REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 179 of 1990

KENYA COMMERCIAL BANK LTD. :::::::::::::::::: PLAINTIFF

VERSUS

1. MARK MAKWATA OKIYA

2. MARKO PETROLEUM DEALERS}::::::::::::::: DEFENDANTS

RULING

This ruling is on a Preliminary Objection which the plaintiff raised against the defendants' application dated 6th June 2008.

The Notice of the Preliminary Objection is in the following terms:

"***1. That the Application has been brought under wrong***

provisions of law.

2. Explanations request are not provided for in the Civil Procedure Act and Rules and they are ineffectual in law.

3. The information is available through perusal of the court file in the Registry.

4. The Application is frivolous and vexatious and an abuse of the court process."

It is common ground that the application was brought by the defendants pursuant to the provisions of sections 3 and 3A of the Civil Procedure Act.

As far as the plaintiff was concerned those statutory provisions could only be invoked as and when there were no specific provisions pursuant to which an application could be brought before the court.

In this instance, the plaintiff says that the explanations which the defendants were seeking, were vague.

But, in any event, the plaintiff believes that any explanations which the defendants may wish to have, are readily available from the court file. The plaintiff's reason for that contention was that the warrants of attachment were issued by the court, and thereafter, the Court Broker filed returns in court.

Furthermore, it is the view of the plaintiff that if the defendants had any genuine issues concerning the

process of execution, they should have invoked the provisions of Order 21 of the Civil Procedure Rules.

It was also contended that the defendants were well aware that the process of execution was being carried out because the defendants had failed to make payments in accordance with the terms of the court order.

The defendants are also faulted for having applied for and obtained orders staying execution herein, from the magistrate's courts at Butere and Bungoma, respectively. Therefore, the application before this court is considered, by the plaintiff, to be nothing more than an abuse of the court process.

In answer to the application, the defendants pointed out that pursuant to Order 6 rule 12 of the Civil Procedure Rules, no technical objection ought to be raised to any pleadings on the basis of want of form.

It is the defendants' contention that the preliminary objection herein was based on an alleged want of form.

Order 6 rule 12 of the Civil Procedure Rules provides as follows:-

"***No technical objection may be raised to any pleading on the ground of want of form."***

Pursuant to the provisions of section 2 of the Civil Procedure Act, the word "pleading" is defined as follows:-

"***Pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."***

I hold the view that the application before me is not a pleading, within the meaning spelt out in section 2 above-cited.

Nonetheless, by virtue of Order 50 rule 12 of the Civil Procedure Rules;

"***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."***

In so far as the objection herein is founded on the ground that the application was brought on the basis of the wrong legal provisions, the objection cannot succeed; that is the gist of the provisions of Order 50 rule 12.

The defendants say that the court file is big, and that therefore a perusal thereof may not give a clear picture on the issues being raised.

As far as the defendants were concerned, the plaintiff has all the information at its finger-tips, and it was thus easier for the plaintiff to provide to the defendants, the information sought.

That submission sounds like one founded on nothing more than convenience. I say so, because the defendants do not appear to deny the contention that the information they are seeking could be obtained from the curt file.

If that be the position, the plaintiff may very well have a basis for stating, as it did, that the application herein, to the extent that it seeks explanations, was not necessary.

However, until and unless the court will have delved into the substance of the application, the court will be unable to determine for itself, whether or not the application was necessary.

For instance, until the application is canvassed in full, the court would be unable to determine the

accuracy or otherwise of the defendants view, that the plaintiff had rendered them destitutes, by selling-off their 7 properties worth Kshs.14.0 million, yet not crediting the proceeds of sale to the said defendants.

To that end, the plaintiff says that the defendants were confused, to be asking for accounts. Indeed, the plaintiff is of the view that it does not have to give any explanations to the defendants.

I am afraid that without having the benefit of submissions on those weighty issues, this court is unable to establish whether or not the plaintiff is right. Therefore, whereas there is a possibility that everything which the defendants are seeking are available from the court file, until the plaintiff illustrates that fact to me, I am unable to so determine, at this stage of the preliminary objection.

The plaintiff may well need to put forward material which will help it verify, to this court's satisfaction, that the defendants were abusing the process of the court, by making applications, before other courts, for stay of execution of the decree herein.

In other words, the facts of the matter before me are not agreed upon, so as to give rise to a proper preliminary objection. Yet, if some of the issues being raised by the defendants were factually correct, then possibly, the plaintiff has some factual explanations to render to this court and to the defendants.

In the result, the preliminary objection is not properly founded on issues of law only, which emanate from either agreed facts or from the facts put forward by the applicant, and which were accepted by the plaintiff.

In the celebrated case of ***MUKISA BISCUITS LTD. VS WEST END DISTRIBUTORS LTD. [1969] E.A. 696, at page 701***, Sir Charles Newbold defined a Preliminary Objection as follows:-

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."

In my considered opinion, founded on the reasons given earlier hereinabove, the preliminary objection raised by the plaintiff herein does not meet the test set out by Sir Charles Newbold. It is the sort of objection which ought only to be raised in opposition to the substantive application, on the merits. Accordingly, I overrule the preliminary objection, with costs to the defendants.

Dated, Signed and Delivered at Kakamega, this 13th day of October, 2008.

FRED A. OCHIENG

J U D G E