REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 784 OF 1996

IN THE MATTER OF AN APPLICATION BY:

AMINA MOHAMED

JAMES KARIUKI MURAGE

JOSEPH THIGA NJOROGE

KASSIM MOHAMED

RACHEL NJOKI WAINAINA

ADAN ALIO

JOSEPH MANYASI

STEPHEN NZUKI

for leave to apply for an order of certiorari

- AND -

IN THE MATTER OF:

THE CHIEF OF EMBAKASI LOCATION

THE PROVINCIAL COMMISSIONER, NAIROBI

- AND -

IN THE MATTER OF: ORBIT CHEMICAL INDUSTRIES LIMITED (Interested Party)

RULING

The application herein was made by Chamber Summons dated and filed on 16th September, 2004. The main prayer is that Orbit Chemical Industries Limited be granted leave to join in as a respondent/interested party. On the basis of an application by Chamber Summons dated 23rd August, 1996 an order of even date, by ***Mbito, J,*** had been made:

"*THAT the applicants be and are hereby granted leave to file suit against the respondents on behalf of themselves and the over ten thousand (10,000) residents of Mukuru Kwa Njenga within Nairobi."*

The leave thus granted was to operate as a *stay* on all further proceedings. That order forms the second item in the prayers in the instant application: that it be *set aside.* The last prayer is that the Provincial Commissioner for Nairobi, and the Chief of Embakasi Location, be allowed to proceed with the *eviction of the petitioners.*

This matter came up before me on 26th October, 2005 when learned counsel ***Mr. Oseko, Mr. Gitonga*** and ***Ms. Mwaniki*** represented (respectively) the applicant, the 1st respondent, and the 2nd respondent.

It was not, however, possible to hear the matter on the merits, as counsel for the 1st respondent had a preliminary objection to raise.

M/s. Mathenge Gitonga & Co. Advocates, on behalf of the 1st respondent, filed their notice of preliminary objection on 21st October, 2005. They assert as follows:

(i) that, the application is incompetent and fatally defective;

(ii) that, the affidavit in support of the application has been sworn by a stranger who has exhibited no authority to swear the same on behalf of the interested party;

(iii) that, one of the prayers in the application has no merits and is not sustainable in law; the prayer in question is the one which seeks the setting aside of the order made by ***Mbito, J*** in August, 1996.

Learned counsel ***Mr. Gitonga*** submitted that, as the applicant was Orbit Chemical Industries Ltd, an incorporated body, it was not permissible that the supporting affidavit of 16th September, 2004 should have been sworn by ***Ashok Chandaria.*** At paragraph 2 of the supporting affidavit, the deponent avers:

"*THAT I have been duly authorized by the directors of the applicant company…to conduct and take charge of all matters, legal or otherwise relating to L.R. No. 12425."*

It is the submission of counsel that ***Ashok Chandaria*** is not a proper person to swear the supporting affidavit on behalf of the applicant, unless first he exhibits a resolution of the interested party authorising him to swear the affidavit. The Court is urged to strike out the affidavit.

Mr. Gitonga invoked in aid of his submission the High Court's decision (***Emukule, J***) in ***Commerce Bank Ltd v. Paradiso Court Ltd and 3 Others***, Milimani Commercial Courts Civil Case No. 1735 of 2000. In that decision the learned Judge had expressed agreement with a decision of ***Mr. Justice Ringera*** in ***Microsoft Corporation v. Mitsumi Computer Garage Limited*** [2001] 2 EA 460: that it was a requirement of Order III, rule 2 of the Civil Procedure Rules that an affidavit made on behalf of a corporation is to be sworn by an officer of the corporation. Counsel contended that it was incompetent for anyone else to swear an affidavit on behalf of a corporation. He asserted that ***Ashok Chandaria*** was not an officer of the interested-party-company and had shown no authority.

Mr. Gitonga cited also the High Court decision (***Ringera, J***) in ***East African Foundry Works (K) Ltd v. Kenya Commercial Bank Ltd***., Milimani Commercial Courts Civil Suit No. 1077 of 2002. In that case the learned Judge had disapproved the practice of advocates swearing affidavits on contentious matters best knowable only to their clients. He had thus remarked:

"…***Mbaluto, J*** deplored what he called the irregular habit which was becoming all too common these days, of advocates swearing affidavits on behalf of their clients in contentious matters, which could lead to the awkward situation whereby an advocate may have to be put in the witness box to be cross-examined in a matter in which he is appearing."

