



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 401 OF 2008**

**ENGINEER E.M. KITHIMBA T/A KITHIMBA**

**ASSOCIATES CONSULTING ENGINEERS.....PLAINTIFF**

**Versus**

**THE HONOURABLE ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**COAST DEVELOPMENT AUTHORITY .....2<sup>ND</sup> DEFENDANT**

**RULING**

**Preliminary Objection**

[1] The Plaintiff filed a Preliminary objection on 3<sup>rd</sup> December, 2013 to 1<sup>st</sup> Defendant's application filed on 20/11/2013. The application dated 3<sup>rd</sup> December, 2013 is seeking for stay of execution of the decree issued herein. The objection is that the application by the first defendant is fatally defective in law and therefor unsustainable and ought to be struck off. The objection according to the Plaintiff is premised on the fact that there are two defendants in this case. The Honourable Attorney General is the 1<sup>st</sup> Defendant and who has been sued pursuant to the provisions of the Government Proceedings Act, Cap 40 of the Laws of Kenya for and on behalf of the Ministry of Finance and also the Ministry of Regional Development. The Honourable Attorney General appeared and filed an appearance and a defence on his behalf on 10<sup>th</sup> September, 2008. The second defendant is a body corporate duly established under the provisions of Cap 449, Laws of Kenya and indeed a legal entity capable of suing and being sued as provided for under **Section 3** of the said Act which defended the suit in that capacity through the firm of J.C Chidzipha & Company who filed an appearance and a defence of 26<sup>th</sup> August, 2008.

[2] The application herein is filed by the Honourable Attorney General but seeking stay of execution whereas execution is against the second defendant. The second defendant has not applied for stay at all. In any event, the law does not permit execution against the Government. The court has been referred to Order 49 Rule 2(2) (b) of the Civil Procedure Rules which expressly prohibits execution against the Government. It follows that the orders being sought are a mere academic exercise.

[3] At all material time, the second defendant has been and still is being represented by the firm of

J.C Chidzipha & Co. advocates. There has never been a notice of change of advocates or an application for leave by the Hon. Attorney General to come on record. The application before the court is by the Hon. Attorney General who purports to act for the second defendant without properly placing themselves on record. The further affidavit filed on 3<sup>rd</sup> December, 2013; by one Edel Fuchaka at paragraph 7 avers that:

**“...the application herein is a state agency and though it had an advocate on record, the Attorney General has always appeared on its behalf with no objection from the Respondent.”**

[4] According to the Plaintiff, the said averment is factually and legally wrong and totally misleading. First, the second defendant has always had a lawyer representing them, and secondly, the application in question is signed by a one Prisca Wambui, a litigation counsel for and on behalf of the Attorney General. The crux of the objection, therefore, is that, if the Hon. Attorney General desires to act for the second defendant, he should apply for leave to come on record for the 2<sup>nd</sup> Defendant. Accordingly, the application by the first defendant purporting to act for the second defendant is totally improper, legally unsustainable and contrary to procedure.

[5] The Plaintiff cited case law on preliminary objections; that of **MUKISA BISCUITS MANUFACTURING CO. LTD v WEST END DISTRIBUTOR LTD [1969] E.A 696** where Law JA stated that:-

***“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.”***

Also quoted J.B Ojwang J (as he then was) who made the nature of preliminary objection clearer in the case of **Oraro Vs Mbajja**.

[6] The Plaintiff, therefore, argued that My Lord, the Hon. Attorney General cannot purport to file and canvass an application for and on behalf of the second defendant who has an advocate representing it. No notice of change of advocates has been filed as required by Order 9 Rule 5 which provides that:

**“A Party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of change of advocate is filed in the court in which such cause or matter is pro ceding and served in accordance with rule 6, the former advocate shall, subject to Rule 12 and 13 be considered the advocate of the par ty until the final conclusion of the cause or matter, including any review or appeal.”**

Further, **Order 9** provides that:

**“when there is a change of advocate, or when a party decided to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

- a. **Upon an application with notice to all parties; or**
- b. **Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party to act in person as the case may be.”**

[7] The Attorney General did not comply with the above provision. Breach of the said provision was dealt with in the case of **UNITED FINANCE CO. LTD v MATIKO AGOYE AKEDI HCCC NO. 246 of 1999 (Unreported)** and where the court upheld a preliminary objection under circumstances similar to the present case. The application by the Hon. Attorney General for and on behalf of the second defendant is legally incompetent and therefore unsustainable. In **BADRUDDIN MOHAMMED ABDULLA KOYA v HASHIL MOHAMED AMBER & ANOTHER, HCCC NO 1379 OF 2002** the court struck out a notice of motion filed by an advocate who had not properly come on record as provided under Order

9 of the CPR.

[8] Further, the second defendant has never filed a notice of appeal yet the purport application is grounded on the reasons that an appeal has been preferred. Accordingly, the court should uphold the preliminary objection and dismiss the first defendant's application with costs and allow the execution to proceed.

