



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 123 OF 2012

SAUTI AFRICA LIMITEDPLAINTIFF

VERSUS

CHERAIK MANAGEMENT LIMITED.....1ST DEFENDANT

FLORENCE NGAIRA T/A GARYL AGENCIE.....2ND DEFENDANT

R U L I N G

By a notice of preliminary objection on points of law dated 30th May 2012 and filed in this Court the same day, the defendants pray that the motion dated 12th March 2012 and the entire suit be struck out with costs on the following grounds:

- 1. THAT it is as admitted by the plaintiff in its grounds of opposition dated the 21st day of March 2012 paragraph 6 thereof in Nairobi HCCC No. 107 of 2012 (a suit consolidated with the present suit) that their purported licenses dated the 5th day of March 2012 did not arise as a result of compliance with Public Procurement and Disposal Act 2005 and Public Procurement and Disposal Regulation 2006. This is therefore an undisputed fact. That therefore their license to the suit premises is tainted with an illegality and/or was purportedly procured contrary to public procurement policy and cannot be enforced by the court at the instance of either party. This therefore goes to the jurisdiction of the court and the suit itself.**
- 2. THAT the jurisdiction of the court cannot be conferred by consent and is a matter which the court must take cognizance of whether raised or not and without jurisdiction the suit is to be struck out.**
- 3. THAT the plaintiff purported carpark licenses agreement(several) and dated the 5th day of march 2012 are therefore illegal as its formation is illegal and is *void abinitio*. A nullity is a nullity and in law it amounts to nothing. It is not only bad but is incurably bad.**
- 4. THAT the purported license in question having been grounded on an illegality, the same does not deserve the court's protection.**

5. **THAT as shown on the face of the plaintiff's annexure "AM2" in the affidavit of Anthony Maina sworn on the 12th day of March 2012, the purported license agreement dated the 4th day of May 2012 between the plaintiff and the NSSF was done in breach and /or in violation of the provisions of the National Social Security Act Cap 258 Laws of Kenya under the first Schedule, limb 10 thereof which provides that the seal of the board of Trustees shall be authenticated by the signature of the chairman of the Board of trustees and the managing Trustee of the Fund. The purported license agreement above document does not have the authentication and/or the signature of the chairman of the Board of Trustees. That again the transaction between the plaintiff and the NSSF is tainted with illegality and the purported license document is a product of illegality, null and void.**

6. **THAT if there is no agreement enforceable, no party is entitled to interest.**

7. **THAT the plaintiff having not come to court with clean hands it does not deserve any discretionary remedies and in law no remedies are open to it.**

8. **THAT arising from the foregoing the plaintiff's suit and the motion having been grounded on illegality and breach of public procurement policies and the provisions of the NSSF Act cap 258 laws of Kenya, the suit and the motion are therefore incontestably or hopelessly bad and not even an amendment will inject it with real life and ought to be struck out.**

9. **THAT from the pleadings, the facts giving rise to the preliminary objection are very clear, is beyond doubt are uncontestable and the court need not resort to elsewhere to ascertain the facts.**

10. **THAT the totality of the objection is that the plaintiff's interest in the suit land having been tainted with illegality, obtained in breach of public procurement policies and therefore null and void *ab initio*, the plaintiff lacks the locus standi to institute and/or maintain the present suit against the defendants and the fate of the suit and the motion lies in it being struck out.**

Confronted with the said preliminary objection, the plaintiff filed grounds of opposition dated 4th June 2012 in which it raised the following grounds:

1. **The 1st and 2nd defendants' purported preliminary objection is a clear misconception and misapplication of the defined precise purposes of the Public Procurement and Disposal Act as stipulated by the Preamble and Section 2 of the said Act.**

2. **The plaintiff's subject license is not a disposal or procurement within the distinct contextual meaning and application of Section 3 of the Public procurement and Disposal Act.**

3. **The 1st and 2nd defendant have misconstrued the enumerated instances when the Public procurement and disposal Act is applicable.**

4. **The plaintiff is not a procuring entity or a public entity within the meaning and application of the Public Procurement and Disposal Act.**

5. **The Managing Trustee of National Social Security Fund Act Cap. 285 of the Laws of Kenya and also has lawfully delegated powers delegated by the Board of Trustee of national Social Security Fund to grant the subject license to the plaintiff in the form that he did.**

I am not aware of the provisions under which the said grounds were filed since the liberty to file grounds of opposition under Order 51 rule 14 of the Civil Procedure Rules is reserved to a respondent who wishes to oppose an application. Here the grounds of opposition are filed by the applicant. However, as no issue was raised on the same and as the filing thereof does not prejudice any party, I will say no more on the same.

