



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Case 332 of 2009

IN THE MATTER OF:

**THE PARCEL OF LAND KNOWN AS PLOT NO.
1X/49 & IX50**

AND

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF
KENYA**

BETWEEN

MATHEW M. KISAO & 43 OTHERSPLAINTIFFS/APPLICANTS

-VERSUS-

- 1. CHANDAN JETHANAND GIDOOMAL1ST
RESPONDENT**
- 2. PREM JETHANAND GIDOOMAL2ND
RESPONDENT**
- 3. MUNICIPAL COUNCIL OF MOMBASA 3RD
RESPONDENT_**

RULING

[1] On 18th September 2012, the advocates for the 22nd and 40th applicants. E.N. Waithera & Co. filed a Notice of Preliminary Objection. The basis for Objection was two fold._

(i) That the application has been filed in a court that does not have jurisdiction to entertain, hear and determine and grant the orders sought as there is already an appeal in the Court of Appeal. The same being Appeal No. 39 of 2012.

(ii) That the 22nd and 40th applicants have never at any given time retained the applicants counsel on record and are therefore strangers to the application before the Honourable Court

[2] When this matter come up for hearing on 18/2/2013 Mr. Obura Learned Counsel for 1st – 21st, 23rd – 39th and 41 – 44 applicants said that he had filed written submissions on behalf of his clients and had served M/s. E.N. Waithera who appeared for the 22nd and 40th applicants aforesaid. M/s. Waithera and Mr. Obura Learned Counsels for the parties said that they had filed written submissions for the preliminary objection and served each other and requested the Court to make a ruling based on the same. The Ruling of the Preliminary Objection was therefore fixed for 10.5.2013.

[3] The submissions of M/s Waithera are basically that the Court is not seized of jurisdiction to hear and entertain this application because there is already an appeal filed in the Court of Appeal vide Civil Appeal No. 39 of 2012. The other reason relied on in M/s Waithera's submissions is that her clients had not instructed Mr. Obura Counsel for the applicants and that the 22nd and 40th applicants are total strangers to the orders sought.

[4] Mr. Obura Learned Counsel for the applicants in response, argued that the mere existence of an appeal to a higher court in this case the Court Of Appeal, does not *ipso facto* oust the jurisdiction of this Court. He further argued that there are no orders of stay barring this Court from proceedings with the matter before it. He contended that the Appeal in the Court of Appeal relates to interlocutory orders and not the final determination of this suit. On the issue of whether he was instructed by the 22nd and 40th defendants he relied on the case of Mukisa Bisquit Co. Vs Westend Distributors Ltd. Where it was held:

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“A preliminary objection is in the nature of what used to be a demurrer. It raised 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”.

He argued that this Preliminary Objection ought and should be dismissed.

[5] I am afraid, I agree with the submissions of Mr. Obura Learned Counsel for the applicant. A perusal of the Civil Procedure Rules² will reveal that an appeal to the next Court higher in rank does not operate as a stay of execution. Any party aggrieved by an order made in an interlocutory matter in the High Court has a right to appeal to the Court of Appeal. When he does appeal he can erect to apply for stay of the proceedings in the High Court pending the determination of that point by the Court of Appeal. If his application is rejected by the High Court he can apply for stay of the proceedings in the High Court by the Court of Appeal. A party who does not do so cannot wait until the suit is set for hearing for either the application or the suit itself and allege that the courts lacks jurisdiction for the reasons that there is an appeal to the Court of Appeal.

The Mukisa Biscuits case quoted³ has settled the issue on what constitutes a Preliminary objection. The fact the 22nd and 40th applicants now claim that they did not instruct the Counsel of the applicant is not a matter of law but fact. This can easily be canvassed at the hearing.

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I am not convinced that there is any prejudice to be suffered by the 22nd and 40th applicants at all. The application dated 5th of September 2012 should be fixed for hearing on merits. This Preliminary Objection is dismissed with costs to the applicants.

DATED and delivered in open Court at Mombasa this 10th day of May 2013

S.N. MUKUNYA

JUDGE

10.5.2013

In the presence of :

Retired Justice Oguk holding brief for Obura for the applicants

Mr. Waithera for 22nd and 40th applicants

Manwa Mabeya for the respondents

[2](#) Order 42 rule 6

[3](#) Mukisa Bisquit Co. -vs- Westend Distributors Ltd. [1969] E.A. 696