



**Stephen Kinyajui Kibunja t/a Kibunja & Associates v New Pilion Estates Limited
(Miscellaneous Tax Appeal 79 of 2021) [2024] KEHC 9719 (KLR) (2 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS TAX APPEAL 79 OF 2021
SM GITHINJI, J
AUGUST 2, 2024**

BETWEEN

STEPHEN KINYAJUI KIBUNJA T/A KIBUNJA & ASSOCIATES ... APPLICANT

AND

NEW PILION ESTATES LIMITED RESPONDENT

RULING

1. Before the court, for determination is the Notice of Motion dated 27th May 2024 and the Preliminary Objection dated 5th July 2024.
2. The Notice of Motion filed by the Respondent seeks the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. That in the final determination of this application, this honourable court be pleased to stay the delivery of the ruling slated for 18th June 2024.
3. In response, the Applicant filed a replying affidavit sworn by Stephen Kinyajui Kibunja the Applicant and an advocate of the High Court of Kenya stating that the application is premised on non-disclosure of material facts by the Respondent/client with the aim of misleading this court to granting draconian orders. The rest of the averments in the replying affidavit in my view delve into the merits and substance of the entire cause.
4. The Preliminary Objection dated 5th July 2024 is raised on the following grounds;



1. The affidavit dated 25th June 2024 offends Section 2 and Section 14 of the [Advocates Act](#) Cap 16 as there was no retainer.
2. The affidavit dated 25th June 2024 herein is scandalous, fraudulent and abuse of the court process.
3. The averment made in the affidavit are devoid of probative value and offends mandatory provisions of the law.
4. The affidavit should be expunged from the court record.

Disposition

5. Both the Application and the Preliminary Objection were canvassed by way of written submissions. I have taken into account the submissions by the parties and the authorities relied upon.
6. A cursory glance at the face of the application, the prayers sought are all pending inter - partes hearing of the application and thus can be said to be spent. Prayer number 4 which seeks arrest of the delivery of ruling, in my view is incapable of being realized as the same is void of substance. The Respondent does not explain why they seek to have the delivery of the ruling stayed. It is trite that a court cannot issue orders in vacuum. The consequence is that the Notice of Motion dated 27th May 2024 fails for want of merit and the same is hereby dismissed.
7. Now onto the preliminary objection. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“----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 a contract giving rise to the suit to refer the dispute to arbitration”.
8. In the same case Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
9. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable.
10. An objection to the jurisdiction of the court has been cited as an example of the preliminary objection that consists a point of law. The jurisdiction is challenged on the grounds that the dispute herein ought to have been referred to the Energy and Petroleum authority or the Energy and Petroleum Tribunal.



Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” (supra) where the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. From the Mukisa Biscuit case, it is clear that a Preliminary Objection should be on a pure point of law and on assumption that the facts pleaded by both sides are correct. The Preliminary Objection herein is raised on the averments contained in the affidavit dated 2th June 2024. The affidavit has been challenged for offending Section 2 and 14 of the *Advocates Act* Cap 16 as there was no retainer. This then means, for me to determine the validity of the affidavit, I have to delve into the issues of whether there was a retainer or not. Further, it is said that the averments in the affidavit are devoid of probative value. In my view, these are not arguments that would summarily dispose a suit. I would require evidence from both sides to reach such a determination which goes against the objective of a preliminary objection and for that reason the Preliminary Objection cannot hold. The same is hereby dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 2ND DAY OF AUGUST, 2024.

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S.M. GITHINJI

JUDGE

In the presence of; -

Ms Wanjiku Nyaga for Respondent

Ms Lilian Mwaura for the Applicant

Ms Wanjiku Nyaga;-I pray for 30 days stay of proceedings.

Court; -30 days stay is granted.

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S.M. GITHINJI

JUDGE

2/8/2024

