



**George Miyare t/a Miyare & Company Advocates v Elsek & Elsek
Construction Limited (Miscellaneous Application 33 of 2018)
[2022] KEHC 14451 (KLR) (Judicial Review) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 33 OF 2018
AK NDUNG'U, J
OCTOBER 26, 2022**

BETWEEN

**GEORGE MIYARE T/A MIYARE & COMPANY ADVOCATES DECREE
HOLDER**

AND

ELSEK & ELSEK CONSTRUCTION LIMITED JUDGMENT DEBTOR

RULING

The Notice of Preliminary Objection

1. The judgment debtor/respondent, Elsek & Elsek Construction Ltd, filed this instant notice of preliminary objection dated February 22, 2022 (herein referred to as “the objection”). The objection was based on the following grounds:
 - i. That the substantive prayers sought in the instant application, to wit prayers (b) and (d) are the same orders previously substantially sought in the decree holder's application dated May 27, 2021 and wherein a ruling on the same was delivered on August 18, 2021 dismissing the said application and consequently the instant application is *res-judicata* and offends s.7 of the [Civil Procedure Act](#).
 - ii. That the proposed 2nd to 8th respondents are neither parties in the matter nor are they judgment debtors for the court to exercise jurisdiction under order 22 rule 35 of the [Civil Procedure Rules](#) for purposes of lifting the corporate veil.
 - iii. That to join the proposed 2nd to 9th respondents who are not judgment debtors and subject them to examination pursuant to order 22 rule 35 of the [Civil Procedure Rules](#) will be travesty of justice granted that the said parties were not parties to the advocate-client relationship



between the decree holder and the respondent and will be condemned unheard in a dispute and/or in respect of proceedings culminating in a judgment they were not party to.

- iv. That while some of the proposed respondent companies (2nd to 8th proposed respondents) have common directors/shareholders, which is permissible under Kenyan Law, it has not been demonstrated that they have parent or subsidiary relationship with the judgment debtor or that any of the said companies has been used illegally or fraudulently to cover the actions of the judgment debtor, or that the judgment debtor has transferred its assets to the said companies during the subsistence of the suit and it is not sufficient to join the said companies as respondents for purposes of lifting the corporate veil.
- v. That the companies are distinct legal entities registered at different times for different purposes and the said companies have separate legal personality from the said director Osman Elsek.
- vi. That the instant application is an attempt to have a second bite at the cherry given that the applicant has not lodged any appeal or applied to review the ruling delivered on August 18, 2021.
- vii. That the orders sought are untenable and an abuse of the court process and the application should be dismissed with costs.

The Application__

2. The objection was raised at the hearing of a notice of motion application dated February 8, 2022; wherein the motion sought the following orders, that,
 - a. Pending hearing and determination of this application and execution, Elsek & Elsek (K) Limited, Kikambala Housing Estate Limited, Diamond Housing Limited, Elsek & Elsek Marine Limited, Elsek Mortgage Limited, Elkay Restaurant (Istanbul) Limited, Elsek & Elsek Marketing Limited and Osman Erdinc Elsek be enjoined to these proceedings as respondents.
 - b. Mr Osman Erdinc Elsek be ordered to attend court to be orally examined on debts owing to the judgment-debtor, and whether the judgment-debtor has any and what property or means of satisfying the decree, and to produce the books of accounts or documents of the judgment-debtor.
 - c. The corporate veil of Elsek & Elsek Construction Company Limited, the judgmentdebtor, and those of all other companies operated under the "Elsek Group of Companies", including Elsek & Elsek (Kena) Limited, Kikambala Housing Estate Limited, Diamond Housing Limited, Elsek & Elsek Marine Limited, Elsek Mortgage Limited, Elkay Restaurant (Istanbul) Limited and Elsek & Elsek Marketing Limited be sidestepped and/or disregarded and the said companies treated as one entity for purposes of execution of the honourable court's decree given on March 27, 2019.
 - d. Mr Osman Erdinc Elsek be made personally liable upon the decree passed on March 27, 2019.
 - e. Costs.

