

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 329 OF 2017

ADRIANO I. AMBANI.....PLAINTIFF

VERSUS

CHRISTOPHER A. MUSATSI.....DEFENDANT

RULING

On the application dated 28th August, the defendant raised a preliminary objection praying that the application to be struck out with costs on the grounds that, the only avenue for the applicant to seek amendment of the judgment is by review as provided for under order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. That the applicant has filed a Notice of Motion with a supporting affidavit which is not commissioned by a commissioner for oaths as provided for under section 88 of the Civil Procedure Acts and Order 19 of the Civil Procedure Rules. That the deponent's thumbprint has no certification certificate as required by law, and as such the same should be expunged from the proceedings. The applicant did not file any grounds in opposition.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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 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.”.

I find that the issues of the applicant seeking amendment of the judgment should be by review as provided for under order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. That the applicant has filed a Notice of Motion with a supporting affidavit which is not commissioned by a commissioner for oaths as provided for under section 88 of the Civil Procedure Acts and Order 19 of the Civil Procedure Rules. That the deponent's thumbprint has no certification certificate as required by law, and as such the same should be expunged from the proceedings are all issues of technicalities. The constitution of Kenya states that;

“159.(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.....

(d) justice shall be administered without undue regard to procedural technicalities; “

The court needs to investigate the facts in order to make a final determination. I find that this preliminary objection is not merited and I strike it out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE