



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

**Civil Case 987 of 2001**

**BOOK POINT LIMITED .....PLAINTIFF**

**VERSUS**

**GUILDERS INTERNATIONAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**GUARDIAN BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

When the application by Notice of Motion dated 7<sup>th</sup> December 2005 came up for hearing on 14<sup>th</sup> May 2007 *Mr. Oduol* for the Defendant/Respondent raised a Preliminary Objection over which he had issued a notice to the opposite party.

These were that the Honourable Court had no jurisdiction to hear the application as drawn and filed; that the application was expressly barred by the Provisions of Section 80 as cross read with the Provisions of *Order XLIV Rule 1(1)(a)* of the Civil Procedure Rules; that the said application contravenes the Civil Procedure Act, *Order XLIV Rule 1(1)* an Appeal against the order sought to be reviewed has been preferred and is still pending in the Court of Appeal and that the application is contra statute as it is drawn and filed in breach of Civil Procedure Act, Chapter 21 Laws of Kenya

Evidence Act, Chapter 80 of the Laws of Kenya and the Stamp Duty Act, Chapter 480 of the Laws of Kenya.

In his submissions, counsel for the Preliminary Objector submitted that there was an application for summary Judgment leading to a decision of Court dated 9<sup>th</sup> July 2003. That in the decision the Judge declined to exercise his discretion to enter judgment against the 2<sup>nd</sup> defendant.

That if one was dissatisfied with the Judge's ruling the proper cause of action is to lodge an appeal. That both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have lodged appeals against that decision.

According to counsel, the Judge in his decision had found that the 2<sup>nd</sup> Defendant was not liable to pay rent because there is/and was no Landlord and Tenant relationship between him and the Plaintiff.

Yet the Notice of Motion application; the subject of the present preliminary objection, seeks to hold the 2<sup>nd</sup> Defendant liable for rent and this is why this preliminary objection has been raised.

That since there is a pending appeal; the decision sought in the Notice of Motion should not be made.

According to counsel there is no jurisdiction of an application for review to be made under *Order XXXV*

based on a Judge's discretion and in view of the pendency of an appeal the application for review cannot be entertained. Counsel submitted that the Notice of Motion application is premised on the basis of an agreement but this agreement was not stamped as is required by the Provision of the Stamp Duty Act, hence this agreement cannot be admitted in any Judicial Proceedings – hence this application is against the statute.

Counsel urged that if this preliminary objection is upheld it will dispose of the entire application and prayed that his preliminary objection be upheld.

*Mr. Nagpal* for the applicant opposed the preliminary objection and stated that there was no merit in any of the grounds argued. According to him a preliminary objection is raised on the basis that all the facts pleaded by the opposite party are correct but that what has been raised by the preliminary objector are not points of law but facts.

Counsel stated that the application by Notice of Motion is based on discovery of new evidence which could not have been discovered earlier. That the applicant had not appealed from the ruling of the Judge for refusing to enter summary Judgment and that they are perfectly in order to come to this Court for an application for review, because though also aggrieved by the ruling of the judge they have not appealed against the decision.

That pending appeals in the Court of Appeal are by Defendants' and do not preclude the applicant from coming to this Court to review.

Counsel submitted that with the material the applicant now has if the judge had it, he would have granted summary judgment.

Counsel did not understand where the issue of jurisdiction was coming from to form the basis of a preliminary objection! That the Court's jurisdiction is not based on whether or not a document is stamped and that the admissibility of a document in evidence is not a jurisdictional matter.

According to counsel, summary judgment was not entered for the applicant because there was still liability for the 1<sup>st</sup> Defendant and not the 2<sup>nd</sup> Defendant but that thereafter the applicants came upon the Memorandum of Understanding which the Court cannot be denied a chance to look at just because it is not stamped.

That this document was not within the knowledge of the applicant at the time the application was heard.

That the applicant was not a party to this document and was not in a position to ensure it complies with the provisions of the Stamp Duty Act.

Counsel asked that the preliminary objection be refused.

If counsel for the preliminary objector had cared and allowed the application by notice of motion dated 7<sup>th</sup> December 2005 and filed in court on 14<sup>th</sup> December 2005 to be heard, he would easily have raised the points raised in this preliminary hearing during the hearing of the review application.

I have said it elsewhere before, and I am not ashamed of repeating myself that a point of law which should form the basis of a preliminary objection should be so obvious that it should not be the subject of any other legal argument, say like where a party in an application for judicial review under *Order LIII* of the Civil Procedure Rules does so after 6 months of the event or a party seeking relief under *Order XXXVI* of the Civil Procedure Rules does so by way of ordinary suit.

Such point of law is so obvious that no learned counsel can present any arguments to counter it.

In the case of *MUKISA BISQUITS MANUFACTURING COMPANY LIMITED vs WEST END DISTRIBUTORS LIMITED [1969] E.A.* 696 at page 700 *Law J.A* (as he then was) had this to say on

preliminary objections:

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise 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*, then President of the Court of Appeal for Eastern Africa had this to say at page 701:

*“A preliminary objection is in the nature of what used to be 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”.*

Similar observations were made: by Judges of Appeal *J.E Gicheru* (now Chief Justice), *R.O. Kwach* and *A.B Shah* in *Civil Appeal No. 132 of 1989 – Nitin Properties Limited vs. Jagjit Singh Kalsi and Kaldeep Kanei Kalsi.*

On lack of jurisdiction for this Court to hear the applicant’s applications dated 7<sup>th</sup> December 2005 counsel for the Preliminary Objector refers to the pending appeals in the Court of Appeal by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

To counter this the applicants say it is not them who have appealed and are therefore not barred from making this application under *Order XLIV Rules 1, 2 and 3(2)* of the Civil Procedure Rules. This Court entirely agrees with this argument. *Order XLIV* of the rules gives the option of review to a party to a decision of the Court who opts not to appeal against it.

And as to lack of jurisdiction due to the non-stamping of the Memorandum of Understanding, the basis upon which the application dated 7<sup>th</sup> December 2005 has been made, I wish to say that this is a matter which should be decided upon at the time the main application is argued. The applicants correctly argue that they are not parties to this document and do not understand how they are affected by the non-stamping.

In that kind of position where there are still questions to be posed and answers given at least at some future time, I cannot say these issues can form the basis of a preliminary objection.

A preliminary objection must be based on pure points of law which have been pleaded. This is not the case here, and in fact whether or not the application dated 7<sup>th</sup> December 2005 is expressly barred by the provisions of Section 80 of the Civil Procedure Act as cross read with *Order XLIV Rule 1(1)* of the rules or that it contravenes the said Civil Procedure Rules, will all be decided upon when the matter is fully argued before the Court and are not capable of forming the basis of a preliminary objection.

As was stated in the case of *Tilling – vs – Whiteman [1979] 2 WLR 401*

*“Preliminary points of law can at times be treacherous short cuts and their price, delay, anxiety and expense”.*

The preliminary objection raised in this matter are the best examples where the above description fits.

*I dismiss this preliminary objection with costs.*

Delivered dated and signed at Nairobi this 7<sup>th</sup> day of June 2007.

**D. K. S. AGANYANYA**

**JUDGE**