



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 46 of 2005

LAXMICHAND KESHAVJI & SONS (K) LTD.....
PLAINTIFF

VERSUS

EAST AFRICAN DEVELOPMENT BANK1ST
DEFENDANT

EASTERN AND SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK2ND
DEFENDANT

INDIGO EPZ LIMITED (*In Receivership*).....3RD
DEFENDANT

KIERAN DAY4TH
DEFENDANT

RULING

The 1st Defendant raised a Preliminary Objection against the Plaintiffs' suit and its application for an injunction. The Preliminary Objection is in the following terms:-

TAKE NOTICE that the First Defendant will raise the following issues as preliminary objections to the Plaintiff's Chamber Summons application dated 27th January, 2005, namely:-

- (a) "That the said application and the entire suit, are misconceived and do not lie on the grounds that it is not open to the Plaintiff as the purchaser or assignee of the equity of redemption to deny the validity of the mortgage dated 22nd January, 2002 created in favour of the 1st defendant.
- (b) That the said application and the entire suit are misconceived and do not lie on the further ground that it is not open to the Plaintiff to contend that the 1st defendant is not a mortgagee of the property known as L.R No. 29/1/16/2 in the face of the admission made by the plaintiff in its own pleadings and evidence filed herein that the 1st defendant advanced to the 3rd defendant a sum of US Dollars 3,500,000.00 on security of the said mortgaged property and that the documents are in the possession of the 1st defendant.
- (c) That the said application and the entire suit are misconceived and do not lie on the further

ground that it is not open to the plaintiff to contend that the mortgage created in its favour over the said property ranks in priority to the 1st defendant's mortgage in the face of the admissions made by the plaintiff in its own pleadings and/or the evidence filed herein that;

- (i) *it acquired from the 3rd defendant the right equity of redemption;*
 - (ii) *the said right was subject to prior mortgages created over the same mortgaged property in favour of 1st and 2nd defendants.*
 - (iii) *The mortgage in favour of the plaintiff did not secure money advanced to the 3rd defendant on the security of the mortgaged property.*
 - (iv) *The mortgage in favour of the 1st defendant secured money advanced to the 3rd defendant on the security of the mortgaged property.*
- (d) That by reason of the matters aforesaid the plaintiff is estopped from seeking the reliefs pleaded in the said application against the 1st defendant.”**

The Defendant's Counsel, in support of the Objection stated that the 3rd Defendant created an English Mortgage over the suit property in favour of the 1st Defendant and that said mortgage was properly executed and attested by the Mortgager the 3rd Defendant. That Mortgage secured a facility given to the 3rd Defendant of US Dollars 3.5 million. He stated that the title documents are in the possession of the 1st Defendant. At present, he said the amount loaned to the 3rd Defendant has not yet been repaid. The Advocate who drew the Mortgage document was an in-house lawyer of the 1st Defendant. 1st Defendant's advocate accepted that this in-house lawyer did not have a practicing certificate at the time of drawing the mortgage deed. He stated that a further mortgage was created over the said suit property in favour of the 2nd Defendant for the amount of PTA Units 2,362,000/=. 1st Defendant counsel also stated that there was a third mortgage in favour of the Plaintiff which secured payment of a mortgage debt. That in the 3rd mortgage, the mortgagee acknowledges the 1st and 2nd mortgages and acknowledges their priority and that consequently the 3rd mortgagee acquired the right of equity of redemption. 1st Defendant counsel stated that those facts were undisputed. He stated that the Plaintiff's case is that the 1st mortgage dated the 22nd January, 2002 created in favour of the 1st defendant is invalid on the ground that the advocate who drew it did not possess a valid practicing certificate. That the Plaintiff consequently now wishes to acquire priority over the 1st defendant by reason of that invalid mortgage. In regard to the law relating to this action, 1st defendant's counsel stated that the suit property is governed by The Government Lands Act. And that the law on Mortgages is contained in the Transfer of Property Act. He stated that in the TPA they are various mortgages, simple mortgage, equitable mortgage, usufructuary mortgage and English mortgage. That the essential features of these mortgages is that they need to be a contract between the parties either oral or written. That the contract is the interest of the property for the purpose of securing money advanced as loan. That the decisions and commentaries of the Indian Courts and Indian authors can guide the court. In this regard he referred to A.K Ray, The Transfer of Property Act. He referred the court to Page 89 of that book and further stated that such contracts have an essential ingredient or requirement of attestation. He said that a mortgagor once he borrowed money and raises a mortgage deed that deed needs to be attested. He referred to a section of the aforesaid book in the following terms:-

6. “Attested by at least two witnesses.” – The requirement as to attestation is a rule of law, not a rule of evidence, and a bond is not a mortgage unless it is attested by two witnesses.”

