



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI HIGH COURT**

**MISC CAUSE NO 394 OF 2008**

**KAGWIMI KANG'ETHE &**

**COMPANY ADVOCATES ..... APPLICANT**

**VERSUS**

**PENELOPE COMBOS..... 1ST RESPONDENT**

**ANTHONY COMBOS..... 2ND RESPONDENT**

**RULING**

[1] Before the Court was the Notice of Preliminary Objection dated 17th September 2015 raised by the Applicant/Respondent. The issue for objection raised was that this honourable court lacks the jurisdiction and power to entertain the Respondents/Applicants application for stay of execution pending appeal dated 4th September 2015 and filed on 16th September 2015.

[2] The grounds upon which the objection was premised was that the issues raised in the application are pending hearing before the Court of Appeal in Civil Application No. Nairobi 205 of 2015 (UR 168 of 2015) – Penelope Combos & Anthony Combos v Kagwimi Kang'ethe & Co Advocates, that the Court of Appeal has declined to grant any orders in the pending application and that further, and in the instance, the present application is similar to the application pending before the Court of Appeal. It was further contended that application was incompetent ab initio as no appeal had been filed nor commenced against the ruling of Gikonyo J, delivered on 26th June 2015.

[3] At the hearing of the Preliminary Objection, the Applicant reiterated that this Court has no jurisdiction to hear and determine the instant application as there was a similar application pending hearing and determination before the Court of Appeal. It was contended that the Respondents sought similar orders from both this Court and the Court of Appeal, and that in the instance this Court lacked the jurisdiction to issue such orders as prayed for by the Respondents. Further, it was urged that the application was an abuse of the process of the Court and that the application should be dismissed.

[4] In response to the objection, the Respondents reiterated that Court had the requisite jurisdiction to hear and determine the instant application for stay of execution pending appeal, notwithstanding that a similar application had been filed in the Court of Appeal which was

pending hearing and determination. In support of their contention, the Respondents relied on the cases cited and listed in their list of authorities dated 18th September 2015, and more particularly Milimani HCCC Misc. App No 698 of 2004 A. N Ndumbiri & Co. Advocates v Mwea Rice Growers Multipurpose Co-operative Society Ltd; (2006) eKLR.

[5] In considering the preliminary objection, the contentions raised by the Applicant and the response thereto by the Respondents as adduced during the hearing of the preliminary objection, the Court takes cognizance of the oft cited case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] E.A 696 at 701, where Newbold, J reiterated as follows;

***“A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”***

[6] In Civil Case No. 102 of 2012 - Cheraik Management Limited vs. National Social Security Services Fund Board of Trustees & Another Odunga, J expressed himself, inter alia, as follows;

***“Ordinarily, a preliminary objection should be based on the presumption that the pleadings are correct. It may also be based on agreed facts. It, however, cannot be entertained where there is a dispute as to facts for example where it is alleged by the defendant and denied by the plaintiff that a condition precedent to the filing of the suit such as the giving of a statutory notice was not complied with, unless the fact of non-giving of the notice is admitted so that the only question remaining for determination is the legal consequence thereof. It may also not be entertained in cases where the Court has discretion whether or not to grant the orders sought for the simple reason that an exercise of judicial discretion depends largely on the facts of each particular case which facts must be established before a Court may exercise the discretion...In this case both parties have adopted the unusual mode of arguing the preliminary objection by filing affidavits in support and in opposition thereof respectively. Accordingly part of the Court’s task would be to determine what are the agreed facts contained therein whether expressly or by legal implication.”***

[7] Further, in Omondi v National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177 cited by Odunga, J in Isaac Gathungu Wanjohi & Another v Director of City Planning, City Council of Nairobi (2013) eKLR, it was held that:

***“The objection as to the legal competence of the Plaintiffs to sue (in their capacity as directors and shareholders of the company under receivership) and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debitojustitiae (as of right) but as a matter of judicial discretion.”***

[8] Ojwang, J (as he then was) in Oraro vs. Mbaja [2005] 1 KLR 141 expressed himself as follows:

***“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. The first matter relates to 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... 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. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”***

[9] The premise of the objection is with regards to the jurisdiction of this Court to hear and determine the instant application for stay of execution pending appeal. The contention by the Applicant was that there being the pendency of a similar application before the Court of Appeal, it was onerous for the instant application to be set aside.

[10] A preliminary objection, as reiterated by Ojwang, J in Oraro vs. Mbaja (supra), may also arise in the challenge of the Courts jurisdiction. However, he further went to explain that the same would not arise in the instance where the any fact is to be ascertained or if what is sought is the exercise of judicial discretion. An order for stay of execution pending appeal, as provided under the ambit of Order 42 Rule 6(1) of the Civil Procedure Rules, is a discretionary power exercised by the Court in the achievement of the overriding objective as enunciated under Sections 1A and 1B of the Civil Procedure Act. What the Applicant is challenging is the jurisdiction of the Court to exercise its discretionary power, in consideration of the pending application at the Court of Appeal.

[11] Whether the Court has the jurisdiction to entertain the instant application is based on agreed facts as per the pleadings filed by the Respondents. In their affidavit in support of the Notice of Motion dated 4th September 2015, at paragraph 21 thereof, the Respondents admitted that an application for stay of execution had been filed in the Court of Appeal in Civil Application No Nairobi 205 of 2015 (UR 168 of 2015), and that the same had been fixed for inter parties hearing on 21st October 2015. The Respondents’ arguments for filing the instant application was that the Applicant had fixed the matter for settlement of terms of sale on 15th October 2015, and that therefore, it was imperative for them to file the instant application for stay of execution at the

superior Court.

[12] Whether similar application has been filed in the Court of Appeal or in this Court is not a matter that may be raised as a preliminary objection as the same touches on exercise of the judicial discretion of the Court. As was reiterated in *Omondi v National Bank of Kenya Ltd & Others* [2001] KLR 579 (supra) and also in *Oraro vs. Mbaja* (supra), the Court will not entertain, and the Applicant would not be allowed, to institute an objection primarily based on the exercise of the judicial discretion of the Court, notwithstanding the fact that the fact of pendency of a similar application before the Court of Appeal has been admitted. In the instance, and in consideration of the foregoing, the instant objection is overruled.

However to avoid the confusion in the orders issued by the courts here and in the court of the appeal and in the interest of justice; and taking to account that the applicant is ready to deposit the decretal amount, I make the following orders;

- a. Temporary stay on condition that, the decretal amount be deposited in the court or in interest earning account in joint names of the parties advocates pending the ruling by the court of appeal in application No. 205 of 2015.
- b. The deposit to be done on or before 14/10/2015 and in default the process of the sale of attached property to proceed as ordered on 26/6/2015.
- c. Cost to the respondent.
- d. The motion herein will await the court of appeal decision in the above application.

**Dated, signed and delivered in court at Nairobi this 2<sup>nd</sup> day of October, 2015.**

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**C. KARIUKI**

**JUDGE**