The objections were prosecuted by way of written submissions which were highlighted by counsel for the

parties. According to the defendant, through their learned counsel **Mr. Arusei**, the plaintiff's suit is based on a document known as **Car Park Licence Agreement** dated 5th March 2012 (hereinafter referred to as the licence). According to the defendants, their objections not only arise by clear implication out of the pleadings, but has been pleaded by the defendants; that the said objections constitute pure points of law; that the facts as they are, are not in dispute; that what is sought is not the exercise of judicial discretion; and that the objection raised if argued will dispose of the suit. These submissions are, needless to say, based on the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696 at 700, 701.**

It is submitted that since the plaintiff herein, in HCCC No. 107 of 2012 which had been ordered consolidated with the present suit, had in its grounds of opposition dated 21st March 2012 stated that the **Public Procurement and Disposal Act, 2005** (hereinafter referred to as the Act) does not apply when it comes to acquiring licences and or procuring licence by a public entity, the facts are admitted, clear, incontestable and beyond doubt as to be a basis for a preliminary objection. The said position, it is submitted is reiterated in the grounds of opposition to the objection. Under section 3 of the said Act, **National Social Security Fund** (hereinafter referred to as NSSF) being a State Corporation is a procuring entity to which the Act applies. Citing **Hecht vs. Morgan [1975] EA 44**, it is submitted that the said agreement has the ingredients of a tenancy/lease since it has all the ingredients of the right to exclusive possession of the premises, a term of the licence, a consideration or rent payable, the suit premises, or the land. On the same authority, it is submitted that it is the substance rather than the form of the document that determines the nature of the relationship in question. Since the plaintiff and NSSF entered into a relationship with all the ingredients of a tenancy/lease rather than a licence, their intention was immaterial and therefore the provisions of the Act apply to the said relationship since there is no exemption whatsoever. It is further submitted that the licensor is a public entity, a state corporation and the assets being dealt with are public assets and the rent collected therefrom are public funds.

It is submitted that since the provisions of section 4(3)(a) of the Act applies the Act to renting of premises, the renting premises can either be a lease, a licence or the management of premises as the case may be. Since the plaintiff unequivocally admitted that it did not go through any form of tender provided for under the Act, it is submitted that their purported car park licence is an illegality, null and void *ab initio* hence nothing comes out of it. It is submitted that the same car park which is the subject of the plaintiff's licence has been subject to tender under the Act. It is therefore submitted that since the spirit of the Act and regulations is well intentioned, a Court of law should lead the way in rejecting a document whose creation and/or formation undermined the good intentions and spirit of the said Acts of Parliament and even tends towards discrimination of other competitors. The defendants, in support of their submissions rely on Mombasa High Court Constitutional Petition No. 6 of 2011 – **Kenya Transport Association (acting in the interest of its members vs. The Municipal Council of Mombasa.**

It is accordingly submitted that the plaintiff's purported licence to the suit premises is grounded in illegality, null and void *ab initio* and the same does not deserve the court's protection and if there is no agreement enforceable, no party is entitled to interest.

The said agreement is also faulted on the ground that there is no evidence on the face of it that it was signed by the Chairman of the Board of Trustees of the NSSF as mandatorily required in limb 10 of the First Schedule to the **National Social Security Fund Act**. Since the document in question was only executed by the Managing Trustee, that was an illegal and an incomplete/or improper execution, it is submitted. It is submitted that under Article 10 of the said NSSF Act, the licence agreement was as a matter of law required to have been authenticated by the signature of the chairman and the managing trustee and support for this submission is sought from the case of **Shem Obondi vs. Seemfod Holdings Ltd Civil Appeal No. 99 of 2007.** Relying on **Cheshire, Fifoot and Furnstone's Law of Contract** as well as **Holman vs. Johnson**, the said **Transport Association Case**, and **Official Receiver and Provisional Liquidator, Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited, Civil Appeal No. 172 of 1998**, it is submitted that if the contract is illegal it is void *ab initio* and neither party can acquire interests from it, the parties' intention notwithstanding.

