



Logitech & Jibril Group Limited v Kenya Ports Authority (Civil Suit E041 of 2023) [2024] KEHC 1443 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E041 OF 2023
DKN MAGARE, J
FEBRUARY 15, 2024**

BETWEEN

LOGITECH & JIBRIL GROUP LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. This is a Ruling on the Defendant’s Preliminary Objection dated 9th November 2023.
2. The Objection is based on rule 9 of the *Oaths and Statutory Declarations Act* and section 7 of the *Arbitration Act*.
3. The role of this court is to make a preliminary finding as to whether the Preliminary Objection is a Preliminary Objection properly so called.
4. What constitutes a preliminary Objection is settled. It has been said and repeated and do repeat that this Court, in determining the Preliminary Objection is not involved in the finding of fact.
5. In hearing a Preliminary Objection, this court proceed on an understanding that what is pleaded in the Originating Summons is correct. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.



6. In a Tanzanian case of *Hammers Incorporation Co. Ltd v The Board Of Trustees Of The Cashewnut Industry Development Trust Fund*, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala In the *Mukisa Biscuit Case*(Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others v The Attorney General*, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the *Mukisa Biscuit case* (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

7. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd(supra)*: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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. Examples are an objection to 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 page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

8. It is therefore settled that a Preliminary Objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to the constitution. The impugned law, the Plaint, or Application in this case and the Preliminary Objection. If you have to refer to the defence or Response, then the Preliminary Objection is untenable
9. As was held by the Tanzania Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & Others v Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA , Ramadhani, CJ , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation;



when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

10. Back home, Justice Prof J.B. Ojwang J (as he then was) also succinctly addressed the issue of preliminary objection in the case of *Oraro v Mbaja* [2005] eKLR:

"I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

11. I am unable to discern, without testing the facts, the assertions in the Preliminary Objection.
12. The Preliminary Objection does not raise matters that would determine the suit. It does raise a pure point of law. This should be the essence of the Preliminary Objection.
13. Therefore, the Preliminary Objection does not meet the threshold of a Preliminary Objection. It fails.

Determination

14. The upshot of the Preliminary Objection dated 9th November 2023 lacks merit and is dismissed in limine with costs of Kshs. 30,000/- payable to the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Cherono for the Respondent

Abdalla Ms for the Plaintiff

Court Assistant - Brian

KIZITO MAGARE

JUDGE

