



REPUBLIC OF KENYA



**Ndumberi General Merchants Limited v Ewaso Ngiro North Development Authority
(Civil Suit 14 of 2017) [2023] KEHC 18180 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT 14 OF 2017
FN MUCHEMI, J
MAY 25, 2023**

BETWEEN

NDUMBERI GENERAL MERCHANTS LIMITED PLAINTIFF

AND

EWASO NGIRO NORTH DEVELOPMENT AUTHORITY DEFENDANT

RULING

Brief facts

1. This is a ruling in respect of the plaintiff's preliminary objection dated 20th March 2023 based on the following:-
 - a. That the application dated 21st February 2023 is similar to the one pending in the Court of Appeal for hearing.
 - b. That the applicant has no audience before this court on the issue of garnishee orders since its application seeking to set aside the same was dismissed by the court on 9th February 2023. Further, the applicant has not lodged an appeal against the said decision.
 - c. That the garnishee nisi was legally and procedurally made absolute as the garnishee, Consolidated Bank Ltd, had by affidavit confirmed that it had no objection to the making of the garnishee absolute and was in accordance with Order 23 Rule 4 of the *Civil Procedure Rules*.
 - d. That the provisions of Order 49 Rule 7(b)(xi) gives powers to the Deputy Registrar to issue orders under the provisions of Order 23.
 - e. That the applicant is guilty of gross abuse of the court process and hence has come to court with unclean hands.
2. Parties hereby disposed of the preliminary objection by way of written submissions.



The Plaintiff/Respondent's Submissions

3. The respondent submits that on 20th February 2023, the applicant filed in the Court of Appeal a similar application to the application dated 21st February 2023. The respondent argues that the instant application ought to be dismissed as being sub judice.
4. It is further submitted that the instant application contains similar prayers to the application dated 26th July 2022 which was dismissed by this court on 9th February 2023. The applicant has not filed an appeal against the said ruling which shows that that the applicant seeks in a back handed manner to re-litigate an application which has already been dismissed. The respondent further submits that the present application is res judicata and ought to be dismissed.
5. The respondent relies on Order 23 Rule 4 of the Civil Procedure Rules and argues that on 3rd October 2022, the manager of the garnishee, Consolidated Bank of Kenya Ltd, one Mr. Edward Nthuli swore an affidavit where he averred that the garnishee had no objection to the garnishee order and confirmed that it held sufficient amount in the account to satisfy the decree. As such, the respondent contends that the granting of the garnishee absolute was inevitable and a matter of course. The applicant at this stage had no say in the matter as its application to set aside the garnishee nisi had been dismissed by the court on 9th February 2023. Furthermore, there is no provision in law for a judgment debtor to oppose the making of a garnishee nisi absolute.
6. The respondent refers to Order 49 Rule 7(b)(xi) of the Civil Procedure Rules which empowers the Registrar of the court to issue orders on matters based on Order 23 and submits that the making of a garnishee nisi absolute falls under this power and therefore the garnishee absolute was issued legally and lawfully.
7. The respondent further submits that if the applicant was aggrieved by the issuance of the garnishee absolute by the registrar, Order 49 Rule 7(2) and (3) clearly set out the procedure to follow to address such a grievance. The applicant has not followed the procedure as it has not filed any appeal and therefore the applicant cannot challenge the decision by filing a Notice of Motion seeking to set aside the order.
8. The respondent submits that the applicant is hell bent on abusing the process of this honourable court and that of the Court of Appeal. The respondent argues that it has painstakingly followed all legal procedures in trying to recover what is lawfully due to it. The court delivered a judgment more than a year ago and yet the applicant has abused the court process to thwart its attempts to recover its just and due payment. The ruling of the court dated 9th February 2023 is a direct indictment and censure of the applicant's conduct in playing procedural games against the respondent.
9. The respondent argues that it filed the instant suit in 2017, more than 6 years ago, for a debt that became due in 2012. In summation, the applicant has managed, through abusing of the court process to shield itself from paying a debt for more than 11 years.
10. The respondent further argues that he who comes to equity must come with clean hands and thus this doctrine requires the court to deny equitable relief to a party who has violated good faith with respect to the subject matter. The respondent states that the applicant conveniently failed to disclose to the court that it had filed on the same day a similar application as the present one in the Court of Appeal.

The Applicant's Submissions

11. The applicant submits that the court has jurisdiction to hear and determine the current application as the application before the court of appeal is fundamentally different from the one before this court.



The current application seeks the stay of the garnishee order absolute which was improperly obtained while the court of appeal's application seeks the lifting of the garnishee orders. The applicant further submits that the two applications are materially different even from the application dismissed by the court. The applicant contends that the respondent irregularly, illegally and without due regard to procedure obtained a garnishee absolute which is the substance of the current application. Therefore, the applicant states that it has moved the court to ventilate and prosecute the application on its merits. To support its contentions, the applicant relies on the case of *J.M.M vs P.M* [2018] eKLR.

12. The applicant refers to the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, *Hassan Ali Jobo & Another v Suleiman Said Shabab & 2 Others* [2014] eKLR and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR and submits that the issues raised by the respondent are issues of facts and not law, which shall require more evidence from the parties for its determination. All the respondent's assertions require the court to look at how the garnishee absolute was obtained and the process raises factual issues which cannot be canvassed by a preliminary objection. The alleged powers of the Deputy Registrar and the objection by the garnishee are all factual matters that need to be looked into as the person who purportedly signed the garnishee order was not the deputy registrar. Thus, the applicant submits that the facts are disputed and can only be ascertained and verified during the hearing of the main application.

The Law

Whether the preliminary objection is sustainable.

13. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributor* [1969] EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-
.....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.
14. (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.
15. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another v Suleiman Said Shabab & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR held that:-
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.
16. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, [2014] eKLR the court held that:-
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 as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
17. It is trite law that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.



18. I have looked at the preliminary objection of the respondent dated 20th March 2023. It raises the issue of the applicant having no audience before this court in that his application that was similar to another in the Court of Appeal was dismissed and that no appeal against that ruling has been filed. Secondly, it is argued that the order complained of namely garnishee absolute was procedurally issued under Rule 23 of the Civil Procedure Rules. Thirdly, that the Deputy Registrar is empowered by Rule 48 of the CPR to issue such orders.
19. A cursory look at the said grounds raised herein, I am of the view that these are matters of fact and law which is not consistent with the description of a preliminary objection as described in the decisions cited herein. A preliminary objection calls for a pure point of law as opposed to a set of facts together with a point of law.
20. In my considered view that the objection dated 20/03/2023 does not satisfy the requirements of a preliminary objection. The same is hereby dismissed. The application dated 21st February 2023 shall proceed to hearing.
21. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of May 2023