Since the plaintiff's interest in the said car park is founded an illegality, it is submitted that the plaintiff

has no *locus standi* to challenge the defendant's tenancy/occupation of the suit lands.

It is further submitted that without compliance with the law the said agreement amounts to a commission of a criminal offence known as abuse of office under section 46 of the **Anti-Corruption and Economic Crimes Act, 2003** and an agreement to commit a crime is, according to the defendants illegal. Consequently, it is submitted that the suit emanating from the said agreement is incontestably or hopelessly bad and ought to be struck out.

On its part, the plaintiff, through its learned counsel, **Ms. Munyua**, submitted that the substantial issue is the factual and legal nature of the contractual relationship created and executed in the written form by National Social Security Services Board of Trustees and the Plaintiff in respect to LR No. 209/11412 and LR 209/11287 and whether the provisions of the Act is applicable to the said relationship. It is submitted that LR Nos. 209/11331, 12220 and 12219 are not in dispute in respect to the plaintiff's licence over the three parcels of land. It is the plaintiff's contention that the licence is in fact and in law a licence and not a lease as alleged by the defendants and is therefore not subject to the application of the Act. According to the plaintiff, the defendants' preliminary objection is a collateral attack on the contractual relations created by NSSF and the plaintiff notwithstanding the plaintiff has not admitted any facts whatsoever in the court records in respect to the legal process that culminated into the execution of the subject licence; the applicability or non-applicability of the Act to the licence is an issue for trial and determination at the substantive hearing of the suit and the same is not determinable at this preliminary stage; the defendants' non-joinder of NSSF to this objection proceedings.

On the authority of the said **Mukisa Biscuits Case**, it is submitted there is no admission in either the plaint or the supporting affidavit sworn on 12th March 2012 of the facts whatsoever as to the process that was followed prior to the execution of the subject licence hence there are no material facts before this court on the procedure employed by NSSF in granting to the plaintiff the subject licence. Similarly, it is submitted that the grounds of opposition dated 21st March 2012 filed in HCCC No. 107 of 2012 particularly paragraph 6 thereof does not reveal an admission of the facts relating to the process that culminated into the execution of the said licence. It is the plaintiff's position that the defendants have misconceived the provisions of the Act with the result that they have misrepresented to the Court that it was NSSF was the entity procuring the subject licence which is incorrect since NSSF that issued the licence but was not issued with a licence. The plaintiff's position is that if it was NSSF that was intending to obtain a licence (which is not the case) then NSSF was under statutory duty to comply with the provisions of the Act. The statement in the offending paragraph of the said grounds of opposition, it is submitted, is the plaintiff's advocate's interpretation of section 4 of the Act which section specifies instances when disposal or divestiture regulations must be followed by a public entity and that a licence is not one of the specifications constituting an instance that would be deemed to be a disposal or divestiture under the Act. It is contended that stating that a licence is not one of the enumerated specifications is not tantamount to an admission that the Act was applicable or contravened. According to the plaintiff under section 3(1)(b) of the Act and section 3 of the ***Land Act*, 2012**, the words "disposal" and "disposition" respectively are not defined to include the word "licence" and in its view the plain English meaning of the word dispose or divest from which the words disposal/disposition and divestiture are respectively derived means to cede, surrender, give up, relinquish, let go, abandon etc of one's rights to an asset. The party disposing transfers exclusive rights of any asset to the transferee. Relying on Order 13 rule 2 of the ***Civil Procedure Rules*** as well as **Mulla, The Code of Civil Procedure 16th Edition Vol. 2 at page 2174-2175**, it is submitted that admissions are only considered if admissions of fact and that where complicated and vexed questions of law arise and are issues between the parties, the passing of summary judgement may not be in the interest of justice. Accordingly, it is submitted that the statement in the said grounds is an undetermined legal position adopted by the plaintiff's advocate of the subject licence vis-à-vis the applicability of the Act and does not amount to clear, unambiguous, unconditional and unequivocal statement of admission by the plaintiff to the effect that the subject licence was obtained contrary to the provisions of the public procurement law as purported by the defendants. Accordingly, that position is subjective and it is only the Court that has jurisdiction to deliver an objective position and that is, according to the plaintiff, a substantive issue for trial which cannot be determined at this preliminary stage. To say that a statute does not apply, it is submitted, is not the same thing as saying that the statute was not followed. Whereas the plaintiff's position is that the legal relationship between it and NSSF is