“Attestation” means that the person shall be present and see what passes and shall, when required, bear witness to the facts”.

The essential object of attestation being protection against forgery, fraud or undue influence, a party

executing a mortgage-deed cannot be an attesting witness thereof. 1st Defendant's counsel said that the equitable mortgage is the deposit of title documents by the mortgagor with the mortgagee and the advancement of money on the strength of those documents. That the difference between equitable mortgage and English mortgage is the enforcement. He said that the 1st Defendant holds two positions in law,

(i) As an owner of the English mortgage by virtue of the mortgage-deed, dated 22nd January, 2002;

(ii) The 1st defendant folds back position is one of equitable mortgage by having title documents and an advancement of US Dollars 3.5 million being made to the 3rd defendant the mortgagor. He said that the Plaintiff is a holder of the English mortgage and a holder of the equity of redemption but that the Plaintiff does not hold title documents and therefore cannot be said to be holding a equitable mortgage.

Further the plaintiff as an assignee or purchaser of equity of redemption cannot deny liability of the 1st defendant's charge for the following reasons:-

1. As Assignee the plaintiff stands in the same shoes as the mortgagor or the borrower. That by virtue of section 65(e) TPA the Mortgagor contracted that he would pay interest from time to time as agreed and undertook to discharge the principal amount on the prior and cumbrance.

2. By virtue of Section 59(a) the 3rd defendant in charging his title to the Plaintiff is bound by the terms and undertakings of the 1st defendant to the 1st defendant.

That as the 1st defendant, it had both the English and Equitable Mortgage and so that the Plaintiff as an assignee or purchaser cannot come to this court to say that the liability to the 1st defendant is no longer enforceable. Counsel said that this issue was addressed in the book A.K Ray as follows:-

“It is not open to the purchaser of the equity of redemption to deny the validity of the mortgage.”

1st Defendant's counsel also stated that the 3rd Defendant had not disputed the mortgage and the plaintiff who purports to derive its interest from the 3rd Defendant. He further stated that if the court accepts the contention of the Plaintiff that the Mortgage deed of the 1st defendant is invalid for being drawn by a person without a practicing certificate, then the 1st defendant's position is that they will be relegated from an English to an Equitable mortgage, in that respect he relied on the case **GUARANTY DISCOUNT CO. LTD vs CREDIT FINANCE CORPORATION LTD & ANOTHER, [1963] E.A. 345**. In that case the documents which apparently were intended to be legal mortgages of 4 properties were prepared and executed by the mortgagee in February, 1960 and by the Appellant on September 2nd 1960. In fact those documents were ineffective as legal mortgages. It was held in that case as follows:-

(i) Where title deeds are handed over by a debtor to a creditor against payment of money a very strong presumption arises that the deposit has been made with a view to the creation of an equitable mortgage over the entire interest of the debtor in the properties concerned and for the entire amount then due by the debtor to the creditor.

(ii) The appellant was a secured creditor by virtue of the deposit of the title deeds.

On the issue of priority of mortgage, counsel relied on section 78 TPA. This section provides as follows:-

“Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee”.

Counsel said that for the Plaintiff to get priority, they would have to meet the conditions in the aforesaid section. That is they would have to show either fraud or inducement. This the plaintiff had not done. The counsel further stated that it is not disputed that the 3rd mortgage created in favour of the plaintiff had the consideration seen in page 1 thereof that is forbearance to sue. Counsel was of the view that such a consideration was not within Section 78 of TPA and it therefore did not give the Plaintiff the right to priority. He contended that even if the 3rd defendant's mortgage to the Plaintiff was registered, the 1st defendant had an equitable mortgage. That the only way the Plaintiff can get priority is by a court order. That the law would require the plaintiff to pay the 1st defendant a mortgage debt, and also the 2nd defendant's debt before laying claim to the suit property.