Respondent's/Judgment-Debtor's Submissions

3. In support of the objection, the respondent /judgment debtor filed his written submissions dated March 15, 2022. In the submissions, the following main issues were submitted on: (i). That the instant application is *res judicata* (ii). That the applicant cannot join the respondents at this stage-there is no



- suit before the court but a miscellaneous cause that is sui generis in nature, and (iii). That the applicant cannot enjoin the 2nd – 9th respondents in taxation application.
4. On the first issue of res judicata, the respondent submitted that the applicant herein had filed a notice of motion dated May 27, 2021 seeking orders, that;
 - a. The honourable court be pleased to order Osman Erdinc Elsek, a director of the judgement debtor/ respondent to personally appear in court on a day to be directed by the honourable court for purposes of examination as to the property/assets of the judgement debtor/ respondent capable of satisfying the decree herein
 - b. Osman Erdinc Elsek be ordered to produce the judgement debtor/respondent's books of accounts, bank statements and/or evidence showing the affairs of the judgement debtor/ respondent from March 29, 2019 to date.
 - c. The honourable court be pleased to order Osman Erdinc Elsek to personally settle the decree herein in full.
 - d. Costs
 5. That the court in a ruling delivered on August 18, 2021 determined the following issues; a) Whether the director of the respondent/judgement debtor to personally appear before court to be cross-examined on the respondent's capacity to satisfy the decree; b) Whether the director of the respondent be ordered to produce the respondent's books of accounts and; c) Whether the director of the respondent should be held personally liable for the respondent's debts and liabilities.
 6. The respondent/ judgment debtor averred that the court ruled that the application lacked merit, and noting that, "there is no indication that Mr Osman or any other director of the respondent has acted in a fraudulent or improper manner. I find that the threshold for lifting the corporate veil against Mr Osman who is also only one of the directors of the respondent herein has not been met. Further I am not satisfied that the evidence has been advanced to indicate that the conduct of the said director suggests that there is any intention to deny settling the respondent's debts. In the end, I find that the application dated May 27, 2021 lacks merit and the same is hereby dismissed."
 7. It was the respondent's submission that this instant application, dated February 8, 2022, has sought the exact same orders - at paragraphs (b) and (d) – as those already determined in the notice of motion dated May 27, 2021, thus rendering the application *res judicata*. Also, that prayer (a) seeking joinder of other parties is secondary to the substantive prayers sought, to wit, prayers (b) and (d).
 8. Further, on res judicata, the respondent relied on section 7 of the *Civil Procedure Act*, and the cases of *Uburu Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni*; and *Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers' Co-operative Society* [2014] eKLR; *Siri Ram Kaura v M.J.E Morgan*, CA 71/1960 (1961) EA 462; and *Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers' Cooperative Society* [2014] eKLR
 9. The respondent posited that the instant application is *res judicata* as it seeks to resuscitate issues which were already determined by the court in the application date May 27, 2021. That it has not been demonstrated that the facts sought to be presented in the current application could not by reasonable diligence have been obtained during the filing of the determined application.
 10. The respondent contended that the applicant has also not proved before this court that the alleged evidence could not have been produced before court after due diligence was conducted. That the applicant is merely seeking to have a second bite of the cherry by purporting to bring in new evidence,



and by so doing the applicant is requesting this court to review the ruling delivered on August 18, 2021; and/or sit on appeal without following the correct appeal process. Reliance was placed on the cases of *Paragon Finance v D B Thackerar & Co* [1999] 1 All ER 400; *Margaret Wairimu Magugu v Karura Investment Limited & 4 others* [2019] eKLR; and *Hannah Wairimu Ngethe v Francis Mungai Ng'ang'a another* [2016] eKLR

