



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2148 of 1987**

**UCHUMI INSURANCE BROKERS LTD ::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**KENYA NATIONAL ASSURANCE CO. LTD:::::::::::::::::::::::::::::DEFENDANT**

**RULING**

The defendants herein have in place a Notice of Motion dated 7.10.2005 and filed on 9.12.2005. It seeks 5 prayers namely that 78, 750 Kenya Commercial Bank Shares of the Defendant deposited in Court as security by order of the court made on 17<sup>th</sup> March 1995 be released to the defendant forthwith or to Kenya National Assurance Company (2001) Limited, the Court settles the issue of accounts between the parties herein, the defendant be discharged from all obligations to the plaintiff as far as this case is concerned. This case be marked as settled and costs of the application be provided for.

The Plaintiff who is the Respondent to that application raised Preliminary Objections to that application.

These are:-

1. The said application is an abuse of the court process
2. The defendant has not been fully discharged of the amounts that is due and owing to the plaintiff/respondent in terms of the decretal sums and costs.
3. The defendant/applicant has misled the honourable court to believing that it was all along holding valuable securities while the securities were given in contravention of Section 46 of the Insurance Act Cap.405 Laws of Kenya.
4. The defendant has not come to court with clean hands
5. The defendant/applicant had previously made a similar application and being dissatisfied with the decision moved to the appellate court.

In support of the objection Counsel submitted that they object to prayer 1 of the application dated 7.10.2005 because it had been raised in an earlier application dated 5.6.95 and it was dismissed. Upon dismissal of the application the defendant moved the Court of Appeal. On this basis that prayer is Res Judicata and it cannot be revisited. That they require receipts to prove that the defendant has paid monies he is supposed to have paid. They have given contradictory deponents in their affidavits which amounts to perjury. That justice Githinji now JA ordered on 10.6.98 for the matter to go for taxation and then be

taken for hearing with notice to the liquidators for security in question to be released to the current plaintiff for realization of the security. That the Plaintiff has done all it could to bring the matter to an end but it is the defendants who are delaying the matter for failure to comply with the earlier orders.

In response Counsel, for the defendant urged the court to disallow the objection because it is dealing with facts whereas a preliminary objection as it is known in law deals purely with points of law which if upheld will dispose off the matter finally. They contend Res Judicata does not arise because the application was dismissed due to non-attendance of counsel and not on merit and so sections 7 Civil Procedure Act does not apply. Matters touching on affidavits are matters of evidence which have to be examined.

On the basis of the foregoing grounds Counsel for the defence urged the court to dismiss the preliminary objection as it has been raised to delay the matter further and to confuse the issues. Given a chance they will demonstrate that they have fully paid what they were supposed to pay.

In response Counsel for the Plaintiff although agreeing with the case law cited by the defence still maintained that res judicata applies since the application of 5.6.95 was disposed off on merit, that is why the defence moved to the Court of Appeal. It is their stand that they do not understand why they are in Court and yet Justice Githinji (now JA) orders were very clear.

On the courts assessment of the facts here in this Preliminary Objection can be disposed off on two fronts:-

- (1) Technicality
- (2) Merit

Technicality arises because it is necessary to establish whether the objection raised qualifies to be a Preliminary Objection in accordance with the principles laid down in case law as to what qualifies to be a preliminary objection and what does not. A leading authority on this is the famous case of MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WESTEND DISTRIBUTORS LTD [1969] E.A. 696. At page 700 paragraphs D-E Law J.A. as he then was, had this to say “*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 New bold president at page 701 paragraphs AB had this to say “*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 addition to the above, Counsel for the defence referred the Court to the case of EUNICE KARIMI KIBUNJA VERSUS MWINGI M. RINGERA KIBUNJA. At paragraph 3 page 1 line 3 from the bottom the Court of Appeal had this to say “The practice of raising points which should be argued in the normal manner by way of Preliminary objection does nothing but unnecessarily increases costs and on occasion confuse the issues. A preliminary objection cannot be raised if any fact has to be ascertained.

The foregoing principles have been applied both to the points raised and the submissions in totality and after due consideration this court has arrived at the conclusion that the points raised fall short of the required ingredients of a preliminary objection for the following reasons:-

1. Abuse of the court process though a point of law in itself it requires facts or evidence to show what comprises abuses of the court process.
2. Evidence of the defendant’s failure to discharge the amounts that is due and owing to the

Plaintiff in terms of the decretal sum and costs needs to be ascertained.

3. The facts of securities having been given in contravention of section 46 of Cap 405 calls for scrutiny of the said evidence to establish that fact.

4. Issue of unclean hands arising as a result of deponing of contradictory evidence leading to perjury needs ascertaining of those facts.

5. Res Judicata also though a point of law is not pleaded in a pleading. It is necessary to scrutinize the record to confirm the existence of the state of affairs leading to Res Judicata or not.

In view of the foregoing findings all the points raised have failed to satisfy the ingredients for a preliminary objection because they are cemented on facts which need to be ascertained. This being the case they can easily and should have been appropriately incorporated in the replying affidavit

in opposition to the application objected to. This would have enabled the court to ascertain some of the factual issues raised to confirm their truthfulness or otherwise.

In the final result having faulted the preliminary objection on a point of technicality there is no need to go into the merits as to whether the points raised are correct or not as in doing so the court will be pre-empting the merits of the application objected to since annexures to the replying affidavit contain some of the issues raised in the objection. This should be left to the trial judge who will be seized of that application.

The preliminary objection dated 10.5.2006 be and is hereby dismissed with costs to the defence. Parties are advised to proceed to fix the application dated 7.10.2005 for final hearing and disposal.

DATED, READ AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY 2007.

R. NAMBUYE

**JUDGE**