The Preliminary Objection was opposed counsel for the Plaintiff stated in opposition that in any preliminary objection the objector had always to accept the facts as set out in the respondent's pleadings and other documents. He said that this is clearly shown in the celebrated case of **MUKHISA BISCUIT MANUFACTURING CO. LTD –vs- WEST END DISTRIBUTORS LTD (1969) EA 696**. Counsel relied on the following section of that case:

“The first matter relates 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

Counsel further stated that if a preliminary objection seeks for the court to make a finding, and a choice of assertions of Plaintiff as opposed to the defendant or if what is sought is the judicial discretion that would not be a proper preliminary objection. On this point too, he relied on the case **BERRY –vs- BRITISH TRANSPORT COMMISSION (1961) 3 ALL ER 65**. He relied on the following passage:-

“This point of law was directed to be heard as a preliminary issue between the parties. For this purpose, of course, all the allegations in the statement of claim must be taken to be true, and this includes the allegations in the particulars, which are part of the statement of claim”.

That for the 1st defendant to contents the facts which are in the plaint, or in the Plaintiff's injunction, it is in contravention with the principles of the 2 above cases. Plaintiff's counsel also submitted that the facts set out in the plaint and in the supporting affidavit in summary were as follows:-

- (i) *that the plaintiff is the 3rd mortgagee of the suit property;*
- (ii) *that the plaintiff is chargee of the equity of redemption;*
- (iii) *that the 3rd mortgage is subject to the validity of the 1st and 2nd mortgages;*
- (iv) *that the 1st and 2nd mortgages are void;*
- (v) *that the plaintiff is entitled to certain remedies which are prayed for.*

He said that this summary does not exhaust the factual position, but it is just a highlight of the facts. This highlighted facts he said cannot be challenged in a preliminary objection. He began by saying that the 1st defendant's mortgage is invalid and that assertion has to be accepted as correct and true. For the 1st defendant to request the court to make a finding opposite to that fact does not qualify as a preliminary objection and at such a finding should await the full hearing of this case. He summarized the 1st defendant's preliminary objection by saying that it is not an objection as such, but that it was a substantive reply to the plaintiff's pleadings but which should await the full trial. That those matters

raised by the 1st defendant are matters for evidence first of all for all arguments to be presented before court and witnesses to give evidence and to be cross-examined. That the preliminary objection was on the basis that the plaintiff had made certain admissions and that the court should not be requested to make a decision at a preliminary objection on such statements. That if the court had to examine whether there were admissions, the court would first ask itself whether there was such an admission and if there was such an admission, whether it entitled the defendant to judgment. That the 1st defendant in seeking the holding of this court, that the plaintiff is estopped from seeking reliefs sought in the plaint cannot be a proper preliminary objection because of contested matters. That estoppel is a matter of evidence and the court would hold that an estoppel may be raised that the matter may be contested. In respect of the prayer in preliminary objection for the dismissal of the plaintiff's suit, the plaintiff relied on the case **D.T. DOBIE & CO. –vs- MUCHINA (1982) KLR 1**. In this regard the plaintiff stated that even if the court was to accept the 1st defendant's warped argument, the court cannot dismiss the suit based on the findings of the aforesaid case. Plaintiff's counsel relied on the case of **KELLAWAY vs BURY (1892) 66 LT 599** where the Judge Denman, J stated as follows:-

“That is a very strong power and should only be exercised in cases which are clear and beyond all doubt the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments”.

This case was relied upon by the Judges in the D.T Dobie vs Muchina case. Counsel submitted that there is no basis for striking out of the Plaintiff's suit nor was it right for the 1st defendant to say that the plaintiff cannot question the validity of the 1st defendant's mortgage. He said that the plaintiff had not contended that its mortgage ranked in priority to the 1st defendant's mortgage.

