

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO.383 OF 2010

FIDELITY COMMERCIAL BANK LIMITED
.....**APPLICANT**

VERSUS

LINEAR COACH CO. LIMITED1ST
DEFENDANT

ALFRED MOFFAY MICHIRA2ND
DEFENDANT

DUNCAN MOGAKA MICHIRA 3RD
DEFENDANT

RULING

1. This is a Ruling in respect of the Applicant’s application by way of a Chamber Summons dated 2nd January, 2024.

Background Facts

2. The Applicant filed the Chamber Summons dated 2nd January 2024 seeking the following orders;
 - a) *The decision of the Taxing Officer in the ruling delivered on 30th October 2023 with respect to sections/parts A, B, C, D, E, and F of the Applicant’s Party and Party Bill*

of Costs against the Respondent dated 29th May 2023 be set aside and taxed afresh by the Court.

b) In the alternative, the Court to order that the Respondent's Bill of Costs with respect to sections/parts A, B, C, D, E, and F be taxed afresh by another Taxing Master.

c) Costs of these proceedings be determined by the Court; and awarded to the Applicant.

3. In opposition, the Respondent filed the Preliminary Objection dated 2nd October 2024 on the following grounds,

a) The application as drawn and instituted herein is in substance incompetent and fatally defective as it was filed contrary to Paragraph 11(2) of the Advocates Remuneration Order

b) The Applicants have not demonstrated any sufficient grounds to impugn exercise of judicial discretion by the Taxing Master to warrant the Court's interference.

c) The Application was filed 49 days beyond the Statutory timelines provided therefore incurably defective.

d) The Applicants are not deserving of the orders sought.

Issues for determination

4. The Court has carefully considered the Application and the written submissions and the only issue for determination is;

a) Whether the Preliminary Objection is merited.

Analysis

5. The leading authority on the nature and scope of a Preliminary Objection remains **Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696**, where the Court stated

“...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.”

6. The Supreme Court has reiterated this position in the case of **Aviation & Allied Workers Union Vs Kenya Airways Ltd & 3 Others, Application No. 50 of 2014 [2015] eKLR**

where it was held as follows;

“Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are

deemed agreed, as they are prima facie presented in the pleadings on record.”

7. Guided by the above case laws, it is evident that a Preliminary Objection can only be raised on a pure point of law. The Point is argued on the assumption that there is no contest as to the facts as pleaded in the pleadings.
8. In the present Application, the Applicant argued that the ruling, together with the reasons thereof, was delivered on 30th October 2023 by the Court (**Hon. S. Githongori Bett**). Yet, the Reference Application was filed three months thereafter, well outside the prescribed timelines. Under **paragraph 11(4) of the Advocates Remuneration Order**, a party may only file such a reference out of time with leave of the Court, which must be expressly sought and obtained. In the absence of any such leave, the 3rd Defendant’s Reference Application is procedurally defective and improperly before the Court.
9. In contrast it was the Respondent’s position that after the receipt of the reasons, one has 14 days to file a taxation reference. Since it received the reasons on 20th December

2023 and filed the Application on 2nd January 2024, it was within the timelines stipulated by law hence there was no need to apply for the extension of time to file a taxation reference.

10. Upon careful consideration, the Court finds that the Preliminary Objection raised does not meet the legal threshold established in the oft-cited case of **Mukisa Biscuit** (*supra*). A valid Preliminary Objection must raise a pure point of law, which is capable of disposing of the matter *in limine*. The Application is interwoven with contested factual issues that would require evidentiary interrogation and cannot be resolved purely based on law.
11. Having found that the facts are contested, the Preliminary Objection must therefore fail.

Determination

12. The Respondent's Notice of Preliminary Objection dated 2nd October, 2024 is overruled and the same is dismissed with costs.
13. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 07TH DAY OF MAY, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Kimathi holding brief for Mr. Morara for the 3rd
Defendant/Respondent.

Miss Nyakundi holding brief for Mr. Omusolo for the
Plaintiff/Applicant.

Mr. John Paul - Court Assistant.