### **The Respondent's Submissions**

[9] The 1<sup>st</sup> Respondent submitted that the Plaintiff's Preliminary Objection dated 3/12/13 is based on a procedural technicality. Article 159(d) of the Constitution of Kenya 2010 states that justice should be administered without undue regard to procedural technicalities. Section 1A and 1B of the Civil Procedure Act (the Oxygen principle) enjoins the court to facilitate a just expeditious, proportionate and affordable resolution of disputes. Article 156 of the Constitution of Kenya established the Office of the Attorney General as a State Office within the National Government. Article 156(6) of the Constitution empowers the Attorney General to promote, protect and uphold the rule of law and defend public interest. Similarly, Section 7 of the office of the Attorney General's Act No. 9 of 2012 provides for audience by the Attorney General in matters of public interest. Section 7(1) of the Act is to the effect that the Attorney General has a right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers:-

1. To be of public interest or involves public property; or
2. To involve the legislature, the judiciary or an independent department or agency of the Government.

[9] Judgment on this matter was delivered on 28<sup>th</sup> September, 2012 against the defendants for Kshs. 3,947,680 with interest of 12% from date of filing this suit. Accordingly the claim involves a substantial amount of public funds thus establishing a significant public interest element in this suit. Order 51 Rule 10(2) of the Civil Procedure Rules states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. The plaintiff has not shown how the Attorney General acting for the 1<sup>st</sup> defendant has prejudiced him or how it has affected the substance of the application. A mere technicality should not be used to deny the defendant a chance to obtain justice before this Honourable court of law. The applicant herein is a State Agency and though it had an advocate on record, the Attorney General has always appeared on its behalf with no objection from the respondent. When the matter came up for taxation, the applicant was represented by the Attorney General with no objection from the Respondent and therefore the respondent is trying to defeat the ends of justice by raising the issue of representation now. In **COURT OF APPEAL CIVIL APPEAL 326 OF 2005 DR. JOSEPH NATHANIEL ARAP NG'OK V ATTORNEY GENERAL [2010] eKLR** the Court of Appeal held that the Attorney General has the unquestionable right to represent a State Corporation in Civil proceedings.

[10] The 1<sup>st</sup> Respondent submitted that, in the view of the above, the Constitution calls upon this court to administer justice without undue regard to procedural technicalities. They urged the court to dismiss the Plaintiff's preliminary objection as it is a waste of the court's time.

### **COURT'S RENDITION**

[11] A preliminary objection was clearly delineated in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD v WEST END DISTRIBUTOR LTD [1969] E.A 696** where Law JA stated the following:-

**“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.”**

And J.B Ojwang J (as he then was) made it clearer in the case of **Oraro Vs Mbajja**[\[1\]](#) where he stated:-

**“I think the principle is abundantly clear. A “preliminary objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and 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. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”**

[12] I do not intend to administer any sudden shock. But I must state from the outset that the Objection before me is not only unfounded but also without any foot on which to stand. The Plaintiff based its case on the inextricable connection between the two defendants and even sought for judgment against the defendants jointly and severally. Indeed judgment was entered for the Plaintiff against the defendants jointly and severally. Therefore, the two are bound by the judgment jointly and severally. Accordingly, any or both jointly or severally could apply for stay of execution of the decree. In any case, the Attorney is a party and bears a constitutional mandate of the defender public interest. A state Corporation holds public funds and the need to defend the public interest is desirable whether the corporation is wholly owned or it has other shareholders. On that basis, I admit the postulation by the Court of Appeal in **JOSEPH NATHANIEL ARAP NG’OK** that the AG has unquestionable right to represent such state corporation in civil proceedings. That is the correct interpretation of the Constitution and ordains the place of the AG in such matters. Even if I was to assume that the preliminary objection is well founded, still, the question whether the Attorney General can apply for stay of execution on behalf of the 2<sup>nd</sup> Defendant is one which is infested and completely blurred with factual issues. The court can only unravel the issues by probing upon evidence by the parties and perusing documents; an exercise that is impossible since the court has already determined the case and held the defendants liable, jointly and severally. And that state of affairs does not meet the threshold of a preliminary objection in the sense of the law. Moreover, and I stated this earlier, the AG can apply for stay as a party in the suit without offending any law and despite the laws which govern execution against government. Where does that leave the objection? That the objection herein is incapable of compromising the entire proceedings for stay of execution and serves no useful purpose. That again confirms the objection is not a true preliminary objection.

[17] Accordingly, the most apt option here is for the Plaintiff to attack the merit of the application for stay and then the argument that the AG has not filed a notice of appeal may become useful. Without much ado, I dismiss the objection filed on 3<sup>rd</sup> December, 2013.

**Dated, signed and delivered in open court at Nairobi this 7<sup>th</sup> day of June 2014**

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**F. GIKONYO**

**JUDGE**

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