



REPUBLIC OF KENYA



**Gitonga v African Commuter Services & 3 others (Civil Case 148 of 2012)
[2023] KEHC 21734 (KLR) (Civ) (25 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 148 OF 2012

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

EUSTACE GAKUI GITONGA PLAINTIFF

AND

AFRICAN COMMUTER SERVICES 1ST DEFENDANT

ISMAEL MOHAMED JIBRIL 2ND DEFENDANT

KENYA CIVIL AVIATION AUTHORITY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated October 5, 2022 brought under Order 39 rules 5, 6 and 7, and Order 40 rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21.
2. The applicant is seeking the following orders:
 - i. That this application be certified as urgent and heard inter-partes as a matter of urgency on such date and at such time as this honourable court may direct.
 - ii. That pending the hearing and determination of this suit, a temporary injunction do issue against the 1st defendant/respondent, its agents, servants, employees and/or any other third parties howsoever acting on its instructions restraining them from disposing off, utilizing or in any other dealing with 20% of the award and/or judgment in Nairobi Hccc 1208/03; African Commuters Services Limited Vs The Ag & Another paid to it by the 3rd and 4th defendants.



- iii. That pending the hearing and determination of this suit the 1st respondent/defendant do deposit in court 20% of the award and/or judgment in Nairobi Hccc 1208/03; African Commuters Services Limited Vs The Ag & Another paid to it by the 3rd defendants within 14 days of issuance of the order.
 - iv. That the applicant be granted leave to withdraw his claim against the 2nd respondent(deceased) without prejudice to his rights to pursue his estate for the judgment subsequently entered in the matter herein.
 - v. That costs of the application herein be provided for.
3. The application is based on the following grounds;
- i. That the applicant commenced the suit herein by way of a plaint dated March 28, 2012 seeking amongst other orders that the 20% of the judgment/award in Nairobi HCCC 1208 of 2003 being Africa Commuter Services Limited vs The Attorney General and Another be paid to him pursuant to a consultancy agreement dated March 28, 2012. The applicant further sought orders of permanent injunction restraining the 3rd and 4th respondents from paying, transferring, awarding or in whatsoever disbursing in part or in toto the award/judgment in the aforementioned suit pending and prior to payment of the aforementioned 20% of the afore cited judgment/award to the plaintiff. Further; the applicant also sought a permanent injunction preventing the 1st and 2nd defendants from disposing off, utilizing or in any other way dealing with the said award/judgment pending and/or prior to the payment of the aforesaid 20% of the judgment/award.
 - ii. That the suit herein has failed to take off at the instance of the 1st and 2nd respondents who have variously delayed the expeditious hearing and determination of the suit herein by initially incessantly attempting to have the suit herein struck out preliminarily unsuccessfully. Further, the 2nd respondent is since deceased but the letters of administration ad litem are yet to be taken out by his estate to aid in prosecution of the suit herein which is clearly another attempt to further delay the expeditious dispensation of the sit herein and defeat the plaintiff's claim.
 - iii. That in a further attempt to defeat the suit herein and render it nothing more than an academic exercise, the respondent has recently learnt that the 3rd and 4th respondents have since disbursed the aforementioned award/judgment to the 1st and 2nd defendant. In this regard, the suit herein stands to the defeated if the orders sought herein are not granted, the subject matter of the suit being the said award/judgment which the applicant lays a 20% claim on pursuant to the consultancy agreement dated February 18, 2007.
 - iv. That there is a risk of the said funds having been disbursed being dissipated in an attempt to defeat the suit herein and the applicant is likely to be left with no means of enforcing the decree subsequently issued in the matter herein there being no other known assets of the 1st defendant.
 - v. That the actions of the respondents constitute misappropriation of trust and intent to frustrate, obstruct and delay the execution of the decree that may be passed against them as contemplated under Oder 39 of the Civil Procedure Rules, 2010 as at all times they were aware of the current suit. the plaintiff is therefore exposed to the real risk of completely failing to recover the aforementioned 20% of the judgment/award in Nairobi HCCC 1208 of 2003 being Africa Commuter Services Limited vs The Attorney General and another and it is in the interests of justice that the orders herein are granted.



