



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 182 OF 2002

**FRANCIS MULATYA T/A GANJONI AGIP SERVICE STATION.....
APPLICANT**

V E R S U S

**KENYA SHELL LIMITED.....
.....RESPONDENT**

**IN THE MATTER OF: AN APPLICATION BY FRANCIS MULATYA KIEMA T/A GANJONI
AGIP SERVICE STATION**

**FOR LEAVE TO APPLY FOR ORDERS OF COMMITTAL TO PRISON FOR CONTEMPT OF
COURT**

AND

**IN THE MATTER OF: SECTION 5 OF THE JUDICATURE ACT CAP 8 LAWS OF KENYA
AND ORDERS 5 RULE 2 OF**

THE SUPREME COURT OF ENGLAND

RULING

Application by way of Notice of Motion dated 4th June 2002 came up for hearing on 8th July 2002 when Mr. Ndegwa the learned counsel for the Respondent raised a Preliminary objection. This Ruling is in the same Preliminary objection only. The Notice of Preliminary Objection was filed on 1st July 2002. I do reproduce the same Notice, though lengthy. It reads as follows:-

"1. That the temporary ex parte court order dated 3rd April 2002 expired after fourteen days as provided by order 39 Rule 1 (2).

2. That in any event the Applicant failed to fulfill the condition precedent imposed by the court on 16th April 2002 for the extension of the said temporary ex parte orders of 3rd April 2002 to wit that the applicant file an undertaking as to damages on or before the 19th April 2002 and has never filed the said undertaking to date.

3. That consequently, the said temporary ex parte orders were not extended on the 16th April 2002 or any time thereafter due to the Applicant's default to satisfy the condition precedent imposed at the inter partes hearing on the 16th April 2002. 4. That accordingly, no orders were in force as at

21st May 2002 when the alleged contempt of court orders is alleged to have occurred. 5. That in any event, the said ex parte temporary orders of 3rd April 2002 was overtaken and rendered of no legal consequence by the court and the subsequent consent court orders of 16th April to the effect that:-

(a) That by consent, the plaintiff granted leave to file a further affidavit. (b) That by consent, applicant be at liberty to file a further affidavit. (c) That by consent, the interim orders of 3rd April 2002 be extended UPON the Applicant filing an undertaking as to damages. 6. That the grounds upon which the application is made as set over in the supporting statement of facts are factually incorrect and deceitful in that paragraph 5 (a) thereof allege that the matter in question was not listed on the 16th April 2002 whereas it was listed and the aforesaid consent orders recorded.

7. That the Applicant has in bad faith deliberately withheld crucial information from the court to note that the Honourable court made subsequent orders on the 16th April 2002.

8. That this contempt proceedings as well as the entire suit on which it is based is an abuse of the court process in view of the foregoing.”

The application for injunction dated 4th June 2002 against which the Preliminary Objection is raised as above is based on grounds that an order of the court issued on 3rd April 2002 was not complied with by the Respondent and thus according to the Applicant, the Respondent is in contempt of the court order. In his affidavit in support of the same Application and in the statement of facts the Applicant has not made any reference to the allegations that the same order obtained on 3rd April 2002 upon which this application is based expired after 14 days. They have not referred to the same allegations of subsequent actions including consent orders which were entered into later as alleged by the Respondent in the Notice of Objection. I do not need to say more for fear of prejudicing the entire application. Suffice it to say that the facts raised in the Notice may not be considered without foundation. However, at this juncture what is before me is a Preliminary Objection which in law can only be entertained upon certain legal principles.

These principles are well spelt out in the case of MUKISA BISCUIT MANUFACTURING CO. LTD VS WESTEND DISTRIBUTORS LTD (1969) EA 696 and particularly at page 701 where the Court of Appeal stated:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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.”

As I have stated, there could have been proper points for consideration but I do feel these were raised at

the wrong time as they are matters based on alleged facts some of which are in the court records. I think the application should proceed to full hearing and let these points be raised in the full argument when all the facts in the entire application will be crystallized and the facts will emerge. At that time points of law based on fact, that will have come out of the Affidavits, court records, etc will be raised. In my humble opinion this Preliminary Objection cannot be entertained as of now as facts put forward by the Applicant (whether they have kept out some facts or not) are at variance with facts put forward by the Respondent.

I decline to sustain the Preliminary Objection. However, because of the comments above, I will not order courts against the Respondent. Rather, I will fix this matter for hearing at the earliest date available.

Orders accordingly.

Dated and delivered this 15th day of July, 2002.

J. W. ONYANGO OTIENO

JUDGE