



**Amin v ASL Credit Limited (Civil Appeal 102 of 2021)
[2022] KEHC 14365 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14365 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 102 OF 2021**

A MSHILA, J

OCTOBER 21, 2022

BETWEEN

BHAI OMAR AL AMIN APPLICANT

AND

ASL CREDIT LIMITED RESPONDENT

RULING

1. The applicant filed a preliminary objection dated November 24, 2021 on the following points of law
 - a. That this honourable court lacks jurisdiction to entertain the plaintiff/applicants application dated November 19, 2021 as the application is filed contrary to section 7 of the *Civil Procedure Act* 2010 as it raises issues allegedly dealt with in the plaintiff's /applicants application dated April 19, 2021 brought before this court seeking for injunction orders restraining the defendant/respondent from in any way interfering with the plaintiff's motor vehicles pending the hearing and determination of the applicants intended appeal, as the relief sought the premise and contentions of thereof are directly similar to the present application wherein substantially similar orders are sought and determination has already been rendered by this Honourable Court by Hon. Mr. Justice Alfred Mabeya on November 17, 2021 which decision has not yet been reviewed or appeal against.
 - b. That this application is incompetent, fatally defective and a patent abuse of court process as it is trite that this honourable court cannot sit on its appeal of its own decision of the plaintiff/applicant's application dated April 19, 2021 which was only allowed in terms of prayer 2 for the applicant to file its appeal out of time but declined to grant the applicant injunction pending hearing and determination of its intended appeal having failed to satisfy the grounds for grant of such injunction.



- c. That the application is a clear mischievous attempt at confounding and compounding the dispute being injunction pending hearing and determination of its intended appeal and or appeal pursuant to Order 42 Rule 6 of the [Civil Procedure Rules 2010](#) through multiplicity of causes, an attempt second bite at the proverbial cherry by giving the application a cosmetic facelift and is otherwise a patent abuse of court process.
- d. That the application herein is contrary to the overriding objectives of this court bad in law, incompetent, frivolous, vexatious and otherwise an abuse of the court process and should be dismissed in limine.

Respondents Case

2. It was the Respondents case that the application dated April 19, 2021 is seeking an injunction pending intended appeal. In a ruling dated 17th April 2021 Hon Justice Mabeya dismissed the application for injunction on reason that they did not make out a prima facie case, there were no documents that showed payment of Kshs. 10,000,000 and found that damages would be an adequate remedy.
3. The applicants did not file an appeal or review on the said ruling and have now filed a similar application seeking the same orders and thus res judicata. The respondents argued that this court cannot sit on its own appeal.

Applicant's Case

4. The applicants on the other hand argued that the preliminary objection raises no points of law. They added that the previous application was seeking leave to appeal out of time and the application now is seeking stay pending appeal. They contended that the criteria for the two applications are different and the circumstances are now different. The applicants added that the P.O was filed without providing the ruling that they are referring to.
5. It was argued that if a stay is not granted the substratum of the appeal will disappear. They argued further that previous applications are not a bar so long as issues and circumstances are different.

Issues for Determination

6. The only issue framed by this court for determination is whether the Preliminary Objection has merit.

Analysis

7. This is a preliminary objection raised on a point of law on the grounds that this matter is *res judicata*. The issue for determination is whether this suit falls on all fours of Section 7 of the [Civil Procedure Act](#) which stipulates as follows:

‘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 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.’



8. A preliminary objection has been defined by the courts in a number of cases. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West end Distribution Ltd* [1969] EA 696 a Preliminary Objection was defined as:-

“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 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 the contract giving rise to the suit to refer the dispute to arbitration ... 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”

9. In *Oraro v Mbaja* 2005 eKLR, Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An 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.”

10. The respondents herein have filed a preliminary objection citing that the application dated November 19, 2021 is res judicata as the applicants had filed a similar application dated April 19, 2021 which was heard and determined by Justice Mabeya in Misc Civil Application E276 of 2021. That in the ruling the court determined that the applicants failed to establish a prima facie case and denied to grant the applicants an injunction pending the hearing and determination of the appeal herein.

11. The applicants have denied the allegations by the respondent and indicated that the application dated April 19, 2021 was for leave to appeal out of time and added that the ruling that the respondents were relying on was not attached.

12. It is clear that a preliminary objection must only be based on pure point of law and if any reason facts are involved then they must not be contested as in the case of *Oraro v Mbaja* (supra). The applicant in his response to the preliminary objection has contested factual details and it is therefore not tenable for the court to proceed on the assumption that all the facts pleaded by the parties is correct.

13. The upshot, is therefore that this court is satisfied that the preliminary objection doesn't meet the threshold set out in the *Mukisa Biscuit's case* (supra).

Findings & Determination

14. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds that the Preliminary Objection raised is not merited and it is hereby overruled;
- ii. The costs to abide the outcome of the Application;
- iii. Mention on November 3, 2022 for directions.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.



HON.A.MSHILA

JUDGE

In the presence of;

Mirie for the Appellant/Applicant

Mwangi for the Respondent

Lucy.....Court Assistant