- vi. That Materially, the respondents have not acted in good faith and have made all attempts to frustrate the prosecution of the suit in an attempt to defeat the plaintiff's claim herein. In this regard, the applicant stands to be greatly prejudiced if the orders herein are not granted. Further, the balance of convenience shifts towards the grant of the orders sought herein.
 - vii. That the suit has a high probability of success as there was a consultancy agreement between the applicant and the 1st and 2nd defendants whose validity is undisputed for payment of the aforementioned funds. The defendants/respondents have knowledge of this and are attempting to delay the recovery of the said outstanding amount through their conduct.
 - viii. That it is in the interest of justice and fairness that the orders sought herein are granted to prevent the 1st defendant/respondent from dissipating the said award/judgment wholly leaving the applicant without any means of satisfying the decree obtained in this suit as he is unaware of any means of satisfying the decree obtained in this suit as he is unaware of any other assets of the 1st defendant that can be attached in satisfaction of the decree. Further, the said funds form the subject matter of the suit and if they are to be dissipated the suit herein is likely to be defeated.
 - ix. That the applicant stands to be greatly prejudiced if this application is not satisfied as urgent and the orders sought herein granted.
 - x. That it is in the interest of justice that this application is certified as urgent, heard *ex parte* and the orders sought herein granted.
4. The application is supported by the affidavit of the plaintiff/ applicant Eustace Gakui Gitonga dated October 8, 2022 which reiterated the grounds stated above.
 5. The 1st & 4th respondents filed a replying affidavit opposing the application in which they deposed that there was a previous suit, Nairobi HCCC No 127 of 2009 between the plaintiff and the Defendants herein seeking the same reliefs the suit was dismissed on March 26, 2012 as it lacked merit.
 6. The plaintiffs filed this instant suit two days later where the issues and dispute are essentially the same. the 1st and 2nd respondent thereafter filed an application seeking to have the suit struck out for offending the provisions of section 7 of the *Civil Procedure Act*. The application was however dismissed and the court directed that the matter be heard on its merit
 7. He deposed that there are no funds due to be disbursed to the 1st respondent as it ceased its operations due to the demise of the 2nd respondent. further, there is no judgement for the plaintiff against the 1st respondent. He added that the plaintiff has not satisfied the legal requirements for the grant of the order sought.
 8. The plaintiff/applicant filed a further affidavit in response to the replying affidavits in which he deposed that it is indeed correct my initial suit; Nairobi HCCC No 127 of 2009 was dismissed on a technicality being that the matter was filed by an incompetent advocate. That , the 1st Respondent having not disputed receiving the funds from the 3rd and 4th Respondents and noting the said averments that it has ceased operations, it is in the interests of justice that the application herein is allowed and the 1st Respondent be ordered to deposit the said funds in court.
 9. The parties filed written submissions as follows; the applicants submitted that he has a prima facie case with a high probability of success. The suit is premised on a consultancy agreement between the applicant and the 1st and 2nd defendants whose validity is undisputed. The applicant submitted that he shall suffer irreparably as the 1st defendant is in the process of closing down as its principal



- shareholder and promoter is since deceased. The company is therefore at a risk of being wound up and the funds have been already released to the 1st and 2nd defendants. The applicant argued that the balance of convenience tips in its favor as he has satisfied the threshold for the grant of temporary injunction.
10. The applicant submitted that the application herein is not res judicata as it is not similar to that dated March 28, 2012. The previous application sought an injunction preventing the release of fund while the current application has been filed upon the funds being released to the 1st respondent.
 11. The 1st defendant submitted that no evidence has been presented demonstrating that the Defendant has with the intent of obstructing or delaying execution of any decree that may be passed against him, disposed or is about to dispose of the whole or any part of his property, has removed his property from the local limits of the jurisdiction of this Honourable Court or has commenced winding up proceedings to wind up its operations in the Country.
 12. The 1st defendant argued that the only reason the Plaintiff has brought this Application is to use it to harass the Defendant and to utilize it as a weapon to defeat and weaken the Defendant in the conduct of its defence in the matter herein. That the application offends the provisions of section 7 of the Civil Procedure Act as it is similar to a previous application dated March 28, 2012. The 4th defendants reiterated the same in its submissions.
 13. The issues for determination in this application are as follows;
 - i. Whether the plaintiff is entitled to an injunction against the 1st defendant from dealing with 20% of the award/or judgment in HCCC No 1208 of 2003 paid to the 1st defendant by the 3rd and 4th defendants.
 - ii. Whether the 1st defendant should be directed to deposit in court 20% of the award in HCCC No 1208 of 2003 by the 1st defendant by the 3rd and 4th defendants.
 - iii. Whether the application dated October 5, 2022 is res judicata.
 14. On the issue as to whether the plaintiff/applicant is entitled to a temporary injunction restraining them from utilizing 20% of the award in HCC No 1208 of 2003, I find that the law governing grant of injunctions is stipulated in the case of Giella vs Cassman Brown as follows;
 - i. That the applicant must show that he has a prima facie case with a probability of success.
 - ii. That the applicant might suffer irreparable loss which cannot be compensated by an award of damages if is not granted.
 - iv. That the balance of convenience tilts in favor of the applicant.
 15. I find that in a ruling delivered by Justice Odunga (as he then was) in this case is a similar application dated March 28, 2012 and a ruling made on December 4, 2012, he said that the issue was canvassed and the court held that the plaintiff was not entitled to injunctive reliefs against the 1st defendant and further that the alleged contract between the plaintiff was based on 'a consultancy agreement hinged on the success of the HCC no 1208 of 2003.'
 16. Justice Odunga (as he then was) further stated in paragraph 12 of the ruling that such types of contracts on their face are contrary to public policy since they may be construed to be meant to subvert the cause of justice.
 17. I find that the plaintiff/appellant is not entitled to injunctive reliefs against the 1st defendant.



18. On the issue as to whether the 1st defendant should be ordered to deposit 20% of the award in HCCC No 1208 of 2003, I find that the answer is in the negative.
19. There is no evidence that the 3rd and 4th defendants have paid any sums to the 1st defendant.
20. This court already made a determination in the ruling referred to above by Justice Odunga (as he then was) dated December 4, 2012 on that issue and there was no appeal preferred against the said ruling.
21. I find that the 1st defendant cannot be directed to deposit any amounts in this case in the circumstances.
22. On the issue as to whether the application dated October 5, 2022 is res judicata, I find that the answer is in the affirmative since the same issues were raised in the application dated March 28, 2012 and a ruling delivered on December 4, 2012.
23. Section 7 of the *Civil Procedure Act* states as follows on the issue of res judicata

' No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

24. I find that the application dated October 5, 2022 is res judicata and further the same lacks in merit and I accordingly dismiss it with costs to the 1st and 4th defendants.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

- for the Plaintiff
- for the 1st Defendant
- for the 2nd Defendant
- for the 3rd Defendant
- for the 4th Defendant