11. It was the respondent position that allowing the instant application would amount to condemning the respondent twice on issues already determined. The Court of Appeal decision in *Accredo AG & 3 others v Stefano Uccelli & another* [2019] eKLR, was relied upon.
12. On the second issue of joinder of parties, the respondent submitted that the applicant seeks to enjoin the 2nd – 8th respondents in the instant application on allegation that they are related and/or conduct business on behalf of the 1st respondent and their behalf. That, the parties who the applicant seeks to enjoin are strangers to the facts herein and were not party to the original taxation cause and/or the application for judgment following the taxation of the bill.
13. The respondent stated that attempt to enjoin the 2nd -8th respondents on misrepresentation of facts by the applicant is not only prejudicial to the 2nd -8th respondents, but also amounts to condemning the said parties unheard which is against the principle of fair hearing. Reliance was placed on order 1 rule 10(2) of the *Civil Procedure Rules*; and the case of *Lilian Wairimu Ngatbo & another v Moki Savings Co-operative Society Limited & another* [2014] eKLR
14. Further, it was the respondent's submission that there is no suit pending between the applicant and the respondent to warrant issuing of an order of joinder of the 2nd -8th respondents to the suit. That the ruling delivered by the court on August 18, 2021 has not been vacated and there has been no appeal preferred against it. That the miscellaneous suit between the applicant and the respondent was therefore concluded on its merits and therefore the applicant cannot seek joinder of other parties based on misconceived facts that are baseless and meant to mislead this honourable court.
15. The respondent contended that the applicant has not proven before this court that the 2nd -8th proposed respondents are subsidiaries of the 1st respondent or that they are directly linked to the 1st respondent; or/and that they aided in the obstruction of the execution of the decree.
16. Also the respondent maintained that the respondent is neither a subsidiary and/or parent company in any of the proposed 2nd to 8th respondents, and that the same is supported by looking at their CR12 documents; wherein the 9th proposed respondent is listed as a director of the 1st -6th respondents and the 8th proposed respondent, while the 7th respondent has no connection to the proposed 9th respondent.
17. The respondent/judgment debtor asserted that the corporate veil of the 2nd -8th proposed respondents cannot be lifted merely on grounds that the companies share a common director. That the applicant has also erroneously and mischievously preferred to join the 9th respondent to this suit while it is evident from the documents adduced that the 1st -8th respondent have more than one director. The cases of *Salomon v Salomon* [1897] AC 78, *Joseph Kobia Nguthari v Kiegoi Tea Factory Company Limited & 2 others* [2016] eKLR; and *Kaydee Quarry Limited v Baileys Rocktech Limited* [2021] eKLR were relied on.
18. In this regard, it is submitted that the applicant's prayer to enjoin the 2nd – 8th respondents is prejudicial as it seeks to enjoin parties not privy to the case from the onset. The application therefore lacks merit and should be struck out.
19. On the third issue of enjoining parties in taxation application, the respondent submitted that this matter arose from a taxation cause brought by the applicant for purposes of execution of the taxed



amount in favour of the applicant. Further, that the bill of costs was duly taxed and judgement thereafter entered. Thus therefore, the applicant cannot seek to enjoin other parties to a miscellaneous cause specific to taxation and wherein judgement was not entered against a mentioned party, that is the intended enjoined parties.

20. Additionally, the respondent contended that the applicant cannot purport to enforce judgement on the 2nd 9th proposed respondents as they never participated in the main cause, and they lack advocate-client relations. Also that this matter, filed as a miscellaneous cause, is anchored on the procedure provided under the advocates remuneration order; which are proceedings *sui generis* and cannot be muddled by reference to the [Civil Procedure Rules](#). Reliance was placed on the case of [Sotik Tea Company v Nyamweya Osoro & Nyamweya Advocate](#) [2017] eKLR.
21. In the end, the respondent was of the position that this instant application was brought un-procedurally, is defective, and it offends the basic fundamental principles of law, thus the application should be dismissed with costs.

