



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

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO.160 OF 1995

WANADEGE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY.....PLAINTIFF

VERSUS

TOM MUSILI & 5 OTHERS..... DEFENDANT

RULING

By an amended Chamber Summons dated the 17th November, 2000 the applicant is seeking the orders that the suit be struck out as it is incurably defective and amounts to an abuse of the court process. It also seeks that the orders granted by this court on 19.10.2000 be set aside.

Before the hearing the respondents filed a notice of Preliminary Objection in which they sought to argue that the application was misconceived, bad in law and incurably defective as it does not comply with the provisions of the Civil Procedure Rules. The arguments put forward in support of the objection were that:-

1. There is no date of the order and therefore offends Order 6 Rule 7.
2. This is a representative suit as there are several defendants. There is no authority from the other defendants authorizing the Defendants to act for these other persons. Such authority must be in writing.
3. The first affidavit offends the provisions of Order 18 (5) as it is in plural when it should be in the first person.
4. The application must be accompanied by a draft-defence.

The objection is opposed on the grounds that the points raised in support do not amount to a Preliminary Objection. In answer to the specific points raised, Mr. Malonza, the Learned Counsel for the applicant submitted that this was not a representative suit as far as the applicants are concerned. They are three defendants who do not claim to act for any other party. With regard to the draft defence demanded by the Respondent it was submitted that there is no requirement that a draft defence must be filed. As to the affidavit it was submitted that the deponent were deponing on matters which were within their knowledge.

Having read the affidavit sworn by Paul Musili, the first defendant, I am satisfied that the three

defendants have rightly filed the proceedings in their own capacities. They are not representing the other defendants and the proceedings can therefore proceed as against them. No authority is necessary in such a case.

The other points raised with regard to the affidavit and the necessity for a draft decree do not constitute a valid Preliminary Objection.

A Preliminary Objection must be on a pure point of law and presumes that all the facts pleaded by the other side are correct.

See Mukisa Biscuit Co. Vs. Westend Distributors (1969) E.A. page 701 where Newbold P. observes:

“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 demurrer. It raises a pure point of law which if argued on the assumption that all the facts are pleaded by the other side are correct. It cannot be raised if any of the 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 issues. This improper practice should stop”.

I agree with this observation and adopt it in this application. The points raised in this application are matters which would need to be ascertained whether they are true or not. In any case all the points raised are matters which could be argued during the hearing of the main application. The preliminary objections are normally used to delay the hearing of a case or application. I detected the wish by the learned counsel to use it as a delaying mechanism to stall the hearing of the application. He insisted the objection being heard first instead of raising the points during the main application.

It will be noted that the application in question is seeking to set aside some orders which were obtained ex parte on 19.10.2000. It would appear that the Plaintiff/Applicant intends to block the application by making it impossible for the application to be heard through the Preliminary Objection and technicalities.

I find that this is not a proper preliminary objection. The points raised can be argued during the main application as they are points which would if allowed determine the application. Most of them would be curable under the Provisions of the Civil Procedure Rules if they breached the Rules.

The objection is overruled and hearing of the application will proceed. The Plaintiff shall pay the cost occasioned by this objection in any event.

Delivered and dated this 23rd day of January, 2001

KASANGA MULWA

JUDGE