



**Ogada & another v Gesner (Executor of the Estate of Wilfred Gurnther Herbert Osser )  
& 4 others (Civil Suit E022 of 2020) [2024] KEHC 3967 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E022 OF 2020  
DKN MAGARE, J  
APRIL 18, 2024**

**BETWEEN**

**FESTUS OCHOL OGADA ..... 1<sup>ST</sup> APPLICANT**

**HANS BRUNO HUSE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HEINRICH GESNER (EXECUTOR OF THE ESTATE OF WILFRED  
GURN'THER HERBERT OSSER) ..... 1<sup>ST</sup> RESPONDENT**

**RONNY PATRICK HERBERT OSSER ..... 2<sup>ND</sup> RESPONDENT**

**JEANINE NOTALE BOEHLIG ..... 3<sup>RD</sup> RESPONDENT**

**HANOS KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. This is one matter where no one wants to proceed. Parties have used every excuse in the book of lies not to proceed. The matter was slated for further hearing when a myriad of Applications were filed. I delivered a Ruling on 27/11/2023. The very next day an avalanche of applications was filed. It is even impossible to know what has not been determined. The number of affidavits of service on the portal is amazing.
2. I sincerely cannot understand why parties can be in mundane issues instead of having the suit heard. Several applications and preliminary objections have been filed for which the ruling relates. These are: -
  1. Notice of Motion dated 2/11/2023.
  2. Notice of motion dated 12/7/23



3. Notice of motion dated 16/11/2023.
  4. Notice of motion dated 27/4/2023.
  5. A Preliminary Objection dated 14/7/2023.
3. I shall determine all in limine. I shall thereafter issue sell by date for the expiry of the suit. Every other application filed after today shall stand dismissed to enable the court hear the suit, if it survives the onslaught from the defendant.
  4. The preliminary objection dated 14/7/2023 is for dismissal. The preliminary objection is based on the following grounds.
    - a. The court lacks jurisdiction to hear and determine the matter herein by virtue of express provisions of clause number 10 of the memorandum and Articles of Association of Hanos K Limited for no reasonable effort has been made to go for arbitration.
    - b. The present suit is brought and is therefore an abuse of the Honourable court for the foregoing.
  5. The preliminary objection is Baseless and an abuse of the court process. It is based on facts that must be ascertained by evidence. Section 6 (1) of the [Arbitration Act](#) provides as follows: -

“6. Stay of legal proceedings

- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
  - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
  - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
- (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.”

6. It follows that if stay of proceedings is not granted at the time of filing and defence was filed. When the Section is not complied the claims relating to arbitration becomes inoperative. There can be no preliminary objection on the issue of Arbitration. Arbitration is a question of fact.
7. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. 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”.



8. In *Hammers Incorporation Co. Ltd Versus The Board of Trustees Of The Cashewnut Industry Development Trust Fund*, where 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.”

9. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as follows: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs 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....”

10. The Court of Appeal of Tanzania sitting in Dar Es Salaam, in *Karata Ernest & Others vs Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., 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.

11. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs 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.

12. It is therefore my view that a preliminary objection must be based on current law. 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 and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable

13. Consequently, the preliminary objection has no basis in law. I dismiss the preliminary objection dated 14/7/2023 with cost of 30,00/= to the Plaintiff. If shall be paid within 30 days.

14. The next one is a notice of motion dated 12/7/2023. It seeks to amend the defence. The plaintiff has already concluded his case. The defendant has for one reason or another been trying to scuttle the hearing. By amending the plaint after closure the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants intend to steal a march on the plaintiff who have no right of audience.

15. The matters being addressed over 35 years ago. These are matters that could not have escaped the defendants. I therefore do not find the application for amendment legitimate. I agree that courts should freely allow amendment. In *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR, the Court of Appeal stated as follows: -

“... Accordingly, all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment ... does not result in prejudice or injustice to the other party which cannot properly be compensated for in costs ... Neither the length of ... proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend. The overriding consideration (are) whether the amendments (are) necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party compensation in costs.”

16. However, it is a different ball game when pleadings are closed, the plaintiff has closed his case and has no chance of replying to new matters. The matter is pending defence hearing. The application for amendment is introducing matters that relate to the year 1989. These are not matters that were outside the knowledge of the Applicant. The Application dated 12/7/2023 is accordingly dismissed with costs to the plaintiff.

17. The application dated 10/11/2023 sought the following prayers: -

- a. That the 4th Respondent has interest in 2108/1/MN/ (CR 15991) and subdivision 2124/1/ M. N R 15993) pursuant a judgment of the ELC COURT IN ELC NO. 52 OF 2016 Hanos Kenya Limited Versus Dhiren Mohanlan Shah and has no known interest in land parcels



1669/18 CR 13796/7 and sub division 2124 Original Number 1669/18 CR 13796/7 being the properties cited in the orders issued on the 27th June 2023.

