IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & KIAGE, JJ.A)

ELDORET CIVIL APPEAL NO. 101 OF 2019

BETWEEN

LUCY KURGAT.....APPELLANT

AND

FRANLINE YAOLA MANYONGE.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Eldoret (S.M. Githinji,J.) dated27th March 2019

in

***Misc. Application No. 22 of 2018*)**

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JUDGMENT OF THE COURT

We do not propose to spend much time on this appeal.

By a ruling delivered on 27th March 2019, Githinji, J. disallowed a preliminary objection raised by the appellant herein on the principal basis that what it purported to raise were not points of law and was thus unmerited.

In so finding, the learned Judge relied on the oft-cited case of ***MUKISA BISCUIT MANUFACTURING CO. LTD vs. WEST END DISTRIBUTORS LTD [1969] EA 696*** where the predecessor of this Court had set out the law on preliminary objections which courts in this country have unerringly followed for over half a century. Yet the appellant filed this appeal.

The respondent had filed an application dated 7th March 2018 before the court below seeking orders of stay of proceedings, and of orders previously given by that court, for cited grounds and supported by an affidavit. It is to that application that the appellant mounted a preliminary objection on the grounds that the same was defective, incompetent and incapable of obtaining the orders sought; it was *sub judice;* and it offended the mandatory provisions of the Civil Procedure Act and Rules for commencement of appeals/suits. The complaint regarding competency was based on the fact that the respondent had filed the application as a miscellaneous civil application which had no basis in law and hence "the suit was non-existent".

As we have previously observed, the learned Judge determined the preliminary objection primarily on the basis that the matters it raised were clearly points of fact and not points of law. On our own perusal of the record, we cannot but agree with learned Judge that there were a number of contested issues of fact that needed to be established or ascertained before the court could determine the matters purported to be raised in the preliminary objection. There were no admissions of those facts and there was also need for the Judge to exercise judicial discretion on the matters raised, especially regarding whether to review the sum for child maintenance previously ordered.

The Judge having come to that conclusion, and having, to our way of thinking, properly appreciated and applied the settled jurisprudence on preliminary objections, we do not see that there was any basis upon which this appeal, which is no more than a rehash of the preliminary objection, can possibly succeed.

We think, with respect, that the appellant ought to have heeded the caution expressed by Sir Charles Newbold, P in ***MUKISA BISCUITS***(supra) at p701;

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner by way of preliminary objection. 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 facts have to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*** *(*Our emphasis)

We find it quite surprising that the clear sentiments expressed so long ago seem to have fallen on deaf ears and parties still insist on the unhealthy and often time-wasting penchant for raising preliminary objections when they clearly do not lie, as in the case before us. It is even more puzzling that even after the learned Judge indicated very clearly that what was raised was not a pure point of law but questions of contested facts and, clearly he was being required to exercise discretion, the preliminary objector had the audacity to challenge so plainly right a decision on appeal. The wisdom of such intransigence can legitimately be questioned.

We have said enough to show that this appeal is entirely devoid of merit, and the same is dismissed with costs.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR