



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO. 15 OF 2016

HON. ROBINSON NJERU GITHAU.....APPLICANT/DEBTOR

VERSUS

MAE PROPERTIES LIMITED.....RESPONDENT/CREDITOR

RULING

1. This ruling is in respect to the Debtor/Applicant's Preliminary Objection filed on 28th August 2020 through which he objects to the Creditor's petition dated 27th February 2017. The objection is premised on the ground that the decretal sum is fully settled thus making the petition unviable.

2. The Preliminary Objection is supported by the affidavit of the Debtor's advocate **Mr. FRANCIS NJANJA** who avers that the Debtor has since paid the entire decretal sum of Kshs. 33, 000,000 which payment was acknowledged by the Creditors advocates. He averred that despite the said payment, the Creditor has insisted that the amount attracts an interest, a fact which he denies on the basis that the consent judgment recorded by the parties was for an all-inclusive judgment that excluded interest. He further averred that the issue of interest is a legal issue by virtue of the provisions of Section 26 of the Civil Procedure Act.

3. The Preliminary Objection was canvassed by way of written submissions which I have considered. Counsel for the Debtor submitted that the petition arises from a decree of the court which excluded the issue of interest and costs.

4. Counsel for the Creditor, on the other hand, submitted that the Preliminary Objection is unsustainable and ought to be dismissed as it is not based on pure points of law. He further submitted that there was no evidence that the statutory demand had been settled.

5. I have considered the pleadings filed herein and the parties' submissions. The main issue for determination is whether the Preliminary Objection has merit.

6. The threshold to be met in Preliminary Objections was stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 as follows: -

"So far as I'm aware, 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."

This was followed up by the judgment of **Sir Charles Newbold** in the same case thus: -

"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 had 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 issue. The improper practice should stop"

7. A "demurrer" is defined in Black's Law Dictionary as follows: -

"A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer."

8. In *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR the court observed that: -

“In the light of the foregoing, a party raising a preliminary objection on a point of law must proceed on the basis (only for the preliminary point) that all facts pleaded by the other side are correct and albeit this, the cause of action is not sustainable as a matter of law. The Objector in such a situation is deemed to accept the correctness of the other party’s facts for the purposes of the application. To do otherwise would render the preliminary objection to be not a true demurrer. An objector cannot introduce any factual dispute or controversy and must stick to pure points of law.”

9. The Debtor argued that the Preliminary Objection raises a point of law with respect to section 26 of the Civil Procedure Act which deals with instances where a decree of the court is silent on the issue of interest. A perusal of the pleadings reveals that the subject of Creditor’s Petition is the decree dated 4th November 2014 that arose from the parties’ consent that required the Debtor to pay Kshs 33,000,000.

10. The issue in dispute is whether the Debtor has satisfied the decree or if there was an additional amount to be paid as interest. The Creditor maintains that the Debtor has not satisfied the decree thus necessitating the hearing of the Petition on its merit.

11. It is trite law that in order to succeed, a Preliminary Objection should raise a pure point of law that is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

12. In the present case, I find that the Preliminary Objection does not raise a pure point of law as it is based on disputed facts revolving around the alleged settlement of the decretal sum and if the same was to attract interest. I find that these are issues that can only be unpacked at the hearing of the Petition.

13. In the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR the Supreme Court held,

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

14. For the reasons stated in this ruling, I find that the Preliminary Objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome to the Petition.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF JULY 2021

in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kahura for the Petitioner.

Miss Kagoi for Njanja for Respondent.

Court Assistant: Sylvia.