Applicant's/Decree-Holder's Submissions

22. In opposing the objection, the applicant/decree holder filed their written submissions dated March 16, 2022. It was their submissions that the judgment-debtor/1st respondent has raised six grounds, with "*res judicata*" being the only point of law for determination as a preliminary question. Reliance was placed on the case of [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors](#) [1969] EA 696.
23. On *res judicata*, the applicant/respondent submitted on section 7 of the [Civil Procedure Act](#). It was their submission that the issues already settled with finality, as between the decree holder/applicant and the judgment-debtor/1st respondent being the principal parties; were related to the taxation of the advocate-client costs - which culminated in a judgment and the decree dated March 29, 2019.
24. That the decree holder/applicant only initiated the execution proceedings herein for the realization of his costs upon failure by the judgement debtor/1st respondent to pay the taxed amounts. Specifically, that the instant application is in execution of the decree.
25. That in particular, through its application, the decree-holder/applicant seeks assistance of the court to satisfy the decree while the judgement-debtor/1st respondent through this preliminary objection seeks to obfuscate any and all avenues of execution by the decree-holder.
26. The applicant/decree holder relied on order 22 rule 7 (2) (f) and (i) of the [Civil Procedure Rules](#). They submitted that due to several failed attempts at recovery of the decretal sums, they seek execution through orders of joinder of the 2nd to 9th respondents, examination of a director, and lifting the corporate veils of the respondent companies; in order to satisfy the decree.
27. It was the applicant's/decree-holder's position that, order 22 rule 7(2)(f) of the [Civil Procedure Rules](#), implies that multiple applications and/or proceedings in execution of a court decree cannot be said to be *res judicata* provided the decree remains unsatisfied. That thus, the objections by the judgment-debtor/1st respondent are misconceived and incompetent. The case of [Lawrence Ong'eni IMokaya v Alice Onserio](#) [2020] eKLR was relied upon.
28. That contrary to the judgment-debtor/1st respondent's objections and submissions, the instant application is not the same as the application dated May 27, 2021, which was dismissed by the Deputy Registrar for lack of evidence. Also that the subordinate court (Deputy Registrar) is not competent to deal with the issues raised by the present application.



29. The applicant/decreed holder maintained that a court of law cannot shut its eyes to an impropriety or injustice just because it has rendered itself on an earlier application for execution. That to do that would be an abdication of duty and a license for parties to do the unimaginable then shout from rooftops that the matter is *res judicata* since a similar mode of execution was attempted but failed.
30. The applicant/decreed holder contended that the issue of the mode of execution and/or satisfaction of the decree has not been finally decided, and that any application in that regard cannot be *res judicata* until the decretal amounts are fully and finally settled.
31. On the issue of joinder of parties for execution, the applicant/decreed holder submitted that the instant application has raised the issue of whether the 2nd to 9th respondents are alter-egos of the judgment-debtor/1st respondent; and whether the respondents' comingled assets can be attached in execution of the decree by lifting the corporate veils of the named companies.
32. The applicant/decreed holder contended that the 2nd to 9th respondents are important to enable the honourable court settle the issues remitted to it pertaining to execution of the court's decree, and that it is not a [pure] point of law to be argued by way of a preliminary objection as purported that can dispose of the matter preliminarily. Reliance was placed on *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co Ltd & another* [2018] eKLR; and order 1 rule 10(2) of the *Civil Procedure Rules*.
33. Further, they asserted that the relationship of the respondents, and hence their joinder, is clearly a contested issue that will require proof at the hearing of the application, as relations cannot be inferred. The case of *National Bank of Kenya Limited v Peter Kipkoech Korat & another* (2005) eKLR was relied upon.
34. The applicant/decreed holder submitted that parties can be joined in execution proceedings if it is established that the assets of a judgement-debtor are convoluted. Further, that no prejudice would be suffered to the respondents as they will be accorded ample opportunity to present their case after which the court will make a final determination based on the facts and evidence adduced.
35. That on the other hand, prejudice would be suffered by the decreed-holder/applicant if its' motion is denied preliminarily since it has no way of ascertaining the assets and capabilities of the judgement-debtor to satisfy the decree in absent intervention by the honourable court as sought. The case of *Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Co Ltd & another* (supra) was relied on.
36. The applicant/decreed holder asserted that joinder of the 2nd to 9th respondents is justified as commonalities of interests between the 2nd to 9th respondents and the judgement-debtor/1st respondent are so apparent. That claims of the 2nd to 9th respondents as being strangers to the taxation proceedings leading to the decree herein should not be upheld since the corporate veils of the respondents are being used improperly to frustrate execution of the decree.
37. That it is apparent there is extensive commingling of assets among the respondents within the group of companies owned by the 9th respondent, to the extent that it is not easy to distinguish which assets are attributable to which member of the group, including the judgement-debtor/1st respondent. The respondent companies are operated and managed as a group as evidenced by the application and they should be joined to facilitate these execution proceedings. The case of *TNT Express Worldwide (K) Limited v Elsek & Elsek (K) Limited* [2012] eKLR was relied on.
38. On the issue of the nature of proceedings, the applicant/decreed holder submitted that the instant matter is on execution proceedings, and not on taxation proceedings as alluded by the respondent.



Consequently, that the proceedings are on execution under Civil Procedure Act, and not Advocates Remuneration Order.