He said that there is a difference between saying that it had priority and saying that the mortgage is void. The plaintiff's contention is therefore that the 1st defendant's mortgage is null and void. On the basis of that contention, the plaintiff seeks an injunction to stop the sale by the 1st defendant of the suit property. Plaintiff's counsel drew the court's attention to the 3rd mortgage deed particularly on page 1 and stated that the plaintiff had also lent money to the 3rd defendant, namely US Dollars 1.9 million and Kshs.15.9 million. Plaintiff's counsel was of the view that there is clear distinction between acknowledging existence of a document and accepting its validity. He therefore stated that the validity of the 1st defendant's mortgage is a triable issue and a matter that cannot be decided on a preliminary objection. He was heard to say that to bring a triable issue as a preliminary objection was reprehensible. Plaintiff's counsel responded to the authority relied on by the 1st defendant namely, **GUARANTY DISCOUNT CO. LTD vs CREDIT FINANCE CORPORATION LTD & ANOTHER, [1963] E.A. 345**. He said that this case as can be seen for the head note, dealt with different statutory law on land which does not apply in Kenya. He therefore said that this case does not assist this court. He referred to the judgment of Newbold Judge of Appeal who stated that in that case there was presumption of a deposit of title with a view to creating an equitable mortgage. In our case plaintiff's said that for there to be such a presumption, the court would have to establish it from the evidence submitted by the parties. On the defence argument that there is an equitable mortgage, he said that Section 99 of the Government Lands Act required registration of the same particularly in Section 100(1) he said that equitable mortgage has to be evidenced by memorandum and writing. He therefore said that the 1st defendant cannot raise an interest which has not been registered. In response to the case **HINDUSTAN IDEAL INSURANCE vs P.S. CHETTY A.I.R. [1961] A.P. 183**, counsel said that it does not assist the court because it related to the right of a decree holder that he said was not the case in this matter. In response to the contention by the defendant that section 136 of the Government Lands Act, required the plaintiff to have given one month's written notice before action, the plaintiff argued that the action before court related to a mortgage and the mortgage under the Government Lands Act is to be found in the TPA. He also invited the court to look at the different Acts of the Government Lands Act and stated that they clearly show that the mortgage does not fall under those different Acts. He referred to Section 58 of the TPA which he said defines a mortgage and which clearly shows that mortgages are under TPA. Similarly Sections 60 – 69 of TPA relate to the power of sale given to a mortgagee. He stated that the plaintiff had come under Section 91(b) of the TPA since the plaintiff had been assigned the right of redemption. This section provides as

follows:-

91. “Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property.

(a)....any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(b)....any person having any interest in or charge upon the right to redeem the property;

Plaintiff’s counsel said that the plaintiff seeks injunction by virtue of Section 75 and 85 of TPA whereby the plaintiff contends that the 1st defendant cannot sell the suit property because their mortgage is null and void. So far as *locus standi* is concerned, plaintiff responded by relying on the case **TARN –vs- TURNER (1888) 39 ChD. 456**. In this case the court upheld the right of a tenant to a lease to bring an action. The plaintiff relied on the following passage of that case.

“In my opinion it seems so clear that I should have doubted if there could have been so ingenious an argument addressed to us on the point. Here is a man who has a certain interest in the equity of redemption, and he may be prejudiced by the action of the mortgagee insisting on his rights as legal owner of the property. The answer must be – Yes, that is quite true, but if the tenant likes to redeem he can do so. The interest which he got from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time. That, as I understand, is recognized in all the cases”.

On plaintiff’s contention that the 1st defendant’s mortgage was null and void, plaintiff sought to rely on the case **OMEGA ENTERPRISES –vs – KTDC (Unreported) C.A. NO. 59 OF 1993**. Plaintiff’s counsel read out the judgment of Pall, JA where the judge found that the violation of Order XXXIX Rule 3 of the Civil Procedure Rules made an injunction order to be void and related that finding to the plaintiff’s present case where the plaintiff is contending that the drawer of the 1st defendant’s mortgage did not have a practicing certificate and accordingly that mortgage was null and void. The plaintiff therefore concluded that the preliminary objection should be dismissed and the plaintiff should be allowed to proceed with its action.

The 1st defendant responded to the plaintiff’s counsel by saying that Section 91 TPA did not give the plaintiff locus for this is not a suit for redemption. He said that section 60 TPA defines what a redemption mortgage is.

