

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

Civil Suit 75 of 2005

BAO INVESTMENTS & OFFICE MANAGEMENT

SERVICE

LTD.PLAINTIFF

-VERSUS-

**HOUSING FINANCE OF KENYA
DEFENDANT**

R U L I N G

When the plaintiff's application dated 16th June 2005, for an order of injunction came up for hearing the defendant's counsel raised a preliminary objection to it notice of it having previously been given.

In brief, the relevant background facts of this case are that on 16th June, M/s BAO Investments and Office Equipment Services Ltd, the plaintiff brought an action against the Housing Finance Company of Kenya Ltd, the defendant, seeking to restrain the defendant from selling or disposing of the plaintiff's property title no. Kisumu Municipality/Block 8/14 by Public Auction until this suit is heard and determined and that as a charge over the said property is void and unenforceable the persistent acts of the defendant in trying to sell the said property are harsh and unconscionable. On the same day the plaintiff made an application for a temporary injunction but it sought and obtained it ex-parte an order on the same day restraining the sale of its property which was scheduled for hearing on 21st June 2005. When defendant was served with the application and other documents, it filed a replying affidavit and lodged a notice of this preliminary objection.

The main ground advanced in support of this preliminary objection is that the plaintiff which is seeking an equitable remedy has failed to disclose to the Court that in Kisumu HCC No. 364 of 2000 between the same parties over the same subject matter its two applications similar to the present one were dismissed by the Court. It was urged that if this Court had been aware that the plaintiff had withheld an information relating to the two previous applications it would not have granted ex-parte orders of 16th June 2005. There were other grounds listed in the notice of the preliminary objection which include a claim that the application is res judicata, no undertaking given by the plaintiff as to costs and that the affidavit in support of the application was sworn by an unauthorized person.

Without examining in detail the merits and the demerits of this preliminary objection, I find that the grounds advanced may not be good grounds for a preliminary objection but may be adequate for Civil Procedure Rules seeking a discharge or variation of an injunction order which had been granted ex-parte. I also find that that there is a misconception not only on the efficacy of the procedure of raising preliminary objection but also as to when it may be invoked and what are its limitations of the objection itself. The only comprehensive pronouncement on the matter is that made by the former Court of Appeal for E.A in the case of **Mukasa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696** where at page 700, E Law JA stated the following:-

“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, 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”.

Sir Charles Newbord, P. at page 701 B of the same case commented on the issue of raising preliminary objections in the following terms:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact as to be ascertained or if what is sought is the exercise of judicial discretion”.

It appears to me that to be able to adequately deal with the issue of whether there was a non-disclosure of previous applications which were dismissed and also whether or not this application is res judicata it will be necessary for me to examine previous suit and the relevant applications. Whether the previous suit was between the same parties as the present one and whether it was over the same subject matter and also whether the issues in the previous case are directly and substantially is issue in the present case. That will call for ascertainment of facts which is not envisaged in the preliminary objections. In all these grounds with exception of res judicata what is sought is exercise of discretion of the Court. That again takes the matter out of the pervue of preliminary objection. This preliminary objection is therefore without merit and it is rejected. It is directed that the plaintiff’s application dated 16th June 2005, be fixed for hearing. The plaintiff to have the costs of this objection.

Dated and delivered at Kisumu this 18th day of November, 2005.

B. K. TANUI

JUDGE

In the presence of; Obina for Abdikadir & Co. for defendant/resp.

Masese for K’opot for plaintiff/applicant.

B. K. TANUI

JUDGE

BK/hao