REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO.134 OF 2003

CATHERINE KAWIRA…PLAINTIFF

VERSUS

MURIUNGI KIRIGIA………....DEFENDANT

RULING

Preliminary objections

[1] The Plaintiff, in -a Notice of Preliminary Objection dated 3rd November, 2014 took up a number of points as Preliminary Objections. The Objections are directed at the Application dated 15th July, 2014. The court on 5th November, 2014 directed that the said Preliminary Objection dated 3rdNovember, 2014 shall be heard first; and on 13th May 2015 that the Preliminary Objection shall be determined by way of written submissions. The said Objections may be summarized as follows:-

(a) That the Defendant's application dated 15th July 2010 is incompetent and incurably defective; and

(b) That the said application is an abuse of court process.

The Defendant gave the reasons and grounds for raising these objections. I shall consider all of them in this ruling

[2] The Plaintiff filed submissions on the Preliminary Objectionas had been directed but the Defendant did not despite having been given time to do so. I will consider the submissions filed. Nevertheless, there should be no anxiety on this matter as I shall determine the Preliminary Objection on the basis of the law.

[3] According to the Plaintiff, the application dated 15th July 2014 is incompetent and fatally defective and should be struck out for the following reasons:-

(a) That the application was filed by the Defendant in person whereas he has an advocate on record, that is, Ndubi & Ndubi Associates. They submitted that the Defendant neither sought leave of the court nor filed a notice to act in person as by law required.

(b) That the Defendant filed a notice of appeal on 6th May 2010 against the order of the court made on 30th April. 2010. Therefore, Order 45 of the Civil Procedure Rules

on review was not available to such the Defendant who has already preferred an appeal on the order to be reviewed.

(c) That judgment against the Defendant was entered in this suit on 9th July 2009, thus, there is no pending suit on which temporary orders of injunction may be granted. There is even not any or pending cross-action on which temporary orders may be founded.

[4] The Plaintiff also sought to establish that the said application in issue herein was an abuse of process of court. In support thereof, he stated that the Defendant had filed yet another application dated 9th November, 2009 for the setting aside of the judgment herein which was dismissed on 30th April 2010. Based on the foregoing, the Plaintiff beseeched the court to dismiss the application dated 15th July 2014.

DETERMINATION

[5] I do not want to reinvent the wheel on the legal threshold for Preliminary Objection. It is now well-settled principle that a preliminary objection should be a point of law that is straight-forward and not obscured in factual details for it to be proved. Again, it must be potent enough to decimate the entire suit or application. On this I am content to cite the case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED v WEST END DISTRIBUTORS LIMITED (1969) EA 696** where it was stated 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. 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."**

I will not forget the admonitions by Sir Charles P Newbold (as he then was) when he stated in the same case that:

> **"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 has 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. This improper practice should stop."**

Ultimately, I wish to associate myself with an apt statement on preliminary objection which was expressed in sheer simplicity in the case of **ORARO vs. MBAJA [2005] 1 KLR 141** by **Ojwang, J** (as he then was) that:

> **"…The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a 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''.**

[6] I will apply the above test to the points which have been taken up as preliminary objections.Doubtless, there is a final judgment in this case which has not been reversed or set aside. Therefore, for as long as the Defendant has an advocate on record, he cannot apply in person unless with court's permission under Order 9 rule 9 of the Civil Procedure Rules. I have

not been shown or seen any such leave of the court or a duly filed Notice to act in person. On that account alone the application dated 15th July 2014 is incompetent. But a more fundamental consideration is that the final judgment herein has not been reversed or stayed. Accordingly, in so far as it is seeking for temporary injunction in the circumstances of this suit, the application dated 15th July 2014 lacks a foot on which to stand; it is totally incompetent. Another matter of importance to note here is that an appeal has been filed against the orders of 30th April 2010; therefore, to the extent that the said application seeks review of those orders subject of appeal, the review application is misconceived. See the scope of Order 45 of the Civil Procedure Rules as prescribed in law. Without doubt, these are clear points of law which are not entangled in factual details; they do not require probing of evidence in order to prove. Thus, the upshot of my analysis is this. I uphold the preliminary objection and strike out application dated 15th July 2014 with costs to the Plaintiff. At the moment the application that is outstandingis the one dated 18th May 2011 about which I will give directions forthwith for the sake of expeditious disposal of this matter; in every sense this case is aged. I note that the Applicant has already filed submissions on the said application but the Defendant has not. As the Preliminary Objection is now out of the way, in the interest of justice I should give the Defendant one last chance to file submissions within 14 days of this ruling. This order shall be served on his advocates immediately for compliance. But in default thereof, I will assign the said application a date for ruling and decide it on the basis of the material filed in court. It is so ordered.

Dated, signed and delivered in court at Meru this 7thday of April 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gitonga Advocate for the plaintiff

No appearance for defendant.

F. GIKONYO

JUDGE