



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.1760 OF 2001

TETRA PAK LIMITED.....PLAINTIFF

VERSUS

MACHEO LIMITED.....DEFENDANT

RULING

1. Before me in an application dated 18th June 2018 filed by the defendant/Applicant pursuant to Article 159(2) (d) and (e) of the constitution, section 1A and 3A of the Civil Procedure Act and order 49 of the Civil Procedure Rules and all enabling provisions of the law. The Defendant/Applicant seeks for the following orders:-

1. The Honourable Court be pleased to set aside the Ruling and Orders of the Hon. E. Tanui, Deputy Registrar, Milimani dated and delivered on the 12th June 2018, in its entirety;
2. This Honourable Court be pleased to reinstate the Preliminary Objection dated 22nd March 2018 for hearing and determination on merits.
3. Cost of this application be provided for.

2. The application is based on several grounds on the face of the application and supportive affidavit sworn by James Toroitich Kisa, dated 18th June 2018.

3. The application is opposed. The Plaintiff/Respondent relies on an affidavit sworn by John Katiku dated 19th July 2018.

4. I have considered the application dated 18th June 2018, affidavit in support and all annexures thereto: the replying affidavit dated 19th July 2018; the Defendant/Applicant submissions dated 7th August 2018 and Defendant/Applicant list of annexures and the plaintiff submissions in opposition to the application dated 4th September 2018. The issues arising thereof for consideration are as follows:-

- a. Whether the 1st objection was lawfully dismissed?**
- b. Whether the 2nd objection was improperly before the court?**

A. Whether the 1st objection was lawfully dismissed?

5. On 16th June 2017 the Honourable Deputy Registrar ordered the Defendant to file and serve the Plaintiff with a further affidavit (*if need be*) together with written submissions in 14 days' time. The Respondent was further ordered to file its submissions within 14 days of service with the Defendant's submissions.

6. On 19th July 2017 counsel for both parties were present in court when the Applicant's counsel informed the court that they had not filed their submissions and the court ordered that the Applicant do file its submissions within 7 days and the Plaintiff to file its submissions within 14 days of service with a further mention on 26th September 2017 to confirm compliance.

7. That on 26th September 2017 the file was placed before Deputy Registrar, Honourable Opande, who proceeded to dismiss the objection despite the applicant's submissions on record. The Respondent had not filed submissions. That though the application was coming for

mention the Deputy Registrar dismissed the objection without hearing the parties. The application was therefore not decided on merits. When a matter is scheduled for mention, it is procedurally and legally wrong to turn a mention date to a hearing date and issue final orders as the party who had expected the matter to be mentioned and appropriate orders issued is not only prejudiced by issuance of final orders in the matter but is denied fair hearing. The party who attends the mention should not get final orders in his favour, even where he is prejudiced by non-attendance of the other party but cost, which in my view, would be adequate compensation for cost incurred in the day in attending the mention date.

8. The Deputy Registrar in her Ruling acknowledges that there was an apparent confusion in the cause list of 26th September 2017, this could may be, the reason for non-attendance on the part of the applicant and placing the file before another Deputy Registrar at the same time. The blame for non-attendance of the Applicant counsel may therefore not entirely be placed on him.

9. My understanding of the procedure as regards mention of matters, is where a matter for mention is turned to hearing by consent of all parties it may be necessary for reasons for proceedings to hearing to be recorded. It is usually in an exceptional circumstances where mention date can be turned into a hearing. In the case of **Peter Nzioki & another Vs. Aron Kuvuva Kitusa Civil Appeal No. 54 of 1882; [1984] KLR 487**, it was held that when a matter is fixed for mention and not hearing it cannot be lawfully dismissed:-

"....On the mention date... Mr. J. B. Patel was unable to attend being engaged somewhere else. Instead of fixing a date for the hearing of the application and again without hearing any argument on the merits, the learned Judge proceeded to dismiss the application...The application for review has never been heard, and it could not therefore lawfully have been dismissed."

10. Further, it is the law that a court will not have the duty to proceed and determine substantive issues on a mention date. This was echoed by Justice G.V. Odunga in the case of **Republic Vs Anti-Counterfeit Agency & 2 others ex-parte Surgippharm Limited [2014] eKLR** further observed thus:

"First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties' consent to the hearing."

11. In **Central Bank of Kenya Vs. Uhuru Highway Development Ltd & 3 others Civil Appeal No. 75 of 1998** cited in the Anti-Counterfeit Case the Court of Appeal upheld this position:-

"...where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties."

12. In view of the above, I am of the view that a matter for mention cannot be lawfully dismissed but can only be heard and appropriate orders made once parties to the suit consent to proceed to hearing of the matter, however any purported dismissal of the suit at the mention stage is not proper as its decision, it is not based on merit as court cannot determine at that stage substantive issues. I therefore find and hold that it was wrong and erroneous for the court to have purported to dismiss the Applicant's first objection at the mention state notwithstanding the non-attendance of the Applicant herein at the mention stage.

13. In the instant application, the issues raised in the 1st objection as regards on issue of jurisdictions of the court by virtue of Limitations of Action Act remains undetermined. The suit did not proceed to be determined on merits the issue and in a fair manner. I find the first objection was not determined properly.

B. Whether the 2nd objection was improperly before the court?

14. The record reveal that on 13th March 2018, the Applicant sought leave to file an application to set aside the orders of 26th September 2017 and was granted seven (7) days to file it's application. That 2 months down the line the Applicant had not filed an application, hence on 16th May 2018 the matter was set down for Notice to show cause on 30th May 2018. On 30th May the Applicant informed court it had filed another preliminary objection, in which case the Notice to show cause did not proceed to hearing. The objection was subsequently struck out.

15. The Deputy Registrar in her ruling noted that the Applicant counsel had indicated that the defendant had filed another preliminary objection dated 2nd March 2018, which could not be traced nor reflected in the court record as there was none in the court file. The court stated even if the same was not on record it could have been improper and struck the same even if it was traceable in the court file. The court went on and stated the only option open to the Defendant/Applicant is to make an application praying to set aside the orders of 26th September 2017.

16. I find and hold that the defendant in filing a second objection and failing to file an application to set aside the order of 26th September 2017 and in proceeding to urge the same is out to delay prompt determination of this suit. It's second objection is an abuse of the court process. The Deputy Registrar was in order in making the orders she did. I find nothing wrong with her decision.

17. The upshot is that the Defendant/Applicant's chamber summons is devoid of merits; I decline to interfere with the Ruling and orders of Hon. E. Tanui, Deputy Registrar, Milimani dated and delivered 12th June 2018. I further decline to reinstate the preliminary objection dated 22nd March 2018 for hearing and determination on merits, as the matter is not before this court; relevant application can only be lodged at the court that dismissed the objection.

18. The chamber summons dated 18th June 2018 is dismissed with cost to the Plaintiff/Respondent.

Dated, signed and delivered at Nairobi this 22nd day of November, 2018.

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J .A. MAKAU

JUDGE