



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Suit 379 of 2004

ANTHONY AMBAKA KEGODE .....1<sup>ST</sup> PLAINTIFF

UHAI LIMITED.....2<sup>ND</sup> PLAINTIFF

VERSUS

FOUR NINETY INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT

ADAM GRAIG OGDEN .....2<sup>ND</sup> DEFENDANT

EAST AFRICAN SAFARI AIR LIMITED.....3<sup>RD</sup> DEFENDANT

EAST AFRICAN SAFARI AIR EXPRESS LIMITED.....4<sup>TH</sup> DEFENDANT

RULING

The first and second defendants have pending before court a Notice of Motion dated 27<sup>th</sup> July 2006 seeking the dismissal of this suit for want of prosecution. Before that application could be argued the plaintiffs advocates raised preliminary objections in the following terms:

- 1. The courts jurisdiction has not been properly invoked as order 5 [1] Rule 7 of the Civil Procedure Rules is applicable only where summons expire before they are served upon the defendant.**
- 2. This honorable court lacks jurisdiction to issue the orders as sought.**
- 3. The application is vexatious and a blatant abuse of the due process of the honourable court and ought to be struck out.**

In support of that objection the plaintiff counsel argued that the pleadings in this case had not closed. He stated that herein this suit there are four defendants. Two of those defendants have filed defences whilst two of the others have not filed their defence. He therefore argued that there was evidence that pleadings had not closed in this case as required by order XVI Rule 5. For that reason he argued that this court does not have jurisdiction to proceed with the matter under that Rule. He further argued that section 3A of the Civil Procedure Act cited in the application was not applicable. That the powers under that Section are used for the ends of justice or to prevent the abuse of the court process. The plaintiffs counsel stated that the grounds stated in the application cannot assist the applicant since the first and second defendants were seeking to dismiss the entire suit including the suit in respect of the other defendants who have not brought an application. The first and second defendants, he argued do not have locus standi to apply on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. Plaintiffs counsel said the application is mischievous and is an abuse of the court process for it seeks to deny the plaintiff remedy against the other defendants. He in particular said that the remedy he has against the 3<sup>rd</sup> and 4<sup>th</sup> defendants is for recovery of judgment entered in default against those defendants. In response to that argument the applicants advocate relied on the case of *MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD* and stated that this case set out what ought to be regarded as a proper preliminary objection. He relied on the following passage:

**“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises 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.”**

The applicants advocate stated that what is before court is basically grounds of opposition to the application rather than being a proper preliminary objection. He therefore sought that the same would be dismissed.

The court will begin by considering whether or not the application is defeated by the pleadings not being close. From the court record it is clear that the first and second defendants filed their defence on the 16<sup>th</sup> of August 2004. It would therefore follow that close of pleadings would have occurred 7 days thereafter that is on the 23<sup>rd</sup> of August 2004. In respect of the 3<sup>rd</sup> and 4<sup>th</sup> defendants the affidavit of service shows that they were served on the 21<sup>st</sup> of July 2004. It is on record that the plaintiff has applied for judgment against those defendants in default of an appearance. It is not therefore correct to state that pleadings have not closed for in the courts estimation pleadings closed on the 23<sup>rd</sup> of August 2004. For that reason this court finds that it has jurisdiction to hear the application aforestated. In regards to the ground No. 3 objection I am in total agreement with the applicant that is not a proper preliminary objection because the court cannot determine on a preliminary objection whether an application is vexatious or a blatant abuse of the process. That would require this court to enter into investigations and perhaps to exercise its discretion in order to make a finding. For that reason that ground will be rejected. Having made the finding as herein before the court finds that there is no legal basis for the preliminary objection raised by the plaintiff dated 6<sup>th</sup> of October 2006. That objection is therefore hereby dismissed with costs to the first and second defendant. As a matter of fact what that preliminary objection has done is to take away the opportunity of the application of the 1<sup>st</sup> and 2<sup>nd</sup> defendant being heard. For that reason at the reading of this ruling and to ensure that justice is met on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendant the court will give a hearing date for the notice to motion dated 27<sup>th</sup> of July 2006.

Dated and delivered this 17<sup>th</sup> day of November 2006

**MARY KASANGO**

**JUDGE**