



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 427 OF 2004**

**MAYFAIR SERVICES & INVESTMENTS LIMITED (IN RECEIVERSHIP).....**  
**PLAINTIFF/RESPONDENT**

**VERSUS**

**HOTEL SIRIKWA LIMITED ....DEFENDANT/APPLICANT**

**RULING**

Before the Plaintiff's application dated 27th July 2004 could be heard the defence raised a Preliminary Objection and the court was obliged to entertain it.

Although the defence counsel had filed a Notice of Preliminary objection on 10th August 2004, when it came to submissions counsel did not restrict himself to the Notice as given.

With regard to the argument that the Plaintiff's pleading in this file contradict those that are in the consolidated file namely HCCC No. 64 of 2004 (Eldoret) I am of the view that that is not strictly a proper point to be taken at a preliminary stage. Why do I say so; because the defendant would be inviting me to consider evidence, which is subject to different interpretations in consideration of that preliminary objection. In the case of **MUKISA BISCUIT CO – V - WESTEND DISTRIBUTORS LTD (1969) E.A. 696 at page 700 D – E Law J.A.** stated: -

**“So far as I am aware, Preliminary objection consists of a pure point of Law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection of 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.”**

At page 701 Sir Charles Newbold, P. said: -

**“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”.**

Having the above quotation in mind I would make a finding that the preliminary objections both No 1 and No 2 raised in the objection filed on 10th August 2003 is not one raised purely on Law.

The defence counsel in submission raised another objection based on Order 11 rule 1 (b). He said that

the two files were consolidated by the order of 3rd August 2004, that is HCCC 64 of 2004 (Eldoret) and HCCC 427 of 2004, the present suit; counsel argued that the court should stay one of them. Defence was heard to say in argument of the preliminary objection that the court should now order that HCCC 427 OF 2004 to be stayed and that HCCC 644 of 2004 (Eldoret) be heard first.

Defence counsel delved a lot of consents that were entered by parties in the Eldoret suit and he argued that if the suit of HCCC 427 of 2004 does proceed the court could possibly reach contradictory decisions.

The plaintiff's counsel responded by arguing that the effect of consolidation is that the two suits become one and to further his argument he relied on *Stroud's Judicial Dictionary Vol. 1 and Chamber's 21 st Century Dictionary* .

Order 11 Rule 1 (b) of the Civil Procedure Rules states that the court at its discretion and upon such terms as may seem fit can:-

- (1) Order a consolidation of suits;
- (2) Direct that further proceedings in any such suits be stayed until further order.

I have perused the order of Justice Waweru on HCCC 427 of 2004 made on 3rd August 2004.

The order did not include the staying of any suit and accordingly since there was no stay granted both suits will be heard at the same time.

I find that it is not proper for a party by way of preliminary objection to seek an order for stay of one suit because that issue is not purely on a point of Law and in any case if the defendants were not satisfied with the order made by Justice Waweru as aforesaid, they ought to have moved this court by way of a formal application not by way of preliminary objection.

Accordingly the order of this court is that the preliminary objection raised by the defendant and filed in court on 10th August 2004 is hereby dismissed with costs to the Plaintiffs.

It is so ordered.

**Dated and delivered this 12th day of October 2004.**

**MARY KASANGO**

**AG JUDGE**