The court as it begins to consider the submissions may by the parties it wishes to confirm that it has considered all those arguments even if they may not be contained in this ruling. Before the court begins to consider its ruling in depth it is important to lay out the plaintiff’s case as contained in the plaint. The plaintiff pleads that by a mortgage dated the 22nd of January, 2002, the 3rd defendant purported to convey by way of an English mortgage to the 1st defendant its parcel of land known as L.R. No.29/6/2 Nairobi. This mortgage secured the principal sum of US Dollars 3.5 million. The plaintiff pleads that the said mortgage is null and void *ab initio* as it was drawn by Sheila Mugambi an advocate without a valid practising certificate at the time the mortgage was drawn. This is in contravention with Section 34 and 35 of the Advocate’s Act. Further the plaintiff pleads that by another mortgage dated 19th March, 2002 created by the 3rd defendant in favour of the 2nd defendant, the 3rd defendant purported to convey by English mortgage the suit land by a mortgage registered on the 19th of March, 2002 securing the amount UAPTA 2,362,000. It was further contented that mortgage called the 2nd mortgage was null and void since the 3rd defendant had conveyed his land which is the suit property to the 1st defendant by way of an English mortgage. That by virtue of that the 3rd defendant was incapable in law to convey the same. It was further pleaded that the 2nd mortgage was void because it was not shown who drew and presented the same for registration contrary to Section 34 of the Advocate’s Act. That such a mortgage-deed is a

document which is prepared by an advocate and was therefore caught by the provisions of the said section. It was further pleaded that the 3rd defendant issued a debenture to the 1st defendant charging all its properties and assets to secure the sum of US Dollars 3.5 million. That the said debenture included the suit property. It was pleaded that this debenture was null and void *ab initio* as it was drawn by Sheila Mugambi advocate, who the law did not allow the draw since she was not a holder of a practising certificate and that further she failed to indicate the word “**drawer**” contrary to Section 34 of the Advocate’s Act. It was further pleaded that by another debenture dated 19th March, 2002, the 3rd defendant secured all its free hold and lease hold property to the 2nd defendant and that that said debenture was null and void for the 3rd defendant was incapable in charging its aforesaid property to the 2nd defendant. Further, it was pleaded that the 2nd debenture failed to indicate the drawer thereof. That that 2nd debenture did not create a right to the 2nd defendant. It was further pleaded that the 3rd defendant created a mortgage in favour of the plaintiff to secure the amount of US Dollars 1,927,577 and Kshs.15,930,000/= which was expressly subject to the 1st defendant’s mortgage and to the 2nd defendant’s mortgage. That the plaintiff’s mortgage is limited to acquiring the 3rd defendant’s equity of redemption only. It was pleaded that the 2nd defendant pursuant to the 2nd mortgage, and debenture in their favour appointed the 4th defendant as receiver manager of the assets and properties of the 3rd defendant. That the said receiver manager is about to sell the mortgage properties covered by the 2nd debenture. That if the receiver manager does sell the said property, the plaintiff’s equity of redemption would be lost. Whereas the 1st and 2nd mortgages and the two debentures are void *ab initio*. The plaintiff therefore seeks a declaration that the mortgages of the 1st and 2nd defendants and the two debentures are void and at the appointment of the 4th defendant receiver manager is also void. The plaintiff in its prayers seeks injunction to stop the 1st defendant and PTA from selling the suit property. Additionally the plaintiff seeks declaration that it is entitled to be the 1st secured creditor as regards the 3rd defendant’s property that is the suit property. The plaintiff also seeks a declaration that the money collected by the 4th defendant from the suit property be accounted and applied towards repayment of the 3rd defendant’s liability to the plaintiff and thereafter to the unsecured creditors. The plaintiff therefore has a pending injunction application seeking to stop the sale of the suit property by the 1st defendant.

The plaintiff when it opposed the preliminary objection quite rightly relied on the case **MUKHISA BISQUIT MANUFACTURING CO. LTD –vs- WEST END DISTRIBUTORS LTD (1969) EA 696**.

