



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT,**  
**MILIMANI COMMERCIAL COURTS, NAIROBI**

**HCCC NO. 1839 OF 1996**

**DR. NDWIGA NJUE MWACHANDI.....1ST PLAINTIFF**

**DR. VICTOR MUURU KABURU.....2ND PLAINTIFF**

**-VERSUS**

**CHARLESMUNGAI NG'ANG.....1ST DEFENDANT**

**ADOLF ISAAC MUCHIRI t/a**

**DOLINE AUCTIONEERS.....2ND DEFENDANT**

**R U L I N G**

By an application dated 30th December, 2004 and filed in court on 6th January, 2005, the plaintiff/applicants sought three main orders-

- (1) THAT the warrant of arrest and order for committal to civil jail issued against the plaintiffs/applicants be lifted and/or vacated
- (2) THAT this court be pleased to set aside the decree issued on counterclaim as the said proceedings were led by an unqualified person
- (3) THAT this Court be pleased to set aside its subsequent judgment for the defendant's counterclaim given on 23rd September, 2003, its decree thereof and all its other subsequent orders as specifically set out in the defendant's counterclaim.

The main ground upon which the application is predicated is that the defence and counterclaim upon which judgment was entered was filed an advocate who, at the material time, did not have a practising certificate.

On 15th March, 2005, the defendants/respondents filed a Notice of Preliminary Objection on the ground that the application is incompetent and an abuse of the process of the court. At the hearing of the application on 16th March, 2005, Mr. Mogeni argued the preliminary objection for the respondents, while Mr. Nzioki responded for the applicants. In his submission, Mr. Mogeni explained that the counterclaim in question was filed pursuant to a court order dated 24th July, 2001 granting leave to amend that counterclaim. He submitted that upon the amendment, the court cannot resort to any prior proceedings. He also submitted that the judgment sought to be impugned by the main application was therefore entered pursuant to a valid amendment effected with leave of the court.

Responding to these arguments, Mr. Nzioki submitted that the original defence and counterclaim were filed by a person without a valid practising certificate and therefore it can be logically assumed that there was no valid defence. The decree upon which the warrants of arrest were issued against the applicants were therefore based on pleadings which were null and void ab initio. He then asked that the preliminary objection be dismissed with costs.

Having considered the arguments of both counsel, I feel constrained to revisit the issue of those matters which ought to be raised by way of preliminary objections. The East African locus classicus on that matter remains **MUKISA BISCUIT MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD.**[1969] E.A. 696. In that case, Law, JA., said at p.700-

**“... 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.”**

On his part, Sir Charles Newbold, P., said at p.701-

**“...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 if 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.”**

I have quoted these excerpts because in my opinion, the point raised might and ought to have been argued in the normal manner, yet it was quite improperly brought as a preliminary objection. As lamented by Sir Charles Newbold, such a practice only increases costs and eats into the court's precious time. Having found that the point raised does not properly fall into the category of preliminary objections as envisaged in the above case, I accordingly dismiss the so-called preliminary objection with costs to the plaintiff/applicants in the main application. The point raised therein should be argued in the main application.

Dated and delivered at Nairobi this 28th day of April 2005

L. NJAGI

JUDGE