



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.602 OF 2001

SASAMBATI INVESTMENTS.....PLAINTIFF

V E R S U S

THE MUNICIPAL COUNCIL OF MALINDI.....DEFENDANT

RULING OF COURT

The Applicant/Plaintiff is a firm registered under the Registration of Business Names Act, Cap.499 of the Laws of Kenya. Said Salim Mbarak Timimi is the sole proprietor, according to a registration certificate issued on 24.11.1995. The Applicant filed a Chamber Summons dated 3.12.2001 seeking for an injunction to issue to restrain the Defendant, Malindi Municipal Council, by itself, its servants, workmen or agents or otherwise howsoever from interfering, terminating/evicting or otherwise interfering with the Plaintiff's rights and leases in respect of the slaughter-house situated in Malindi Township on portion No.4882, pending the hearing of this suit.

To preserve status quo, I granted interim orders on 3.12.2001 and the application finally came for a hearing on 18.12.2001. On this day, Mr. Ole Kina for the Defendant decided to argue a preliminary objection notice of which had been filed on 13.12.2001 and served thereafter before 18.12.2000. The Notice of Preliminary Objection raised the following points:-

1. The Plaintiff does not exist as a matter of law.
2. The Plaintiff has not complied with S.8(2) of the Registration of Business Names Act.
3. The Plaintiff is disabled by the provisions of S.11 of the Registration of Business Names Act enforcing the terms of the lease.

I now turn to consider these points of objection.

Mr. Ole Kina started by raising the issue whether Sasambati Investments is a firm or not. He argued that if it is a firm it should have been registered under Registration of Business Names Act and particulars therefore should have been described or given. Failure to do so is fatal. But Mr. Mogaka answered this by stating that details of the applicant firm are shown in the Amended Plaintiff and if the Plaintiff does not include all the information which should have been included, it can yet be amended as the case is at the preliminary stages. Mr. Ole Kina then plunged into what may be called assumptions. He stated that the firm of Sasambati Investments started its business on 1st April, 1996. According to the provisions of the Act, particulars of the business ought to have been filed within 28 days thereafter. He then argued that since the person who was operating the business died on 4.8.98, the details thereof and of the person who

took over as the operator or personal representative should have been also filed in the Registry. Any failure to file those particulars, he argued, would lead to punishment under the Act. This would make the firm lose certain legal rights. He pointed out that such disability is only curable by this court on the disabled firm making an appropriate application, which he said, has not been done. He then raised issues about the wrong amendments done by the Plaintiff which he sought that this court strikes out; indeed he sought that the whole suit be struck out.

Mr. Mogaka objected to the preliminary objections raised above. He stated that if the Plaintiff's Affidavit was poor in form, the same would be improved by amendment and that a suit need not be struck out merely because of lack of form. He argued that the Defendant cannot argue that Plaintiff is non-existent when it has been dealing with it for many months and has been recognizing Plaintiff's existence. He put in authorities in respect to the principle of estoppel.

I have considered the arguments raised by Mr. Ole Kina in respect to the preliminary objections. I have also considered answers given by Mr. Mogaka. The way I understood the proceedings at this stage, is that the parties were meant to argue only on the Preliminary Objection notified by Mr. Ole Kina. However, perusal of the material before me confirms that Mr. Ole Kina argued on other matters not covered by the Notice he served. For example the issue of whether amendments done by Mr. Mogaka were proper or not were not in the Notice. Nor was the issue of striking out the suit altogether.

The issue to be considered is whether Mr. Ole Kina's points of objections amount to preliminary points and if so, what would be the court's next step.

It is now accepted law that a preliminary objection is in the nature of what used to be called 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. Can it be argued that facts raised in this case preliminarily are certain or are agreed between the parties so that the principle of law applicable to the agreed set of facts will dispose of the suit or the issues in dispute? The main issue herein is whether or not Sasambati Investments exists or not and if it exists, whether or not it complied with the provision of the Registration of Business names Act, Cap. 499. Mr. Ole Kina himself approached the issue by putting across to the court the question whether or not Sasambati exists. He then put it, on assumptions, to the court, to the effect that if it existed, then it was required to file various particulars at various times. In my opinion this approach clearly established that many facts in this case are not ascertained, even to Mr. Ole Kina and that they are to be established during the latter stages of the case, probably during the hearing. It cannot be denied also that the conduct of a case whether for the Defendant or Plaintiff is in the domain of the party. Thus, he may or may not apply to amend at any stage as the law may provide. Until such stages of any case are reached when the pleadings cannot be amended, therefore, a party is at liberty to apply. Under these circumstances, it is my view and I so hold, that Mr. Ole Kina's points of objection do not amount to points of a preliminary objection. Furthermore, even if it could be later established that Sasambati Investment does exist, as the Certificate of Registration later delivered to the court by this court's request established, it is possible that such a finding would raise even more factual disputes. Neither party also introduced an official search in respect to the Business Name Sasambati Investments. Whether or not this was deliberate or not does not make a difference at this stage. What matters is that issues raised as preliminary objection do not amount in my opinion, to preliminary points of law. It may be considered also that issues like amendments or the relief of a registered firm under Registration of Business Names Act, Section 11 are discretionary reliefs which may or may not be availed the party on application of the exercise of judicial discretion of this court. Such cannot be subject of a preliminary objection.

Under these circumstances this court has no better way of dealing with the objections raised by Mr. Ole Kina but dismiss them as they do not fulfill the ingredients of a preliminary objection.

As clearly stated in the case of **Mukisa Biscuits Co. –vs- West End Distributors**, [1959] E.A. 696 at 701, Sir Charles Newbold, President of the Court stressed the improper raising of points by way of preliminary objection.

He stated that such objections do nothing but unnecessarily increase costs and, on occasions, confuse the issues. He called this an improper practice and called for its stop. This court repeats those serious words and restates that such objection in this case have increased costs and indeed, may have confused issues.

The costs caused by these objections will go to the Plaintiff in any event and the Plaintiff is at liberty to assess the same before the main suit is finally determined.

**Dated and delivered at Mombasa this 5th day of June, 2002.**

**D. A. ONYANCHA**

**J U D G E**

Mr. Mogaka – for Applicant

Mr. Kinyua – for Ole Kina – for Respondent