



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Suit 774 of 2003**

**MICHAEL MUASYA NDUNDA.....PLAINTIFF**

**VERSUS**

**COOPERATIVE BANK OF KENYA LTD.....DEFENDANT**

**RULING**

When the application of the 16th /11/2004 herein came before me for hearing, Mr. Ohaga took a preliminary point that the application was incompetent.

His grounds are set out in his Grounds of Opposition filed but the substance of the objection is that as the Applicant is seeking to restrain the Respondent from selling the suit premises pending the hearing of the suit, the order can only be obtained if it is the subject matter of the suit itself.

The suit is based on an allegation that the Defendant/ Respondent unfairly wrongfully and or unlawfully breached the Plaintiff's/ Applicants contract of service with it as set out and particularized in paragraph 16 of the Amended Plaintiff.

The relief sought in the prayers in the Amended Plaintiff is as follows:

- (a) Special damages of Kshs 39,499,285.85
- (b) General and prospective damages for unlawful termination.
- (c) A declaration that the purported Retirement of the Plaintiff by the Defendant effective on 23rd June 2003, is illegal, void and of no effect.
- (d) A declaration that the Defendant is in breach of contract of service. (e) A declaration that the loans Kshs 7,106,463.80 owed to the Defendant be paid in the normal manner in terms of each loan.
- (f) Payment of all terminal benefits pension and gratuity calculated at the time the Plaintiff would retire at the age of 55 years.
- (g) Costs of this suit
- (h) Interest on (a) at court rates.
- (i) Any other relief this court might deem fit in the circumstances.

Mr. Kilonzo for the Applicant, relying on the case of **Mukisa Biscuit Co. Ltd Vs West End Distributors Ltd (1969) E.A page 696** in which Newbold P stated in referring to a preliminary objection: “It raises a pure point of law which is argued on the assumption that all the facts placed by the other side are correct”, submitted that no point of law had been raised.

The provisions of O39 rules 1 and 2 under which the application is brought refer respectively to the “property in dispute and “in a suit for restraining a breach of contract or other injury of any kind”.

Clearly the subject matter of the application for an injunction must relate to the subject matter of the suit.

Mr. Ohaga relied on the case of **Kiwayu Safari Village Ltd Vs Musaira Ltd HCCC No. 4759 of 1989** (Unreported) in which Bosire J (as he then was) found that in the circumstances in that case that there was no property in dispute threatened with wastage, damages or alienation.

And the case of **Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Ltd (Milimani) HCCC No 324 of 2000** in which Ringera J (as he then was) stated: “I cannot see that a lender who happens to be the employer of the borrower can be refused from exercising his contractual or statutory powers merely because the borrower has brought into question the lawfulness of dismissal from the lender’s service.”

I am of the view that the point raised by the preliminary objection is a point of law. I also hold that as the subject matter of the Plaint nor do the prayers therein relate to the property in dispute of which an injunction is sought, O39 rules 1 and 2 do not apply. I would also with respect concur with the views of Ringera J referred to above.

For these reasons, I dismiss this application with costs to the Respondent.

**DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF JANUARY 2005**

**P.J RANSLEY**

**JUDGE**