that of a licensee/licensor, the defendants' position is that it is a lessor/lessee relationship to which the Act applies and the implication is that the legal nature of the subject licence is unascertained and it would be prejudicial to the plaintiff and NSSF to ascertain. Relying on the said **Land Act**, and **The Law of Real Property, 7th Edition at page 1390-94** it is submitted that the distinguishing feature of licence and lease is the exclusivity of possession which feature does not appear in the subject licence in which it is expressly stated that the licence is not a lease or a tenancy but just a permission and the Court has no jurisdiction to re-write a contract for and on behalf of parties who have contracted. Relying on **Ngobit Esatet Ltd vs. Carnegie Civil Appeal No. 57 of 1981**, it is submitted that the Court must import and adopt the ordinary and plain meaning of the English language and grammatical expressions as written in the statute. According to the plaintiff, section 4(3) of the Act which defines "procurement" as including "rental" is only applicable when NSSF or any other procuring entity is a public entity wishes or intends to acquire and not where it is the disposing entity.

In the plaintiff's view, the defendant's preliminary objections are an unconstitutional attempt to nudge the Court to hear and determine adverse and prejudicial allegations the defendants have against NSSF without availing NSSF the right to be heard yet it is NSSF which has documentary and *viva voce* evidence on the process that was followed in issuing the licence to the plaintiff. It further argued that NSSF's fundamental right to be heard and to a fair trial are inalienable under section 25 of the Constitution.

With respect to the statutory powers and duties of the Managing Trustee of NSSF, it is submitted that there is no mandatory format provided for drafting a licence agreement and no material has been provided to prove that the Managing Trustee of NSSF has no statutory and/or delegated powers to grant the subject licence in the form and manner he did. That, according to the plaintiff, is a matter for trial. Regulation 9 of the NSSF on the other hand, it is argued, is merely permissive and is not mandatory. At this preliminary stage, it is submitted, the court and the plaintiff do not possess any material knowledge as to whether the subject licence is one of the documents required to be or not to be under seal and who may authenticate such a licence. According to the plaintiff the NSSF Act confers upon the Managing Trustee executive powers akin to that of a Chief Executive Officer of any other body corporate capable of legally binding NSSF to simple contracts, for example a mere permission to use the car park by way of a licence which is a non-registrable instrument. According to the plaintiff, the defendants cannot dictate the format of a licence whereas the same defendants had previously enjoyed the use of the subject lands by way of a letter dated 6th May 2011 signed only by the Managing Trustee, which letter does not bear a seal and is only authenticated by the Managing Trustee.

According to the plaintiff, the preliminary objections should be dismissed as they are founded on misconceptions of law and fact, for being premature, premised on unascertained and ambiguous facts and for failing to meet the threshold upon which a preliminary objection based on facts ought to be made. To allow the preliminary objections, it is contended would be pre-empting the outcome of the plaintiff's suit thus it would be prejudicial and unfair to the plaintiff who is yet to adduce in court material facts upon which the court may wholly adjudicate the issues raised in the preliminary objection.

In his oral address to the Court, **Mr Arusei** took issue with the plaintiff's contention that to allow the objection would be a breach of the constitutional rights of NSSF, and submitted that this case was instituted by the plaintiff who has not deemed it fit to amend the pleading to join NSSF. He reiterated that under Articles 46 and 47 of the **Constitution**, the defendants deserve the right to be heard fairly and justly. According to him, what is under attack is the licence agreement which according to his clients is a nullity and therefore incurable by any amount of argument or joinder.

On her part **Ms. Munyua** reiterated that since it is NSSF that is a beneficiary to the transaction the information sought herein can only be availed by NSSF with respect to the process that culminated into the execution of the said licence. The plaintiff's case is simply that it is a licensee and the process has never been an issue. NSSF has not been joined in these proceedings because the plaintiff intends to call it to adduce evidence which evidence has to be *viva voce*.

