

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1732 OF 2001

MOTORWAYS (K) LIMITED..... PLAINTIFF

VERSUS

UNITED INSURANCE CO. LTD. DEFENDANT

R U L I N G

At the hearing Mr. Ondabu for the respondent raised a preliminary objection on a point of law as regards the application dated 1st February 2000 by way of Notice of Motion, to the effect that Order XII rule 6 is inapplicable in the circumstances of the case.

According to Mr. Ondabu there is no admission on the respondent's part. The letter dated 8/5/2000 which is exhibited as "DGM1" does not constitute an admission as the same was written on 14th November 2001 long before the suit was filed.

Mrs Kiarie for the applicant contended that the preliminary objection is misconceived. The application is brought under Order XII rule 6. There is admission of facts in paragraph 5, 6 and 7 of the supporting affidavit. It was Mrs. Kiarie's further submission that in any event exhibit "DGM 2" is a further acknowledgement by the respondent to pay the outstanding amount of shs 867,729/- by way of instalments.

I have anxiously weighed the submissions of both counsels and in my view what is raised by Mr. Ondabu does not in law amount to a preliminary objection on a point of law. In his submission Mr. Ondabu went into the evidence by way of affidavit and tried to argue the application under the guise of a preliminary objection.

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 as a preliminary point may dispose of the suit.

That was the observation of LAW J.A. in MUKISA BISCUIT MANUFACTURING LTD -vs- WEST END DISTRIBUTORS LTD 1969 EA 669 . I adopt it as the correct proposition of law and so hold.

For those reasons the preliminary objection is dismissed.

Costs to abide the outcome of the application. **DATED and DELIVERED at Nairobi this 15TH day of March 2002.**

N.R.O. OMBIJA

JUDGE

Mr. Ombanbe for Ondabu for defendant/respondent

Miss Okioga for Mrs Kiare for plaintiff/applicant