



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA**

MISC CIVIL APPL. NO. 131 OF 2004

MUMIAS OUTGROWERS SAVINGS &

CREDIT CO-OPERATIVE SOCIETY LTDAPPLICANT

VS

1. ALI OMITO WECHULI 1ST RESPONDENT

2. NYONGESA ONYIMBO 2ND RESPONDENT

3. MUMIAS SUGAR CO. LTD 3RD RESPONDENT

RULING

Mumias Outgrowers savings and Credit Cooperative society Limited the applicant herein took out a notice of motion stated to be under the provisions of Sections 3, 3A and 18 of the Civil Procedure Act and under Order XXI rule 22 and Order XXII rules 6,7,8 and 9 of the Civil Procedure rules. The applicant sought for the following main orders:

(i) That pending the hearing and determination of this application there be an order directed to the executive officer of this court or any other officer not to part with, pay, interfere or in any other way interfere with the sum of Ksh.1,552,882/= deposited in court by the 3rd respondent, by paying to Sichangi & Co. Advocates or any other party.

(ii) That should the firm of Sichangi & Co. Advocates or any party acting through them be paid or in any other way receive or be in possession of the said money the said money be returned forthwith to the court for safe custody.

(iii) That the order by the Senior Principal Magistrate's court dated 14.5.2004 releasing the money to Sichangi and Co. Advocates be set aside and or discharged.

(iv) That this court be pleased to transfer Bungoma S.P.M.C.C. No. 782 of 2003 to the High Court Bungoma for hearing and final determination of the application pending therein.

When this motion came up for hearing the 2nd and 3rd respondents through their advocates each raised preliminary points of law which were similar in nature against the notice of motion.

The first ground raised is that the firm of Namatsi and Co. Advocates has no locus standi to file the motion because he has not filed a notice of appointment of Advocates pursuant to the provisions of Order III rule 8 of the Civil Procedure rules.

Secondly that the motion is fatally defective in that the same not conform with the provisions of order L rule 15 (2) of the Civil Procedure rules.

Thirdly, that the matter sought to be transferred had been finalized hence there is no suit pending but a Judgment or decree exists.

Before dealing with the matters raised above, it is imperative at this stage to examine the definition of a preliminary point of law. I will refer to the definition given in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) E.A. P. 696** Sir Charles Newbold said: at 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.”

Looking at the preliminary points of law raised herein in the context of this definition will reveal that the third ground does not qualify to be referred to as a preliminary point of law. It is clear that in order for one to establish this preliminary objection the facts must be ascertained from the affidavits in support and against the motion. Alternatively one will have to peruse the court file in respect of Bungoma S.P.M.C.C. No. 782 of 2003 to establish the true facts obtaining in this matter. Consequently I will not deal with the third preliminary point because I think it was improperly raised. The remaining two preliminary points in my humble view qualify to be dealt with at this stage as preliminary points of law.

It is submitted that the firm of Namatsi and Co. Advocates has no locus standi to file and prosecute the motion because it had not filed a notice of appointment of Advocates.

What is not in dispute is that the motion was filed by the firm of Namatsi & Co. Advocates on behalf of Mumias Outgrowers savings & Credit Cooperative society Ltd, the applicant herein. I think this is in conformity with the provisions of Order III rule 1 of the Civil Procedure rules which reads:

“Any application to or appearance or act in any court required or authorised by the law to be made or done by a party in such a court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf”

. In this case it is not denied that the applicant is represented by the firm of Namatsi & Co. Advocates.

A notice of appointment of an advocate is required to be filed under the provisions of Order III rule 8 of the Civil Procedure rules which Provides:

“Where a party, after having sued or defended in person appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment,”

I have come to the conclusion that in this matter it is not necessary for the firm of Namatsi & Co to file a notice of appointment of advocates. They were instructed right from the beginning to commence the current proceedings. Hence the firm has the necessary locus standi to appear pursuant to the provisions of Order III rule 1 of the Civil Procedure rules. Consequently this preliminary point has no merit.

The last preliminary point raised is that the motion is fatally defective in that it does conform with the provisions of Order L rule 15 (2) of the Civil Procedure rules.

The way I see it is that this objection is valid in that the law clearly spells the format and contents in which applications must be or contain. The questions which must be answered are: Does the objection go

to the jurisdiction of the case? What prejudice have the respondents suffered? Under Order VI rule 12 of the Civil Procedure rules, courts of law are given a wide discretion to take care of situations like this even where the rules are couched in mandatory terms. In my view the objection does not go to the jurisdiction of the matter. It would also appear that the respondents would not suffer any prejudice due to the defect. Consequently, for the broad interest of justice I will not strictly apply the provisions of order L rules 15 (2) of civil procedure rules. The objection is in the category of technical objections which the law does not encourage.

The upshot therefore is that the preliminary objection is dismissed for lack of merit with costs to the applicant.

DATED AND DELIVERED THIS 28TH DAY OF MAY 2004.

J.K. SERGON

JUDGE