Learned counsel did not say whether or not ***Ashok Chandaria*** was an advocate — a question of fact; but this was a relevant point, as counsel was relying on the ***East African Foundry Works*** case. Counsel spoke on another question of fact: "The person who has sworn the affidavit is not an officer [of the interested party], and has no personal knowledge of the matters in issue." How would counsel know if ***Ashok Chandaria*** had or had no personal knowledge of the matters in issue? An inquiry on *facts* would, I think, have been inevitable — which could lead to a dispute between two parties at least, on *what was the correct version of facts.*

In his subsequent submissions, learned counsel clearly proceeded on the basis that ***Ashok Chandaria*** *could* be a legitimate deponent in this matter, save that his affidavit was defective because —

(a) he swore that the applicant was the owner of the suit property — but failed to disclose his source of information;

(b) he swore that the respondents were squatters on the suit land — but did not state his source of information;

(c) he swore that the applicants were the rightful owners of the disputed land — but did not indicate his source of information.

Lastly ***Mr. Gitonga*** contended that the instant application carried a mischief; by it, "a stranger [presumably Orbit Chemical Industries Limited] seeks to join an existing case, in which respondents are also claiming property and have obtained orders." This point, as it stood, in my view lacked cogency; for the object of dispute is *land*, and a plurality of persons desire the same; so, logically, and as a matter of legitimate legal strategy, those who apprehend being excluded can only come into the suit through *interested-party* status. Was learned counsel suggesting that *no person but his clients* should be protected as holders of the suit land? If so, then I would disagree with a notion which would annex legal process, to be for ever at the exclusive service of *one* privileged lot!

Learned counsel ***Mr. Oseko*** submitted that the respondent's three grounds raised as preliminary objections were not *preliminary objections* in a proper sense.

Counsel submitted that whereas the instant application had been filed more than a year ago, on *16th September, 2004* and the respondent had been duly served, no response had followed; and so the objections now coming as preliminary objections would be subterfuges, for covering for lost ground in terms of making responses to the application.

Mr. Oseko submitted that the respondent's objections had not been presented as *preliminary points of law;* indeed, they were objections based on *fact.* Submissions such as those questioning aspects of the supporting affidavit by ***Ashok Chandaria,*** learned counsel argued, were submissions upon *evidence.* Such submissions addressed controverted facts — and so could not be preliminary points of law.

The East African Court of Appeal decision in ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd***. [1969] E.A. 696 had established a principle which has not been departed from by Kenyan Courts, on the essential character of a preliminary objection raised at the commencement of the trial process, or of the hearing of an application such as the instant one. The principle is thus stated by ***Sir Charles Newbold, P***. (p.701):

> "**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 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."**

Mr. Oseko submitted that the respondent's preliminary objection herein ran afoul of the *Mukisa Biscuits*

principle: because the respondents had not *pleaded* the points they were now seeking to raise; and because answering the preliminary objection will certainly entail recourse to *evidence*. In counsel's words*: "All the facts pleaded must be correct, for a preliminary objection to be raised; [but in this case the respondents] are disputing [the] facts. If facts are [still] to be ascertained, then there can be no preliminary objection."*

Counsel also relied on the *Mukisa Biscuits* principle, that it is not tenable to raise a preliminary objection when what is sought is an exercise of *judicial discretion*. It is my apprehension that this point is akin to the one that a preliminary objection may not be raised when *facts* are in dispute; in the sense that no parties will know beforehand how the Court will exercise its discretion; and with such an uncertainty, conditions are not right for seeking to terminate proceedings *in limine,* through a preliminary objection.

Mr. Oseko submitted that the competence of the instant application stood to be determined on the basis of *judicial discretion*; and consequently it was inappropriate to raise a preliminary objection.

