



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE 40 OF 2007

TROPICAL TRADING CO. LTD.....1ST PLAINTIFF
HARDEV SINGH SAIMBHI.....2ND PLAINTIFF

VERSUS

TROPICAL QUARRIES (KENYA) LTD.....1ST DEFENDANT
INDERJIT SINGH SAIMBHI.....2ND DEFENDANT
SUHWINDER KAUR SAIMBHI.....3RD DEFENDANT

RULING

In the Notice of Preliminary Objection dated 9th June 2009, the Defendants sought for this suit to be struck out on the following grounds:

- (a) ***That this suit is fatally defective, having been initiated by a non-existent entity Tropical Trading Co. Ltd. whilst the Company registered at Sheria House is "THE PROPICAL TRADING COMPANY (KENYA) LIMITED."***
- (b) ***The suit is an abuse of Court process, having been filed without the authority of the Board of Directors and/or any Resolution by the Board of Directors.***
- (c) ***The suit is a duplex and cannot proceed before the determination of a previously instituted suit on the same issues to wit HCCC No. 118 of 2001 pending before this Court.***
- (d) ***No proper discovery has been made and the suit was fixed for hearing before issues were framed and/or agreed upon and before other pre-trial procedures were completed.***

When the aforesaid Preliminary Objection came up for hearing on 13th May 2010, the Defendants sought to argue both the Preliminary Objection and the Summons dated 28th April, 2010. Mr. Karweru, learned advocate for the Plaintiffs raised a preliminary point in which he urged this Court to rule whether or not the Defendants are entitled to proceed that way.

It is the submission of Mr. Karweru, learned advocate for the Plaintiffs that the Defendants must elect to either argue the Preliminary Objection or to abandon it and argue the Summons instead. Mr. King'ara, learned advocate for the Defendants, was of the view that he was entitled to argue both.

I have taken into account the rival submissions presented by both learned counsels and the material laid before this Court. It is not in dispute that the grounds raised in the Notice of Preliminary Objection dated 9th June 2009, are the same as those set out on the face of the Summons dated 28th April, 2010. The question is, whether the Defendants are entitled to argue both the Preliminary Objection and the application at the same time? In order to get the answer to the above question, one must examine the definition and the extent of a Preliminary Objection. In the notorious case of **MUKISA BISCUIT MANUFACTURING CO. LTD. =VS= WEST END DISTRIBUTORS LTD [1969] E.A. 696, At Page 701, SIR**

CHARLES NEWBOLD stated as follows:

“A preliminary objection is in the nature of what used to be a demurer. It raises pure points 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 will adopt the above definition in this matter. In a nutshell, the preliminary objection must raise pure points of law which must stand out clearly. In such a case the facts relied upon must not be disputed. The Court is not required to go searching for the facts. The facts must be admitted and manifest themselves from the pleadings. A party is not allowed to introduce facts by affidavit evidence to support a preliminary objection. In the Summons dated 28th April, 2010, the Applicants have raised similar grounds as those raised in the Preliminary Objection. The aforesaid Summons is premised on *Order VI rule 13 (b), (c) and (d)* of the Civil Procedure Rules. Under *Order L rule 3* of the Civil procedure Rules, all applications must set out the grounds they are based and should where applicable be supported by affidavit evidence. It is therefore obvious that the scenario obtaining in this case is that the Defendants must elect which between the Preliminary Objection and the Summons should proceed for hearing. If the Defendants elect to argue the Preliminary Objection, then the facts relied upon must not be contested. The record shows that the Summons dated 28th April, 2010 was served. The Plaintiffs have filed a Replying Affidavit to controvert the facts. Despite having been urged to

make an election, Mr. King'ara has insisted that he would proceed for hearing with the two applications. Mr. Karweru has further urged this Court to strike out both applications because the same issues are also pending before the Court of Appeal. Mr. King'ara stated that the issues raised in the appeal pending before the Court of Appeal are totally different. With respect, this Court cannot make a decision over this issue at this stage because the facts must be ascertained from the affidavits filed for and against the Summons dated 28th April 2010. That application is yet to be argued substantively. This Court cannot convert the Preliminary Objection raised by Mr. Karweru to determine the issue based on facts. That is the preserve of the Court which will hear the application dated 28th April 2010. Essentially what the Plaintiffs have sought is for this Court to give directions on the way forward. Mr. King'ara has refused to make an election. This Court cannot choose for him what to do. The best I can do in the circumstances is to strike out the two applications. This will give the Defendant a chance to begin the process afresh, if need be. I hereby strike out both the Notice of Preliminary Objection dated 9th June 2009 and the Summons dated 28th April 2010 with costs to the Plaintiffs.

Dated and delivered at Nyeri this 21st day of June 2010

J. K. SERGON

JUDGE

In open Court in the presence of Mr. Karweru for the Plaintiffs and Kioni holding brief King'ara for the Defendants.