an order of temporary injunction under Order XXXIX Rules 2 and 2A of the Civil Procedure Rules. It is obvious that the appellant has come under the wrong provisions of the law. An order for a temporary injunction in an appeal is granted under Order XLI Rule 4(6) of the Civil Procedure Rules. The appellant therefore ought to have moved the court by way of a notice of motion under that rule. The question is, should the appellant's application be struck out? I think not. No prejudice has been caused to the respondent. As was stated by Shah JA (as above quoted), the court should strive to do justice between the parties undeterred by technical procedure. In this case, an appropriate amendment would cure the defect.

For thee reasons, I overrule the preliminary objection, I direct that the appellant shall file an appropriate amended application within 14 days from the date hereof and that the same be heard on merit.

Those shall be the orders of this court.

**Dated and delivered this 24<sup>th</sup> day of July, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Muriuki for the appellant

Gacheru H/B for Kuria for the respondent

Muriuki H/B for Interested Party.