

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA.

Civil Appeal 39 of 2004

BUSIA SUGAR COMPANY LIMITED.....APPELLANT

VS

WANGA & COMPANY ADVOCATES.....RESPONDENTS

R U L I N G

In a notice dated 18.2.2005 the Respondent raised a preliminary objection against the Motion dated 1st February, 2005. The Motion was basically seeking for a stay of execution of the orders issued by the Deputy Registrar of this Court on 4.10.2004 and 23.11.2004.

The nature of the objection is said that if argued it would dispose of the whole appeal. The applicant on the other hand complained that such application can only be entertained after the appeal has been admitted pursuant to the provisions of order XLI rule 8B of the Civil Procedure rules. He therefore saw the preliminary objection to be premature.

The respondent on the other hand is of the view that a preliminary objection can be raised at any stage even before admission of the appeal.

The applicant has also raised an interesting view that a respondent is expected to file grounds of opposition or a replying affidavit in response to a motion or a summons. The applicant is of the view that the law does not recognize a preliminary objection as a form of response to a summons or a motion.

The view I take is that a preliminary may be taken at any time of the proceedings so long as the same qualifies to be defined as such. It is well settled that a preliminary objection consists of a point of law which has been pleaded, or which if argued as a preliminary point may dispose of the suit or the appeal. I am of the view that the provisions of order L rule 1 of the Civil Procedure rules cannot prevent a litigant from raising well merited preliminary points of law. I do not subscribe to the view that order XLI rule 8B bars a party from having the appeal determined before admission. The upshot therefore is that I find that the preliminary objection is properly raised. The Respondent is given the green light to proceed with the same. The applicant's objection is overruled with costs to the Respondent.

DATED AND DELIVERED THIS 4th DAY OF March 2005

J.K. SERGON

JUDGE