Mr. Oseko submitted that in the suit proceedings, one important fact remained unsettled and had to be established: *who is the owner of the suit land?* Were the preliminary objection to be allowed, then the effect would be to *camouflage the answer* to that question. Even on that ground alone, counsel submitted, the preliminary objection merited dismissal.

Learned counsel depicted the context of the preliminary objection as follows: on *23rd August, 1996* the respondents herein had come to Court and obtained leave to file suit; on *16th September, 2004* the instant application was filed, to set aside the said leave, but the respondents herein did not then, indicate that they had a *preliminary objection* to raise; and when the hearing now came to take place, in *October, 2005,* the respondents now come up with a preliminary objection. Counsel submitted that there were, in the circumstances, no signals of a *bona fide* preliminary objection, and the objection appeared more as a scheme designed to *delay* the fair and just disposal of the suit.

On the contention that the supporting affidavit should not be allowed to stand, *Mr. Oseko* submitted that this was a mere technicality which should not be allowed to impede a hearing of the application on the merits. The relevant contention had been that *Mr. Ashok Chandaria*, before swearing the supporting affidavit, must exhibit a formal instruction to him endorsed by signature and corporate seal, accompanied with the company resolution authorising the making of the depositions. Without such instruments, counsel for the respondents had submitted, there was no valid supporting affidavit as required under Order L; and that, therefore, the application itself was incompetent and must fall together with the impugned affidavit itself.

Mr. Oseko for the applicant cited as persuasive authority in support of his client's position, the High Court decision in *National Industrial Credit Bank Ltd. v. Mutinda* [2003] 1 E.A. 194, where *Mr. Justice Nyamu* had thus held, on the consequences of certain departures from technicalities of procedure (p.197):

"***As a matter of policy…[the Court] …ought to cherish and place a very high premium on the right to defend. It is a right which ought not to be taken away lightly.***

"***By a long line of authorities it has been firmly established by the courts that the Court has a wide discretion under Order IXA, rule 10 but that discretion must be exercised judicially."***

Learned counsel urged that the principle thus stated be applied, in responding to the technical point raised by the respondents.

The application before me, quite clearly, is concerned with an important question for which an answer ought to be found, through the *legal process.* Failure to provide an answer carries the risk of encouraging breaches of the law, as there are *competing claims* to property; *legal title* has been created for the said property; considerable expenses have been incurred over the said property. The property is L.R. No. 12425 situate in Nairobi. *Who in law is the owner of this property?* The determination of this question, I believe, is an urgent task before the Court, and it should be settled once and for all.

Now as the foregoing question is the reference-point which must lead the Court in its exercise of discretion, it follows that the technical impediment to a fair hearing of the application which is raised by the respondents cannot be allowed to stand.

I am left with the question whether there is a proper preliminary objection before the Court. The preliminary objection has certainly *assumed certain facts*, for instance, as to the status of *Ashok Chandaria* in the applicant corporate body — and such facts are not at all agreed; they are bound to be controversial. This element negates the propriety of the respondents' motion as a *preliminary objection*.

The history of the proceedings in the matter would call for an exercise of *discretion* by the Court. The respondents obtained Court orders given *ex parte* on 23rd August, 1996; those orders touched on sensitive questions concerning *ownership and possession* of the suit property; the application to set aside those orders was made on *16th September, 2004* and service was duly effected; then, more than a year later, on *21st October, 2005* the respondents filed a notice of preliminary objection. It is a case in which the respondents have enjoyed *ex parte* orders which, besides, stayed all proceedings, for an interminable period, when the state of relations among the parties has been crying out for *settlement* under the law. These circumstances, in my judgement, clearly favour the exercise of the Court's discretion in favour of an opportunity for expeditious hearing and determination of the main issues in dispute. I therefore hold that this is, without doubt, not a condition for the termination *in limine* of an application such as that filed by the interested party.

Accordingly, I hereby dismiss with costs the respondents' preliminary objection.

DATED and DELIVERED at Nairobi this 2nd day of December, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Applicant: Mr. Oseko, instructed by M/s. Oseko & Co. Advocates

For the 1st Respondents: Mr. Gitonga, instructed by M/s. Mathenge Gitonga & Co. Advocates;

For the 2nd Respondent: Ms. Mwaniki, instructed by the Hon. The Attorney-General