I have considered the preliminary objection, the grounds of objection thereto, the submissions of counsel

both written and oral and this is the view I form of the matter.

In my ruling delivered in Nairobi HCCC No. 107 of 2012 on 25th May 2012 between **Florence Ngaira T/A Garyl Agencies** (the second defendant herein) as plaintiff and **NSSF and Sauti Africa Limited** (the Plaintiff herein) as defendants, relying on **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696**, and **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177** I expressed myself 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 matter four matters fall for determination. The first issue is whether on the pleadings it is admitted that the provisions of the Public Procurement and Disposal Act, 2005 were not complied with. The second issue is whether the transaction in question was subject to the provisions of the said Act. The third issue is the consequences of failure to comply with the said Act. The fourth issue is whether the subject licence was executed in accordance with the provisions of the ***National Social Security Fund Act*** and the consequences of failure to comply therewith.

It can be immediately appreciated that the determination of some of the issues herein depends on the determination of the other issues.

The first and one of the crucial issues is whether there is an admission on the pleadings that the plaintiff did not comply with the provisions of the Act. In support of the defendants’ position that there is such admission reliance is placed on paragraph 6 of the Plaintiff’s grounds of opposition filed in HCCC No. 107 of 2012 and paragraph 2 of the grounds of opposition filed in opposition to the objection the subject of this ruling. In order to appreciate the full tenure and meaning of the said paragraphs it is important to set the out.

In paragraph 6 of the former suit, it was stated as follows:

The Public Procurement and Disposal Act clearly enumerates instances or acts which amount to disposal or divesture within the meaning and application of the said Act of Parliament and a licence is not included therein thus the said statute does not apply.

Paragraph 2 of the grounds dated 4th June 2012 on the other hand is on the following terms:

The plaintiff’s subject licence is not a disposal or procurement within the distinct contextual meaning and application of section 3 of the Public Procurement and Disposal Act.

It is these paragraphs that the defendants contend amount to an admission that the provisions of the Act were not complied with. In opposing the objection the plaintiff has sought to rely on the provisions of Order 13 of the Civil Procedure Rules and decisions relating thereto. In my respectful view, that Order and the authorities relating thereto are not strictly applicable in a preliminary objection. Under that Order it is the admission of the facts in dispute that are under consideration. In a preliminary objection, strictly speaking, it is not the facts in dispute that are being considered but the state of affairs. An admission for example that there is another suit pending between the parties in respect of the same cause of action may be a basis of a preliminary objection when such an admission may not necessary be a basis for an application under Order 13 aforesaid.

However, for a preliminary objection based on facts to succeed there must be an agreement between the parties on the state of affairs whether expressly or impliedly. In the instant case it is argued that the admission is implied from the foregoing grounds. It is important to appreciate the role of grounds of opposition under Order 51 of the Civil Procedure Rules. Grounds of opposition are legal propositions sought to be relied upon by the respondent in opposing an application. Factual matters, strictly speaking, do not form the basis of grounds of opposition. Whereas the contents of affidavits are evidence of the facts contained therein, grounds of opposition are not and a party is perfectly entitled in future to adopt a different legal perception of the matter without falling foul of the legal process. A party's legal perception of the facts may not necessarily be the correct legal position. In *Fernandes vs. Commercial Bank of Africa Ltd and Another* [1969] EA 482 it was held that if there is no reasonable and probable cause the mistaken opinion of a legal adviser cannot alter a fact. The legal opinion pronounced in the foregoing paragraphs would be a secondary issue whose determination would depend on whether or not the provisions of the Act were complied with. They cannot, in my respectful view, form the very basis for determination whether the factual processes stipulated under the Act were complied with. Even in cases of admissions under Order 13 aforesaid an admission may be of no effect if it is shown that it is made based on a mistaken legal conception. The mere fact that a person contends that a particular legislation is inapplicable does not necessarily mean that it was not complied with. However, in instances where there is an allegation that the legal requirements were not complied with, compliance would be uniquely within the knowledge of the party charged, the failure to rebut such an allegation when given an opportunity to do so may be construed against the party charged. This is the very essence of the evidential burden of proof stipulated under section 112 of the Evidence Act, Cap 80 Laws of Kenya. In the instant case, the issue having been taken by way of a preliminary objection, the plaintiff, even if it was contended should be the one in possession of the facts whether or not the Act was complied with, the procedure does not allow it to adduce such evidence in opposing a preliminary objection. However, the plaintiff contends that such material is in possession of NSSF which is due to feature in these proceedings as a witness. Either way, this Court is unable to form an opinion as to whether the evidential burden of proof actually falls on the plaintiff at this stage.

