



**Sharma v Alcon Holdings Ltd & 3 others; KCB Bank Kenya Limited (Interested Party) (Civil Suit 328 of 2015) [2024] KEHC 10203 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10203 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL SUIT 328 OF 2015  
A MABEYA, J  
AUGUST 16, 2024**

**BETWEEN**

**ALKA ROSHANLAL H. SHARMA ..... PLAINTIFF**

**AND**

**ALCON HOLDINGS LTD ..... 1<sup>ST</sup> DEFENDANT**

**JASPRIYA KAUL HANSPAL & SACHA KAUR HANSPAL (SUED AS THE PERSONAL ADMINISTRATOR OF THE ESTATE OF DAVINDER SINGH HANSPAL) ..... 2<sup>ND</sup> DEFENDANT**

**MANJIT KENT ..... 3<sup>RD</sup> DEFENDANT**

**VIJAY HANSPAL (SUES AS AN ADMINISTRATOR OF THE ESTATE OF INDERJIT SINGH HANSPAL ) ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**KCB BANK KENYA LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling determines the amended application by the plaintiff dated 15/11/2023. The application was brought under sections 1A, 1B, 3A of the [Civil Procedure Rules](#) CAP 21 Laws of Kenya, Order 40 rules 1 and 2 of the [Civil Procedure rules](#).
2. The application sought to restrain the interested party from paying out or releasing to 3<sup>rd</sup> parties the residue of the monies received from the sale of the suit property known as LR. No 12467 (“the property”) belonging to Alcon Holding Limited (“the Company”). It also sought that accurate accounts be provided for the sale of the property and the interested party be ordered to release Kshs. 440,000,000/- being the residue after the sale of the property to court for preservation.



3. The application was supported by the grounds on out on the face of it and the supporting affidavit of Alka Roshanlal Harbanslal Sharma sworn on even date. The applicant's case was that the company had pledged the property for a loan facility advanced to it of Kshs. 50,000,000/-. That in Milimani HCCC 1766 OF 2000, the applicant moved to court to challenge the exercise of the statutory power of sale by the bank, however, the proceedings were compromised by the consent order dated 25.10. 2018.
4. That the consent allowed the property to be sold and the bank recovers Kshs. 90,000,000/-. However, on 31.07.2023, the property was sold for Kshs. 530,000,000/-. It was contended that the bank had not accounted for the residue of Kshs. 440,000,000/- after having deducted the amount due to it and that the said amount was under a threat of being wasted away.
5. The interested party opposed the application vide a replying affidavit sworn on 26/4/2024 by Lilian Sogo. It was contended that the interested party marketed the suit and found a prospective purchaser who agreed to purchase the suit property for Kshs. 530,000,000/-. That the interested party made a professional undertaking with the 1<sup>st</sup> respondents advocate that the balance of the sale proceeds would be remitted to the 1<sup>st</sup> plaintiffs advocate. That consequently, the said proceeds were transferred to the 1<sup>st</sup> respondent's advocate as per the professional undertaking dated 6/4/2023.
6. In the premises, the interested party pleaded that the application had been overtaken by events as the net proceeds of the sale had already been transferred to the 1<sup>st</sup> respondent's advocates. That the application was substantially the same as the application dated 28/9/2023 by the 4<sup>th</sup> respondent.
7. In addition, the interested party filed grounds of opposition dated 23/11/2023. It stated that the application was an abuse of the court process as the applicant lacked the requisite locus standi to institute the suit. That the application was res sub-judice under section 6 of the Civil Procedure Act. That the application was res-judicata as the issue of the sale of the property had already been determined.
8. Further, the interested party raised a preliminary objection dated 23/11/2023 on the grounds that the application was res-judicata and fell short on the doctrine of sub-judice.
9. The application was canvassed by way of written submissions which I have carefully considered.
10. The interested party submitted that the application was sub-judice since the 4<sup>th</sup> respondent had filed an application in HCCC 1766 which is pending a ruling. That the said application was directly and substantially in issue with the present application as the grounds raised therein are similar. Counsel submitted that the application was res-judicata for the parties had previously litigated on the same issues and subsequent rulings were delivered.
11. The plaintiff submitted that the preliminary objection was not merited as the court in determining whether the application was res-judicata and sub-judice had to examine the facts. Counsel submitted that the purpose of the application was to preserve the property that had been subject to the proceedings before it.
12. I have considered the parties' contestations and the submissions on record. There are two issues for determination; whether the preliminary objection is merited and if not, whether the orders sought ought to be granted.
13. On preliminary objection, in the case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696, the same was defined as consisting 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. It 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 has to be ascertained.

14. In the present case the preliminary objection is premised on two grounds namely; that the application is res-judicata and that it was sub-judice.
15. The doctrine of res-judicata is encapsulated in section 7 of the *Civil Procedure Act*, 2010. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR, the Court of Appeal held that: -

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

16. In this case, it has not been denied that the applicant filed a suit in HCCC 1766 OF 2000 and the same was compromised by consents entered by the parties on 8/11/2017 and 25/10/2018. The interested party was allowed to sell the suit property for Kshs. 90,000,000/-.
17. The property was sold to a third party pursuant to those consents but the applicant has now filed the present application seeking to stop the interested party from releasing the residue of the suit property. I am of the view that the issue of accounting for the proceeds of the sale has not been raised and or determined.
18. The second challenge was that the application was sub-judice. Section 6 of the *Civil Procedure Act* provides for this principle as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



19. Addressing the same *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [202] eKLR), the Supreme Court of Kenya stated as follows: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

20. For the doctrine of sub-judice to stand, the four principles examined above must be present. That is, there must exist two or more suits filed consecutively, the matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits must be the same and they must be litigating under the same title and the suits must be pending in the same or any other court having jurisdiction in Kenya.
21. The respondent contended that the application was sub-judice as there was a similar application by the 4<sup>th</sup> respondent that was pending for ruling in HCCC No. 1766 of 2000. I have considered the evidence annexed to the interested party’s replying affidavit. It is evident that in Hcc 1766 OF 2000 there is an application dated 28/9/2023 seeking the same orders as the present application. The application is with respect to the same parties and the same subject matter. The Court therefore finds that the application is sub-judice. The preliminary objection is sustainable. In the premises the application dated 15/11/2023 is hereby struck out.
22. Be that as it may, the Court is of the view that the issue raised in the present application is akin to post judgment proceedings. It is proceedings that arise from the execution of the consents entered in the previous suits. Section 34 of the *Civil Procedure Act* is clear that any execution or post execution proceedings have to be made in the same suit where the judgment was entered.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2024.**

**A. MABEYA, FCI ARB**

**JUDGE**

