



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL CASE 622 OF 2001**

**M.A. BAYUSUF & SONS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**EXPRESS KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/JUDGEMENT DEBTOR**

**CHINA ROAD AND BRIDGES CORPORATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to a Preliminary objection filed in Court on 9<sup>th</sup> December 2016 by the Plaintiff (herein the “Applicant”). The same is raised in relation to the Application dated 17<sup>th</sup> November 2016, filed by the 1<sup>st</sup> and 2<sup>nd</sup> Objectors (herein “the Respondents”).

2. The grounds of the Preliminary objection are that as follows;

***i. That the Application is fatally defective in law.***

***ii. That the Application is an abuse of the Court process.***

3. The Applicants told the Court that, the provisions of Order 22 Rules (51), (52), (53), and (54) of Civil Procedure Rules, describe the manner in which the Application as herein should be brought before the Court. Further the same provisions provide for the steps to be followed once the Application is filed. However, in the instant case, the Objectors have not complied with those steps, as they filed this Application before the Court issued the Decree Holder with the mandatory notice the Applicant attribute the failure of the Court in issuing the said notice “presumably” due to the invalid objection Notice filed by the Applicants belatedly on 22<sup>nd</sup> November 2016. The applicant further argues that, the 2<sup>nd</sup> Objector’s document marked “CNM3” is a lease dated 6<sup>th</sup> January 2013, for business premises, as such there are no moveable properties cited in the Lease belonging to the Objector. The Applicant prayed that objectors Application be struck out with costs.

4. However, the Preliminary objection was opposed by the Respondents who argued that the wording of the Order 22 Rule 51 (2) and (2) of Civil Procedure Rules 2010, is coached in “discretionary and not mandatory terms as the Plaintiff would want to make the Court believe”. The Respondent submitted that they filed a valid notice of objection on 22<sup>nd</sup> November 2016. However, the Court has not exercised its discretion under Order 22 Rule 52 of the civil Procedure Rules 2010 issue an order for stay of execution. The Respondents argued that Sections 1A, and 3A of the Civil Procedure Act facilitate provides for the

expeditious disposal of disputes and Section 3A, gives the Court inherent power to make orders that are necessary to meet the ends of justice. In that regard, the Objectors/Respondents should be accorded an opportunity to be heard on merit. The Respondents cited Article 159 (2)(d) of the Constitution of Kenya, which provides that, Justice should be administered without undue regard to procedural technicalities. On the issue raised regarding annexure CNM 3, the Respondents submitted that the same cannot be determined on a Preliminary Objection. The Objectors/Respondents relied inter alia on the following cases to buttress the point that, the Court will disregard technicalities to uphold substantive justice.

**i. *New look Estate & Another Vs Khira Omera Maalim & Another 156 of 2008.***

**ii. *Shashiken C. Patel Vs Mental Commercial Bank HCCC No. 264 of 2005, and***

**iii. *Diana Entertainment Ltd Vs Kumar Gupta & Esspee Investment Ltd Acc. No. 94/2014.***

5. I have considered the Preliminary objection, and note that is based on two afore stated grounds. However, when I considered the submissions filled by the Applicant, I found no submissions made on the 2<sup>nd</sup> ground in support of the Preliminary objections, which alleges that, the Objectors Application amounts to an abuse of the Court process. Therefore I shall not consider that ground in determining the merit of the Preliminary objection. As regards 1<sup>st</sup> the grounds that the Application is fatally defective, I find that, the same is based on the fact that allegedly the Court has not to date issued the decree holder with a mandatory notice under Order 22 Rule 52. The Applicant in that regard averred:

**“presumably due to the fact that the invalid objection Notice filed belatedly on 22<sup>nd</sup> November 2016”.**

6. The question then is: Is the Applicant acting on “presumption” or “facts” when they allege that the Objection Notice is invalid. Secondly, assuming the said Notice invalid as alleged, has the Applicant stated what factor(s), if any, render the said Notice invalid? Unfortunately, the Court is not able to find any reasons advanced to support the alleged invalidity. I have looked at the said subject notice. It is dated 11<sup>th</sup> November 2016 and filed in Court on 22<sup>nd</sup> November 2016. It is indicated as having been brought under Order 22 rule 51 of Civil Procedure Rules 2010. I don’t see anything invalid about it. It is properly served upon all the Parties. If the argument is that, the Court has not ordered for a stay of attachment, then that issue should be raised with the Court. That per se does not make the Notice invalid and cannot be visited on the Objectors/Applicants. In any case, Order 22 Rule 52 of Civil Procedure Rules states the Court “**may**” order stay of execution. It is not mandatory.

7. The other issue raised is that the Notice is not accompanied by an application supported by an Affidavit. If that is so, then that issue can only be dealt with during the hearing of the main Objectors Application.

8. All in all, I find that the Preliminary Objection raised herein has no merit. Even if the Application failed to comply as argued, which is not the case herein, the Court is empowered under Article 159(d) of the Constitution of Kenya to uphold substantive justice and the Objectors Application would still be heard on merit with appropriate orders to costs to the Respondent. I therefore order that the Objector’s Application be heard on merit. I further order that if the Court has not issued the order for stay of attachment, the same should be issued immediately. In that regard this ruling be brought to the knowledge of the Deputy Registrar, (unless otherwise for good reasons to be notified to the Parties). The Preliminary Objection is thus dismissed with costs to the Objectors/Respondents. The Parties are directed to file their respective responses and/or submissions on the Objector’s Application dated 17<sup>th</sup> November 2016 within time frame to be agreed on. If they have complied, a date for highlighting of the submissions be fixed. If the submissions are not filed they should be filed and exchange the same within a time frame to be agreed upon.

9. Orders accordingly.

**Dated, delivered and signed on this 16<sup>th</sup> day of June 2017 at Nairobi.**

**G. L. NZIOKA**

**JUDGE**

**In open Court in the presence of:**

Mr. Ngechu h/b Mrs. Githae for Plaintiff

Mr. Kamwaro h/b Miss Mogire for Defendant

Mr. Kamwaro for Objector