It is therefore my view that the grounds relied upon by the defendants as the basis for their objection that the provisions of the Act were not complied with do not disclose an admission of the facts necessary to ground a preliminary objection on points of law. Whether or not the Act was complied with cannot be determined based on the pleadings as they are at this stage.

Having made the above determination, it is my view that it would be inappropriate for me to determine the issue whether or not the relationship between the Plaintiff and NSSF was a licence or lease and whether the provisions of the Act were applicable to the said relationship. To make that determination in light of my finding above would amount to usurping the jurisdiction of the court that may be called upon to determine an application that may be brought by a party when the facts are laid bare or the suit itself. The determination of that issue will have to wait another day if the second limb of the objection does not succeed. This was not properly speaking a proper preliminary point of law and I cannot help but associate myself with Sir Charles Newbold, P in *Mukisa Biscuits Case* that "this improper practice should stop". I assume without deciding that an application under Order 2 rule 15 of the Civil Procedure Rules may have been a better option. It must always be remembered that striking out of pleadings whether on preliminary points of law or under Order 2 rule 15 aforesaid, is a very drastic remedy that is only to be resorted to in very clear and plain cases.

The next issue for determination is whether the subject license was executed in accordance with the provisions of the NSSF Act and the consequences thereof. The defendants have relied on paragraph 10 of the First Schedule to the NSSF Act. I have, however, noted that the said Schedule was deleted and replaced by Act No. 5 of 1997. The relevant paragraph is now paragraph 9 which is substantially the same as the former paragraph 10 save for the substitution of the phrase "one of the Trustees" and "such Trustee" in the proviso with "the secretary" in both instances. The objection taken is that the licence is neither signed by the chairman nor does it bear the seal of the Board of Trustees. It is further submitted that there is no evidence that any Trustee was nominated under the said provision. I have gone through the NSSF Act and I have not seen any provision requiring that documents be signed by the Chairman of the Board. None was cited to me. The only requirement is that the seal of the Board be authenticated by the signature of the Chairman of the Board of Trustees and the managing trustee and that any document not required to be under seal and all decisions of the Board of Trustees may be authenticated by the chairman and the managing trustee. Authentication of a document is not the same as execution of the same. Since no evidence has been led to show that the licence herein was required to be under seal, I will proceed to consider the same as a document not required to be under seal or a purported decision of the Board in which case the same may be authenticated by the chairman and the managing trustee. It is noteworthy that where the document is not required to be under seal the requirement of authentication is directory rather than mandatory. The proviso, however, only applies to authentication of the seal by the secretary on behalf of the chairman or the managing trustee. No provision is made in the current First Schedule aforesaid for document not required to be under seal in the absence of the chairman or the managing director. However, the said Schedule as amended, unlike the former schedule expressly makes provisions for the appointment of a secretary to the Board tasked with performing "such duties as the Board of Trustees may assign from time to time". From the record one cannot find with certainty what were the tasks assigned to secretary. The manner in which the present objection was taken i.e. a preliminary objection rather than an application for striking out militates against the consideration of disputed matters of fact, a consideration which would be necessary if a funding is to be made upholding the objection.

I am therefore not satisfied that in this case the test laid down by the Court of Appeal in *Kensan Insurance Brokers Ltd. & Another vs. Kenindia Assurance Company Limited Civil Application No. 94 of 1997*, that striking out being a strong summary remedy that must be granted in clearest cases with extreme caution has been met.

Accordingly, the preliminary objection dated 30th May 2012 not being a proper point of law to be taken as a preliminary objection, the same is unmerited and is dismissed with costs to the plaintiff.

Ruling read and delivered in court this 4th day of July 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Munyua for the plaintiff

Mr. Arusei for the defendants