



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 333 of 2004**

**DHANJAL BROTHERS LTD.....1<sup>ST</sup> APPLICANT**

**DHANJAL PROPERTIES LTD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**AFRICAN BANKING CORPORATION.....DEFENDANT**

**R U L I N G**

The Defendant herein filed a notice of motion dated 11<sup>th</sup> September, 2004 which sought judgment against the Plaintiff on admission or in the alternative summary judgment for Kshs.15.5 million. That application provoked a preliminary objection that was filed on behalf of the Plaintiff. The objection was in the following terms:-

1. That the application is null and void as it is founded on Defendant's defence and counterclaim filed in this honourable court on 3<sup>rd</sup> September, 2004, which defence and counterclaim is null and void, having been filed out of time and without leave of the court.
2. That the application is an abuse of the due process of this honourable court, in view of the courts orders given on 5<sup>th</sup> August, 2004.

In support of the first limb of the objection counsel for the Plaintiff submitted that the Defendant ought to have filed a memorandum of appearance on or before 17<sup>th</sup> July, 2004. That the defence and counterclaim ought to have been filed on or before 27<sup>th</sup> August, 2004. However, he stated that the defence and counterclaim was filed on 3<sup>rd</sup> September, 2004. he said that this was more than fifteen days after the appearance had been filed. He said that in regard to Order VIII rule 1 (2) of the Civil Procedure Rules the defence and counterclaim was filed out of time without leave. He said that paragraph 12 of the reply to defence and counterclaim clearly challenged the period taken to file the defence and counterclaim. In that regard he said that the Plaintiff had filed an application which was pending before this court seeking to strike out the defence and counterclaim. In support of the second limb of the preliminary objection counsel said that the defendants aforesaid application was an abuse of the process in view of orders that were granted by Justice Njagi on 5<sup>th</sup> August, 2004. Those orders were in the following terms:-

- That the honourable court be pleased to grant an order of injunction restraining the defendant, by itself, its servants, and/or its agent, M/s Garam Investments, auctioneers or any of them or otherwise from advertising for sale, selling by public auction or private treaty or whatsoever however the 2<sup>nd</sup> Plaintiff's piece of land known as L.R. No. KWALE/GHALU/KINONDO/670 until the hearing and determination of this suit.
- That the honourable court be pleased to grant an order of injunction requiring that full accounts be

taken between the parties pending the hearing and final determination of this suit.

Counsel highlighted the 2<sup>nd</sup> Order and said that it required the parties to take accounts but that exercise had not been undertaken. Therefore, submitted that the Defendant's application could not be entertained until that exercise had been completed. He was of the view that the defendant's application was mischievous for having been brought before accounts were taken. For that reason he sought that the defendant's application be struck out.

The Defendant's counsel opposed the preliminary objection and started by saying that it had raised numerous facts which cannot be traversed in a preliminary objection. On the issue of accounts he said that both parties had filed their accounts. He confirmed that the Defendant filed its accounts on 22<sup>nd</sup> July, 2005. He also confirmed that the Plaintiff's accounts were filed on 3<sup>rd</sup> July, 2006. These accounts he said were filed in furtherance to an order made by Justice Emukule in the year 2005. He therefore submitted that the Plaintiff's preliminary objection did not raise pure points of law and in this regard he relied on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. Counsel in particular relied on the following portion of that case:-

*"A preliminary objection is in the nature of what used to be a demurre. 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."*

He therefore, stated that the second limb of the preliminary objection relied on facts which had to be ascertained or which required judicial discretion and therefore cannot be a proper preliminary objection. He therefore submitted that the second limb of the Plaintiff's preliminary objection be dismissed. On the first limb defence counsel submitted that at various times the High Court and the Court of Appeal have held that where interlocutory judgment has not been entered a defence can be filed at any time. Counsel for this proposition relied on the case of Trust Bank Limited vs Amalo Company Limited Civil Appeal No. 215 of 2000 (UR). Counsel also relied on a case of this court namely Francis Maina Nduati vs Achelis Material Handling Ltd. Civil Case No. 487 of 2003. He relied on the following quote of that case:-

*"The Order VIII Rule 1(2) provides the period within which a defence ought to be filed and failure to so file the plaintiff would be at liberty to apply for judgment in default of an appearance."*

*When the plaintiff fails to so apply for judgment the Order IX Rule 1, provides the defendant leeway to file a defence any time before interlocutory judgment."*

*That being the case the defendant's defence filed herein was indeed filed in time in that there was no interlocutory judgment entered in favour of the plaintiff at the time of filing thereof."*

Defence counsel therefore sought that the first limb of the preliminary objection would also be dismissed. He further had this to say that the notice of motion dated 9<sup>th</sup> September, 2004. That it had been fixed for hearing by consent of both parties. He said that the issue of second limb to the preliminary objection had been considered by Justice Emukule that the accounts had thereafter been taken. He was of the view that the preliminary objection raised by the plaintiff was unnecessary. He said that the Plaintiff was enjoying injunction orders and it was not surprising that it would raise preliminary objections that were intend on delaying the completion of this matter.

In the court's view the Defendant is correct when he relied on the case of Mukisa Biscuit Company vs West End Distributors Ltd (Supra). In that the preliminary objection raised by the Plaintiff and particularly the second limb of the same relied on facts that were not agreed and which would have required the court to carry out an investigation. That is not a proper preliminary objection and on that basis alone the same will be dismissed. In regard to the first limb of the preliminary objection as can clearly be seen in the cases decided before and indeed by the provisions of Order VIII Rule 1(2) and Order IX Rule 1 of the Civil Procedure Rule a defence can be filed at any time before judgment. The Defendant's defence and counterclaim herein was filed before judgment was entered and therefore cannot

be said to have been filed out of time without leave. The first limb of the Plaintiff's objection therefore on this ground will be dismissed. I find that I am in agreement with the defendant's counsel that it is necessary for the courts to discourage unnecessary raising of preliminary objections which objections are sometimes bent on delaying the hearing of the matters. I am of the view that this present objection ought not to have been raised and it is possible that the Plaintiff having obtained injunction orders would wish to continue to enjoy those orders. I will therefore require the Plaintiff to pay the costs which shall be assessed by this court before the next hearing date. Failure to so pay the Plaintiff will be denied right of audience in this matter. These therefore are the orders of this court.

1. That the preliminary objection dated 15<sup>th</sup> October, 2004 is hereby dismissed with costs being awarded to the Defendant.
2. That the court does hereby assess the costs of that preliminary objection at Kshs.7,000/= which costs the plaintiff shall pay to the Defendant before the next hearing date in this matter. In default of such payment the Plaintiff will be denied audience.

**MARY KASANGO**

**JUDGE**

**Dated and delivered this 30<sup>th</sup> day of October 2006.**

**MARY KASANGO**

**JUDGE**