



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

MISC CIVIL APPLI 97 OF 2003

HEADNOTES:

JUDICIAL REVIEW/CIVIL PROCEDURE

- *Principles applicable when considering Preliminary Objections.*
- *Preliminary Objection is in the nature of what used to be a demurrer.*
- *Preliminary Objection shall not be raised if the facts are disputed or if what is sought is the exercise of judicial discretion need to be ascertained.*
- **MUKISA BISCUIT MANUFACTURING CO. LTD –V- WEST-END DISTRIBUTORS LIMITED – (1969) EA 696 – applied**

REPUBLIC APPLICANT

VERSUS

ELDORET WATER AND SANITATION COMPANY LIMITED.... RESPONDENT

BOOKER ONYANGO)

MESHACK OMONDI AGENDO)

JOHN KWAMBAI ROTICH) EX PARTE

R U L I N G

This is a judicial review application filed by the Ex parte Applicants under the provisions of Order 53 Civil Procedure Rules and Section 8 and 9 of the Law Reform Act. In a Notice of Motion dated 18th April, 2003, the Applicants seek the following judicial review orders against the Respondent, the Eldoret Water and Sanitation Company Limited:-

1. An order of CERTIORARI to remove into this Honourable Court and to quash the proceedings and decision of the Respondent dated 21st and 23rd January, 2003.
2. An order of PROHIBITION to prohibit the officers of the Respondent from further harassing and intimidating the Applicants with regard to the subject matter of this application.

3. An order of MANDAMUS to compel the Respondent to reinstate the Applicants to their former jobs and to pay their salary arrears and other lawful benefits due to the Applicants forthwith and to continue paying salaries and benefits regularly thereafter.

The application is opposed by the Respondent and it inter alia, filed a Notice of Preliminary Objection dated 5th June, 2003 which raised the following grounds:-

1. The Respondent is a private limited liability Company against which orders of certiorari, prohibition and mandamus do not lie.
2. The Respondent's decisions, resolutions and actions are not open to challenge by prerogative orders.
3. Employment contracts are governed by a specific legal regime and do not invite prerogative orders.
4. That the whole application in spirit and substance is an abuse of the Court process.
5. The application offends the provisions of Order LIII Rule 7 of the Civil Procedure Rules and should be struck out.
6. The application is improperly titled.

At the hearing, the Respondent took up the Preliminary Objection and in particular grounds 3 and 5 thereof. Having considered the issues before this Court for determination in the Preliminary Objection on points of law, I felt obliged to revisit the all-important case decided by the Court of Appeal which must be this Court's guide on the issues raised. This is MUKISA BISCUITS MANUFACTURING CO. LTD –V- WEST END DISTRIBUTORS LIMITED (1969) EA. 696 in which SIR CHARLES NEWBOLD P observed as follows:-

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

In this proceedings it is the Ex parte Applicants' case inter alia that:

- Their rightful employer is the Municipal Council of Eldoret.
- They are on transfer to the Respondent Company, Eldoret Water and Sanitation Company.
- The Respondent is an agent of the Municipal Council and empowered to and/or delegated with responsibility to manage water and sewerage services within the Municipal Council's environs.
- The Applicants are employees of the Municipal Council of Eldoret who are only seconded to the Respondent and under the Agency Agreement reached between the Respondent and the Municipal Council of Eldoret, the Respondent had no powers to deal with staff matters.
- The transfer of staff from the Municipal Council of Eldoret was illegal as Municipal staff are employees of the Government of Kenya and could not be transferred to a limited liability Company.
- That the Applicants have never resigned from the Municipal Council of Eldoret nor have their services been terminated by the Council.
- That the Respondent is wholly owned by the Municipal Council of Eldoret and a limited liability

Company must have at least 2 shareholders.

- That to date the Ministry of Local Government has not acceded to the formation of the Company and/or the transfer of staff to the Company but the Municipal Council of Eldoret has gone ahead and formed the Company and transferred civil servants to the limited liability Company.

On the other hand, it is the Respondent's case inter alia, that:

- The Respondent as a private limited Company duly incorporated on 29/10/1997.

- Vide the Agency agreement the Company absorbed all members of the staff of the Water and Sewerage Department of the Municipal Council of Eldoret.

- On 19.12.2002 the Board of Directors of the Respondent Company resolved that the service of the applicants be terminated.

- The Respondent Company is a limited liability Company whose affairs cannot be supervised and challenged by Judicial review proceedings.

In Blacks Law Dictionary, a "demurrer" is defined as:-

"A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer."

In the light of the foregoing, a party raising a preliminary objection on a point of law must proceed on the basis (only for the preliminary point) that all facts pleaded by the other side are correct and albeit this, the cause of action is not sustainable as a matter of law. The Objector in such a situation is deemed to accept the correctness of the other party's facts for the purposes of the application. To do otherwise would render the preliminary objection to be not a true demurrer. An objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

In the present case the Respondent in raising – Ground 3 of the Preliminary Objection, assumes that there is an employment contract between the Applicants and itself and that this agreement is admitted by the Applicants. This is far from the truth if one examines that issues raised in the application by the Ex parte Applicants. Their cause of action is in fact substantially grounded on the contention that there is no contract of employment with the Respondent and that the Respondent is not their employer and they could not invoke any disciplinary procedures or terminate their services. The Agency Agreement and its validity, legality etc forms the core of the dispute herein.

From the issues disclosed by the pleadings and allegations by each side the questions of the relationship if any are heavily contested. In view of the inevitable disputes of facts arising from the positions taken, I do hereby hold that Grounds 1, 2 and 3 in the Notice of Preliminary Objection do not constitute pure points of law or demurrers. They are questions full of disputes and controversies and are most suited to be determined in a full hearing on the merits.

Under Ground 5 the Respondent has invoked the provisions of Order 53, Rule 7 (1) which requires the verification of any orders, records which is the subject of an application for an order of certiorari by an affidavit.

It is my view that this issue cannot be the basis of a Preliminary Objection on a point of law at this stage since at the very least, the hearing of the application had not been reached by the time the Notice to raise the Preliminary Objections were filed. If at all the orders, decisions or records in question are not verified, the Applicant has a last opportunity at the hearing to satisfy the High Court as to the reasons for the failure to verify the same by way of an affidavit. This point can still be taken up at the appropriate time.

I therefore do hereby dismiss the Preliminary Objections raised with costs to the Ex parte Applicant.

DATED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE