



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 547 OF 2011

GODFREY KIMANI MWANGI.....APPELLANT

VERSUS

KANORERO WENDANI CO. LIMITED

KIMANI KURIA

ANDREW GIKUYU

ANASTACIA WANJIRU.....RESPONDENTS

RULING

1. Brief facts of this case are that the Appellant is a former chairman and director of the 1st Respondent and the 2nd 3rd and 4th are shareholders of the 1st Respondent. There dispute between the parties is an alleged unlawful withdrawal of funds from the 1st Respondent's account and an alleged illegal removal of the Appellant as a director and chairman of the Respondent.
2. The Appellant has now filed a notice of motion dated 24th November, 2012. In it the Appellant seek the following orders:-
 - i. *That this court be pleased to stop the Respondents from evicting, harassing, intimidating or interfering with the occupation of House No. C2 in respect of the suit premises known as L.R. plot No. Nairobi/Block 36/329/VII, Kanorero Wendani House, Eastleigh Section 7(suit premises).*
 - ii. *That this court orders the Respondents to immediately pay land rates to the Nairobi City Council and other statutory payments in respect of the suit premises.*
 - iii. *That this court be pleased to appoint an agent to collect rent and deposit the same in court in respect of the suit premises pending hearing and determination of the appeals.*
 - iv. *That this court be pleased to order the Respondents to supply a statement of accounts in respect of the sums of money they withdrew from bank account no. 0152021143400, Standard Chartered, Kenyatta Avenue, belonging to the company and the rent collected in respect of the suit premises within thirty days from the date of the application.*
3. It is the Appellant's contention that the trial court on 19th January, 2010 issued orders restraining the Respondents from collecting rent, interfering with the registered management, operations and holding meetings on behalf of the 1st Respondent. That the Respondents were served with the order of court and are aware of the said orders. He averred that on 13th March, 2010 the Respondents and their agents held meetings contrary to the said order. That since May, 2010, some of the directors and shareholders have run the said company in breach of its Articles of

- Association, the Companies Act and in breach of their fiduciary duty and that the majority shareholders have purported to make major decisions for the company.
4. The Respondents raised a preliminary objection on the grounds that the application and the appeal are a non-starter, misconceived, frivolous, defective, bad in law and an abuse of the court process and that the orders sought by the Appellant are not available in the Appellate court as the Appellant ought to have sought the prayers in the trial court where the matter is still pending.
 5. The threshold of a preliminary objection were set out in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** where it was stated:

“So far as I am 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 submissions that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold stated in the same judgment that:

“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 in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. In his submissions, the Appellant reiterated his averments as they are in his affidavits. The Respondents' submissions are not on record. The application was heard together with the preliminary objection. I have considered the application and the preliminary objection. In my view, the Respondent's preliminary objection does not meet the threshold of what constitutes a preliminary objection since it calls for factual materials to be placed before the court by way of evidence. Particularly the second ground that the orders sought by the Appellant are not available in the Appellate court as the Appellant ought to have sought the prayers in the trial court where the matter is still pending. To ascertain why the orders were not sought in the trial court and the pendency of the matter before the trial court, affidavit evidence will have to be tendered.
7. Further to the foregoing, there is no replying affidavit to the application, the facts deponed in the supporting affidavit are therefore considered unrebutted and I take them to be true. In **Kennedy Otieno Odiyo & 12 others v. Kenya Electricity Generating Company Limited (2010) eKLR** it was held inter alia:-

"The respondents only filed grounds of opposition to the application...Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what is deponed to was not rebutted by the Respondents. It must be taken to be true..."

8. Accordingly, the application herein is allowed. It is so ordered. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

N/A for Karauka for the Appellant

Miss. Miring'u for the Respondent

