



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

**Civil Case 709 of 2003**

1. LAWRENCE PAUL MUNYI
2. ANDREYA O. WANEKEYA
3. WILLIAM LUVISIA MAJANI.....PLAINTIFFS

**(Suing on their own behalf and as representatives of affected officers of the Kenya Meteorological Department of the Ministry of Transport and Communications of the Government of Kenya employed as public officers designated “Meteorological Assistant”)**

**V E R S U S**

**THE ATTORNEY GENERAL .....DEFENDANT**

**(Sued under the Government Proceedings Act, Cap 40 of the Laws of Kenya on behalf of:-**

- (a) **The Permanent Secretary, Ministry of Transport & Communications**
- (b) **The Director, Directorate of Personnel Management**
- (c) **The Permanent Secretary to the Treasury**
- (d) **The Public Service Commission of Kenya)**

**R U L I N G**

The Plaintiffs have, by notice dated 30<sup>th</sup> June, 2008, raised a preliminary objection to the Defendant’s application by notice of motion dated 24<sup>th</sup> April, 2008. That application seeks orders to review and set aside orders entered on 27<sup>th</sup> February, 2004 and 28<sup>th</sup> April, 2004.

The orders of 27<sup>th</sup> February, 2004, (Ojwang’, J) disallowed the Plaintiff’s application by notice of motion dated 8<sup>th</sup> December, 2003 for interlocutory judgment and for a date for assessment of damages. The disallowance of that application was stated by the learned judge to be:-

**“Conditional upon the Respondent (Defendant), within 14 days of this ruling, filing and serving the required pleadings and/or affidavits for the prosecution of this case.”**

There was no default clause in the order of 27<sup>th</sup> February, 2004; that is, it was not stated in terms what should happen if the Defendant did not, within 14 days of the ruling, file and serve **“the required pleadings and/or affidavits”**.

By the orders of 28<sup>th</sup> April, 2004 (Kihara Kariuki, J) the Plaintiff’s application by notice of motion dated 27<sup>th</sup> April, 2004 was allowed in prayer no. 3 thereof. I have not been able to find that application in the court record; so I do not know what precisely had been sought in prayer no. 3 thereof. But the formal order issued on 10<sup>th</sup> May, 2004 says that judgment was entered for the Plaintiff for various declarations and orders. It was further ordered that the suit be set down for assessment of damages.

I have read the grounds set out in the notice of preliminary objection. I have also given due consideration to the submissions of the learned counsels appearing. In the case of **MUKISA BISCUIT CO. –vs- WEST END DISTRIBUTORS LTD [1969] EA 696**, Law, JA stated:-

**“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out 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 ....”**

In the same case Sir Charles Newbold, P said:-

**“...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 ....”**

I have carefully read the nine grounds set out in the notice of preliminary objection in light of the above perimeters set by the predecessor of our Court of Appeal. None of these grounds meets the standard of a preliminary objection as defined in the two quotes. Some of the grounds are based on contentious facts that must be ascertained at the hearing of the application. Others will depend upon exercise of the court’s discretion. None of them raises a pure point of law capable of disposing of the application unheard.

I must therefore overrule the preliminary objection. It is not well-taken at all. I will award costs thereof to the Defendant. It is so ordered.

**DATED, AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2008**