



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

Civil Suit 406 of 2006

JOSHUA KIBET CHOGE.....1ST PLAINTIFF

NAOMI JELANGAT CHOGE

T/A JOTO COMMERCIAL HAULIERS.....2ND PLAINTIFF

VERSUS

MAINA MAHINDA T/A DALE ENTERPRISES also

T/A SHELL & BP PETROL STATION – ATHI RIVER1ST DEFENDANT

WARLEEN TRADERS (K) LIMITED.....2ND DEFENDANT

RULING

The Notice of Motion dated 30.1.2006 seeks **inter alia** an order that the actions of the defendant Davis Mahinda from 19.1.2006 to date to forcefully detain the plaintiffs' motor vehicle KAG 966V and eventual removal of all studs from its wheels and damaging of the fuelling tanks and pumps thereon and refusal to release unconditionally the said motor vehicle and threatening to attach many other plaintiffs' vehicles whenever spotted near his Athi River Shell Petrol Station is in contempt of the order made by Hon. Ransley J on 14.7.2005 and extended until 7.2.2006 by subsequent orders of this court.

On 2.3.2006 the defendants filed a Notice of Preliminary Objection on the following grounds:-

- (1) That the application is fatally defective and bad in law.
- (2) That the applicants have failed to comply with mandatory provisions of the law.
- (3) That leave granted on 27.1.2006 was obtained by misrepresentation of facts and incorrect fact intended to mislead the court.
- (4) That the alleged orders which are alleged to have been breached had already lapsed as at the time of instituting committal proceedings.
- (5) That the application is founded on falsehood and made in bad faith.

The locus classicus on Preliminary Objections is **Mukisa Biscui Manufacturing Company Limited – vs – West End Distributors Limited (1969) EA 696**. The case stated the law as follows. A

preliminary objection in Law “**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.**”

So, on the authority of Mukisa Biscuits Manufacturing Company case a valid preliminary objection must: (i) raise a pure point of law; (ii) facts pleaded by the other side must be assumed to be correct (iii) no fact has to be ascertained and (iv) what is sought should not be the exercise of judicial discretion.

From the arguments made in support of and in opposition to the preliminary objection none of the grounds for the objection can be resolved without facts being ascertained and where any single fact has to be ascertained a preliminary objection is not appropriate. Indeed ground 3 alleges misrepresentation of facts and incorrect fact intended to mislead the court. That is a direct challenge against the position taken by the plaintiffs. There is therefore no assumption that the facts pleaded by the plaintiffs are correct in fact the defendants expressly say the contrary. Ground 4 implies a conflict with respect to the very orders that are the subject of the application and is based on the existence of certain circumstances that are not admitted. Ground 5 alleges falsehoods and bad faith. How can that ground be entertained without ascertaining facts which form the basis of the complaint?

As the application still has to be heard, I should not say more to avoid prejudicing the hearing of the application in which the parties will obviously have the right to make the same arguments made at this stage. For now however, I find and hold that the Preliminary Objection has not been properly raised and is overruled with costs to the plaintiffs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Josiah holding brief for Munge for the defendants and Onyango for the plaintiffs.

F. AZANGALALA

JUDGE

15/6/07