



REPUBLIC OF KENYA



KENYA LAW
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**Kamau t/a Penton Packaging Limited v Kiriungi t/a Gmat Company Limited
(Civil Suit E024 of 2022) [2024] KEHC 10185 (KLR) (13 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E024 OF 2022
DO CHEPKWONY, J
AUGUST 13, 2024**

BETWEEN

**SHEILA BARBARA KAMAU T/A PENTON PACKAGING
LIMITED APPLICANT**

AND

JUDY KAGENI KIRIUNGI T/A GMAT COMPANY LIMITED RESPONDENT

RULING

1. The Applicant filed a Chamber Summons dated 13th October, 2022 which was supported by the Affidavit of Sheila Barbara Kamau sworn on the same date and is seeking the following orders:-
 - a. Spent.
 - b. That this Honourable court be pleased to order or to declare the release of office equipment, printing and sewing machines being held illegally by the Defendant to the Applicant since she is the lawful owner and pay usage charges for the last three years since the 15th September, 2019 to date.
 - c. Costs of this application be provided for.
2. The Respondent filed the Notice of Preliminary Objection dated 14th June, 2023 on the following grounds:
 - a. That the issues surrounding this matter are currently before the High Court of Kenya at Kiambu vide Civil Case No. 24 of 2019 where the Defendant is the Plaintiff the affected party Jupen Limited in a derivative suit which is coming up for pre trial directions on 19th July, 2023. This being neither an Appeal nor a Judicial Review Application, it is therefore sub judice.



- b. It was filed without due authority from the Plaintiff company (Penton Packaging Limited) as it was not sanctioned by any of its relevant organs which is the alleged bonafide owners of the equipment in question.
- c. There is no resolution or valid resolution of the Plaintiff company, (Penton Packaging Limited) , approving the institution of the suit.
- d. Ms Sheila Barbara Kamau who swore Verifying Affidavit and the Affidavit in support of the Chamber Summons both dated 13th October, 2022 did not have the authority or instructions of the Plaintiff company which is the alleged bonafide owners of the equipment in question to do so.

Determination

3. To determine the application dated 13th October, 2022, the court shall start with the Notice of Preliminary Objection as it has the effect of disposing off the main suit if the same is successful. On the definition of Preliminary Objection, the court in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 had this to say:

“---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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

4. Upon considering the motion filed by the Applicant with regard to the grounds raised vide the Preliminary Objection dated 14th June, 2022, the main issues that arise for determination are:
 - a. Whether the suit offends the doctrine of subjudice.
 - b. Whether the suit was filed without authority.

Whether the suit offends the doctrine of subjudice.

5. The doctrine of subjudice is defined under Section 6 of *Civil Procedure Act* as follows;

“..... No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”

6. Basically, this subjudice rule or doctrine is against parties re-filing a suit, hence “meant to prompt those who misrepresent facts relating to active proceedings for contempt of court given that such proceedings



would unfairly prejudice ongoing legal proceedings”. The rationale of the law was explained in the case of *David Ndii & others versus Attorney General & Others* 2021 eKLR, where a bench of five Judges inter alia stated;

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”

7. In response and objection to the application herein, the Respondent has attached the pleadings filed in Kiambu HCCC No. 24 of 2019 which were filed by Judy Kageni Kiruingi the Respondent herein against Peninah Mutindi Muinde and Jupen Poly K. Limited. The Orders therein are seeking a temporary injunction against possession or interference with Polypropylene woven bag printing machine and various sewing machines. In this case the Plaintiff is seeking release of the office equipment, printing and sewing machines that have been held since 15th September, 2019 to date.
8. It is the court’s view, that the subject matter are essentially similar and from the statement filed in HCCC 24 OF 2019 by one Peninah Mutindi Muinde, the parties in the two suits are also similar given that the Plaintiff herein is affiliated to the Affected Party in the suit. It therefore follows that the suit herein offends the doctrine of subjudice.

Whether the Suit was Filed Without Authority.

9. Having found that the case herein offends the doctrine of subjudice, this court cannot proceed to entertain the suit any further and thus there is no need of addressing the other issues on authority or resolution as raised in the Preliminary Objection. In the circumstances, the Preliminary Objection is found meritable and the same is allowed. The upshot is that this suit be and is hereby dismissed with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF AUGUST, 2024.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Gitonga counsel for the Respondent

Plaintiff in person – Present

Court Assistant - Martin