39. It was posited that a court that delivers a judgment has the power to deal with any proceedings for full execution of its orders/decrees. That in this instant case, as the issued decree is yet to be satisfied, the court has the mandate to entertain execution proceedings upon invocation by the decree-holder as they are ancillary to the court's judgement/decrees. Reliance was placed on section 34 (1), 38, 44(1) of the Civil Procedure Act; and order 22 rule 35 of the Civil Procedure Rules.
40. That the orders sought by the applicant/decrees-holder do not seek alteration or change of the decision already delivered, but seeks to only perfect the judgment by satisfying the issued decree. Also, it was maintained that the execution proceedings in the matter cannot be said to be fully and finally concluded before the honourable court when the decree has not been satisfied.
41. In the end, the applicant/decrees-holder asserted that the preliminary objection is an abuse of court process, and if allowed it will only serve to impede execution of a proper decree. To that end, the applicant prayed that the notice of preliminary objection dated February 22, 2022 be dismissed with costs.

Issue for Determination

42. From the material on record, the following issues for determination arise: (i). Whether the instant preliminary objection is merited in law. (ii). Whether res judicata has been established in this case.

Analysis and Determination

43. On the first issue, it is trite law that point of law can be raised at any stage of proceedings. The courts have time and again restated this position of the law. In the case of Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited [2015] eKLR (Nairobi judicial review miscellaneous application No 2 of 2015) the court found that: -

“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of *Beatrice Cherotich Koskei and another v Olenguruone Land Dispute Tribunal and 2 others* Misc civil Appl 861 of 2007, the court observed as follows:

“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”

These sentiments echoed the view of the court in the case of *Ali Oshan and others v Mrs Catherine Kaswii Nyiha and others* Misc civil application 525 of 2002 where the court stated as follows:

“It is obvious that the Kenya National Football Federation constitution does not allow parties whose disputes fall within the definition of article xix (1) to commence proceedings in a court of law but to refer them to Arbitration. ... It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr Gikandi is perfectly right to raise the preliminary point at this stage...”



44. The High court, in discussing preliminary objection, in *Republic v Permanent Secretary, Ministry of Education & 2 others ex parte Mesback Ochieng'* [2021] eKLR observed that,

“The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, are as follows:

“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.”

10. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of *Oraro v Mbaja*, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company v West End Distributors Ltd* (supra) that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

45. Turning back to the instant matter, a close reading of the grounds of the objection, and guided by the above discussed authorities, it is clear that only one ground meets the threshold of a proper preliminary objection on a point of law - that is the *res judicata* ground. The other grounds fail to satisfy a preliminary objection. It is not in dispute that there was a previously litigated matter between the parties; notice on motion dated May 27, 2021 being the former matter, and notice of motion dated February 8, 2022 as the instant matter.

46. On the issue of *res judicata*, an examination of what *res judicata* is becomes necessary. The court in *Republic v Baua Ali & another Ex Parte Mohamed Gituma & another* [2021] eKLR stated that;

11. The doctrine of *res judicata*, is set out in section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

12. A close reading of section 7, reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: -

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.



47. In the instant matter, some of the issues brought by the notice of motion dated February 8, 2022 and the notice of motion dated May 27, 2021 are directly and substantially in issue in the former and the later applications. In particular, are prayers (b) and (d) sought in the February 8, 2022; as contrasted with prayers sought in application dated May 27, 2021, which was dismissed by court. Further, a look at the both applications shows that the five essentials for satisfying *res judicata* are met.
48. Therefore, to my mind, and to the extent of the prayers (b) and (d) in the instant notice of motion dated February 8, 2022, those prayers/issues were already determined by a competent court and thus are *res judicata*. For clarity, the issues raised in prayers (a), (c), and (e) of the instant notice of motion dated February 8, 2022, have not been determined and thus are not *res judicata*.
49. It then follows that the notice of preliminary objection succeeds in part, therefore the following orders are issued:
1. The notice of motion dated February 8, 2022 shall be heard in so far as it relates to prayers (a), (b) and (c). Prayer (e) on costs too, shall be canvassed.
 2. For clarity, issues in prayer (b) and (d) of the notice of motion dated February 8, 2022 are hereby determined as being *res judicata*;
 3. Each party to bear its own cost.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2022

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A.K. NDUNGU

JUDGE

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