

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 123 of 2005

AGNES MUKAMI & 5 OTHERS.....APPELLANTS

VERSUS

NGEWAJI CO. LTD.....RESPONDENT

RULING

The applicants filed an application by way of a Notice of Motion under Order XLI Rule 4(1) and Order L Rule 1 of the Civil Procedure Rules seeking an order of stay of execution of implementation of adoption of and all consequential orders arising out of the decision of the Business Premises Rent Tribunal Cases Nos. 43, 44, 45, 46, 47 and 48 of 2004 (consolidated in BPRT Case No. 46 of 2004) delivered on 7th July 2005. The stay was sought pending the hearing and determination of the applicants' appeal which they had filed against the said decision of the Business Premises Rent Tribunal.

Before the said application was heard, the respondent filed a notice of preliminary objection and stated that the application was misconceived, bad in law and incompetent and that the application was procedurally improper before the court. I must pause here and state that I deprecate the practice of raising vague preliminary objections which do not inform the opposite party and the court what exactly is intended to be argued.

Since a valid preliminary objection may have serious ramifications to a suit or an application including striking out of the suit or summary dismissal thereof, a preliminary objection should be sufficiently clear and informative so that the party against whom it is raised can either concede to the same or prepare appropriately to oppose it instead of leaving the opposite party guessing as to what may have caused the proponent of the preliminary objection to state that the suit or application is misconceived, bad in law and incompetent. A clear and well taken preliminary objection may expedite disposal of matters before a court but on the other hand a vague preliminary objection often causes delay in determination of matters.

Mr. Mwangi for respondent told the court that the applicant's application was incompetent because the order that was sought to be stayed was not annexed to the application and the proceedings of the tribunal had not been signed or certified. He submitted that Order XLI Rule 4 required that the order sought to be stayed be annexed to the application seeking such stay.

Mr. Karanja for the applicants submitted that the preliminary objection was not well taken and was strictly speaking not a preliminary objection as stated in **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD** [1969] E.A. 696 where Sir Charles Newbold P, held that a preliminary objection raises a pure point of law and is argued on the assumption that all the facts pleaded by the other side are correct.

Mr. Karanja further submitted that the competence of the application had not been challenged and in any event, under Order XLI Rule 4 there was no requirement that the order sought to be stayed be annexed. He said that the ruling of the tribunal was yet to be adopted by the Resident Magistrate's Court which was the executing court. He urged the court to deal with the application as it had inherent power to do so.

I think the first preliminary objection that was raised was simply unfounded. I am not aware of any provision under Order XLI which requires an applicant for stay of execution to annexe to the said application the order that is sought to be stayed. However, I am aware of Rule 8B(4) of Order XLI which

states that before allowing an appeal to go for hearing, a judge should be satisfied that the judgment, order or decree appealed from among other documents, are on the court record. That stage has not been reached in this matter as the appeal has not even been admitted to hearing.

Likewise, the fact that the applicants annexed to their application neither signed nor certified true copies of the proceedings and judgment is not a bar to the court hearing their application for stay of execution. These are issues which would have carried some weight if it was the appeal that was being heard but not in an application for stay of execution pending appeal.

I find the preliminary objection to be unfounded and I dismiss the same with costs to the applicants.

DATED, SIGNED & DELIVERED at Nakuru this 28th day of September, 2005.

D. MUSINGA

JUDGE