The 1st defendant in advancing the preliminary objection started by saying that the mortgage-deed was properly attested and that there was no question of fraud. With respect that is not was contended in the plaintiff’s claim as it can be seen herein above. The plaintiff’s claim is that due to the procedure deficiency the mortgages or debentures are null and void. For the 1st defendant to seek the striking out of the suit on the basis that even if the English mortgage will fail it will still be relying on equitable mortgages does not pass the test of a Preliminary Objection as stated in the celebrated case of Mukhisa Biscuit. It did seem to the court that the arguments presented by the 1st defendant were inviting the court to investigate the different contentions of the parties and to exercise judicial discretion. That is not proper in a preliminary objection and the court rejects the attempt to take it through that route. The arguments of the 1st defendant and with whole agreement with the plaintiff should have been left to the response of the plaintiff’s injunction application. For the 1st defendant to say that the plaintiff cannot deny liability of the 1st defendant because he is merely an assignee is not an argument be entertained at this time. The defendant’s argument that the plaintiff does not have locus cannot also be entertained at this stage. I am of the view that the plaintiff is entitled to show by evidence or by provisions of the law that it is entitled as a 3rd mortgagee to protect its position by raising whatever illegalities it perceives in relation to the 1st and 2nd defendant’s security documents. Reliance on Section 78 TPA in regard to 1st defendant’s argument that the plaintiff does not have priority, I find that that section deals with priority which essentially is not contested by the plaintiff but rather the plaintiff seeks declaration that the 1st mortgages are null and void and therefore seeks that it would receive payment if the court accords its mortgage-deed. For the 1st defendant also to argue that the consideration for the 3rd mortgage was not recognized by the law because it was forbearance to sue is not a proper preliminary objection point. The plaintiff

drew the courts attention to the first page of the mortgage-deed where there is a statement that the 3rd obtained certain moneys from the plaintiff which cannot be said that that is not sufficient or proper consideration at this state it would be a matter of evidence at full trial. The 1st defendant's contention under Section 136(2) of the Government Lands Act that the plaintiff failed to give defendants written notice is also a matter of evidence because that cannot be traced from the plaintiff's pleadings or injunction application filed herein. Plaintiff's counsel was quite right as he submitted at length to the 1st defendant's reliance in support of the preliminary objection relied on matters that are not in agreement with the plaintiff's pleadings. In deed it is correct as submitted by the plaintiff that there is no averment in the pleadings of the plaintiff that the title documents are held by the 1st defendant. Indeed that was a statement from the bar for even the defendant's pleadings do not state so. It was therefore not right for the defendant to argue that it can rely on the equitable mortgage because of being a holder of the title documents. The 1st defendant is seeking to raise estoppel against the plaintiff in that the plaintiff cannot question the 1st and 2nd mortgage-deeds is also a matter of evidence and cannot be taken at a preliminary stage. The 1st defendant has sought by raising the preliminary objection to bring out matters that bring out triable issues on contested pleadings which is also not proper in a preliminary objection I will not go as far as saying that it is reprehensible as stated by the plaintiff but it is wrong for the defendant to have so sought. The plaintiff seeks indeed to have a trial before discovery drafting of issues or hearing the evidence of the witnesses. That cannot be allowed. I find my self in total agreement in filing of the case **WINDSOR REFRIGERATOR CO. LTD & ANOTHER v. BRANCH NOMINEES LTD and OTHERS (1958 w. No. 1431.)** and I can do no better than to quote from two judgments the first is of Lord Evershed M.R. as follows:-

“I repeat what I said at the beginning, that the course which this matter has taken emphasizes, as clearly as any case in my experience has emphasized, the extreme unwisdom – save in very exceptional cases – of adopting this procedure of preliminary issues. My experience has taught me and this case emphasizes the teaching that the shortest cut so attempted inevitably turns out to be the longest way round”.

And also of Harman L.J, as follows:-

“I concur, and find myself doing so with particular heartiness with reference to the last observations my Lord has made. The number of conditions he has found it necessary to use to fence in the expression of this court's opinion shows at once the undesirability of this kind of procedure. It is highly undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say *“Well if this was thus, then that was so.”*”

I do not wish to be drawn to make definite findings on the different sections of TPA and GLA for to do so in my mind would be to usurp the discretion of the trial judge and that would not be right. It suffices to say that the objection raised by the 1st defendant relate to contested matters and is based on issues not found on the plaintiff's pleadings and cannot therefore properly be made on a preliminary objection. What indeed the present objection has done is merely to prolong the hearing of this suit.

The end result therefore is that the court rejects the preliminary objection raised by the 1st Defendant 23rd February, 2006, which is hereby dismissed with costs to the Plaintiff.

MARY KASANGO

JUDGE

Dated and Delivered at Nairobi 6th October, 2006.

MARY KASANGO

JUDGE