- b. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are bound by the Injunctive orders issued by the court of appeal sitting in Mombasa on the 7<sup>th</sup> Day of February 2020 and don't have capacity to deal with the properties of the 4<sup>th</sup> Respondent either directly or through nominees until civil appeal 81 of 2019 is heard and determined.
  - c. That the application is frivolous, vexatious and a waste of the precious judicial time as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents by law lack capacity to deal with the assets of the 4<sup>th</sup> Respondent until the determination of the appeal or the vacation of the injunctive orders against them.
  - d. That the proposed Peter Huthu is not a registered Agent under the [Estate Agents Act](#) Cap 533 Laws of Kenya and there are no credentials whatsoever conforming that he is registered and licensed by the Estate Agents Registration Board of Kenya.
18. The application dated 16/11/2023 sought the following orders: -
- a. That this application be certified urgent and service thereof be dispensed within the first instance
  - b. That pending the inter partes hearing of this application interim stay orders do issue Ex-parte staying the execution of the ruling and orders of this court delivered herein on the 27th April 2023 as well as any/all orders and or process consequential thereto
  - c. That pending the interpartes hearing of this application interim orders do issue staying the proceedings by way of notice of motion dated the 22nd Nov 2023 seeking to appoint one Peter Huthu as a managing agent and any consequential orders pursuant thereto either/or arising from the said notice of motion.
  - d. That an order do issue from this court for Stay of execution of the ruling delivered herein on the 27th April 2023 as well as any/all orders and/or process consequential thereto pending the hearing and determination of civil appeal No. 81 of 2019 or the vacation of the injunctive orders against the 4<sup>th</sup> defendant by the court of appeal issued on the 7th Feb 2020, whichever comes first.
  - e. That the honorable court be pleased to vary, review and/or set aside ex debito justitiae; in its entirety the ruling delivered by this court on the 27th April 2023 as well as any/all the orders and/or process/processes consequential thereto.
  - f. A declaration that the ruling of the honorable court of the 27th April 2023 and all consequential orders and processes issued per-incuriam; in as far as the 4<sup>th</sup> defendant is concerned since the said defendant has no known proprietary interest in the properties cited in the said court Order; to wit rental premises on various parcels formerly part of 1669/18 CR13796/7 & Subdivision 2124 (original Number 1669/18 CR 13796/7).
19. The same is supported by the affidavit of Ronny Patrick Herbert Osser. The application is disguised as an application for stay and review when in reality it is an application to Appeal from the decision of the Court. The orders sought are not tenable. The Applicant states that there are several suits pending among them Elc 52 of 2016. This is not a suit that the Applicants came to know about yesterday.
20. Review is provided for under Section 80 of the [Civil Procedure Act](#) which states that:

“ Any person who considers himself aggrieved—



- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”.

Section 63 (e) of the [Civil Procedure Act](#) states that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

21. This is buttressed by Order 45 of the Civil Procedure Rules which provides for Review and states as follows:

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

22. Review is different from an appeal. If a party feels or countenances that the court erred in law or was plainly wrong, then the cause of action available is Appeal. A decision by the court is usually an exhibition of the limits of wisdom on the particular matter. Even where the court becomes wiser, it is permitted to change its mind. This gives way to the principle of finality.

23. Courts should never self-doubt. I am not saying that courts cannot err. They can make decisions that are horrendous and even anathema to sense of justice. The court cannot correct itself. Otherwise there will never be an end to the vicious cycle of review. This reminds me of the words of the former US presidential candidate in addressing the supreme court decision that snatched defeat from the jaws of victory on him. He posited as doth in his concession speech: -

“Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that ...



...Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done. And while there will be time enough to debate our continuing differences, now is the time to recognize that that which unites us is greater than that which divides us. (adjusted to UK English ).”

24. One can ask himself how could the high court overrule the court of Appeal or even another court of equal jurisdiction? How can a court reach such stupid decision. In our hierarchical tiers of courts, we hide the distaste of the court’s errors by pontificating that the court erred in law and in fact or the court fettered discretion. That is why we have a court of Appeal and a supreme court. If parties keep Appealing to the same court, they will render more superior courts redundant.

25. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994* where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

26. What the Applicants are asking the court to do is to set on appeal from its own decision. These are factors that the court should have been informed about. The idea of concealing facts and turning around to rely on them is untenable and anathema to good order and administration of justice.

27. The plaintiff filed another application dated 2/11/2023. The same was opposed. The Applicant 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondent stated that the same is frivolous. The Application only sought to implement the ruling of the court issued on 2/11/2023. Other than the fact that the Applicants have issues with the ruling, there is no legal objection. The submission and grounds of objection relate to the application I have already dismissed.

28. I therefore allow the application in terms of prayers 2 and 3. Costs in the cause. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed submissions related to the application dated 27/4/2023. None is on record. They appear to be opposing the application dated 2/11/2023. Parties must seem to Appeal decision of the Court. It is embarrassing to ask the court to correct its own decision. A party aggrieved must comply with the Court of Appeal rules and file a notice of Appeal. The application dated 2/11/2023 is accordingly allowed.



29. I have seen the submissions dated 4/12/2023. It relates to issues that can only be handled at the Appeal level.

### **Determination**

30. In the end I make the following orders: -

- a. The upshot of the foregoing is that I make the following orders in respect of all the applications preliminary objection and give direction for hearing. Any party aggrieved should be at liberty subject to where leave is required sought and granted Appeal.
- b. The matter shall now proceed for hearing. The Defence cases shall stand closed on 30/6/2024, whether or not parties had testified.
- c. The Application dated 2/11/2023 is allowed in the following terms;
  - i. Peter Huthu is appointed as an official agent for rent collection for the orders given in the Ruling dated 27/4/2023.
  - ii. Peter Huthu do take charge forthwith and comply with the orders of 27/4/2023. His charges shall be borne out of the said funds.
- d. Each party to bear their cost for the said Application.
- e. The Application dated 12/7/2023 is berated as the plaintiff has closed his case. The same is dismissed with costs.
- f. The Application dated 16/11/2023 is dismissed with costs.
- g. The notice of Preliminary Objection dated 14/7/2023 is dismissed with cost of Kshs. 30,000/ = payable within 30 days.
- h. The matter shall proceed for full Defence hearing on 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> June, 2024.
- i. The defence cases shall stand closed on 30/6/2024.

**DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 18<sup>TH</sup> DAY OF APRIL, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Munyoki Maheli and Company Advocate for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Birir & Company Advocates for the plaintiff

Selina Egesa & Company Advocates for the 1<sup>st</sup> Defendant.

Court Assistant – Brian

