



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E018 OF 2020

JOY KENDI KUBAI.....PLAINTIFF

-VERSUS-

HELLEN OCHWANGI.....DEFENDANT

RULING

PRELIMINARY OBJECTION

1. The Defendant filed a **Notice of Preliminary Objection** dated **11th June, 2021** on even date based on the following grounds:-

*a) That under **Section 6 of the Civil Procedure Act** no court should proceed to hear a matter which is directly and substantially in issue in another matter pending before the lower court involving the same parties and when such matter is instituted it must be stayed.*

*b) That the Plaintiffs suit offends **Section 6 of the Civil Procedure Act** as there is a pending matter involving the same parties and touching on the same subject matter being **CMCC No.111 of 2020**.*

*c) That the Defendant pleaded the issue at **paragraph 10** of her **defence** and the plaintiff admitted the same at **paragraph 8** of the **Plaint**.*

*d) That the lower court matter was filed on **6th October, 2020** while the suit herein was filed on **16th November, 2020** and therefore the lower court matter takes precedence over the suit herein.*

2. To understand the gist of the **Preliminary Objection**, it is imperative to appreciate the background of the dispute as captured in the Pleadings filed in court. The suit was instituted vide a **Plaint** dated **10th November, 2020** wherein the Plaintiff claimed Judgment in the sum of Kshs.20,330,682.75 as against the Defendant allegedly being an outstanding amount of sums of money she had lend to the Defendant on diverse dates between **September 2016** and **March 2020**.

3. It is pleaded that the Defendant failed to repay the outstanding monies as agreed by the parties but when the Plaintiff demanded the same, the Defendant rushed to court and filed **Mombasa CMCC No.E111 of 2020** seeking to restrain the Plaintiff from instructing the debt collectors to recover the money from her. In the Plaintiff's view, the present suit cannot be heard alongside the suit in the Magistrate's court since the subject matter exceeds the pecuniary jurisdiction of the Chief Magistrates court.

4. The **Preliminary Objection** was canvassed by way of oral submissions on **21st June, 2021** with **Mr. Mughambi** appearing for the Plaintiff while **Mr. Chege Kamau** appeared for the Defendant.

5. In support of the **Preliminary Objection**, the Defendant's counsel submitted that the point of law raised is in line with **Section 6** of the **Civil Procedure Rules**, which precludes a party to an existing suit pending before a court of competent jurisdiction from instituting a subsequent suit on the same subject matter and between the same parties. On that view, he submitted that there exists a pending suit between the same parties being **Mombasa CMCC No.111 of 2020** and the subject matter is the non-payment of the loan and the charging of irregular and illegal interest rates. Since the lower court matter was filed before the instant case, the learned counsel urged the court to consider the lower court suit as the one taking precedence over the instant suit. The Counsel borrowed from the case of **Kenya Bankers Association -vs- K.P.A [2019]eKLR**, where it was held that when there is a pending previously, instituted matter in another court, instituting further proceedings would be illegal.

6. **Mr. Mughambi** on the other hand and while admitting that the existence of the lower court matter as being between the same parties,

argued that the subject matter in the two suits is different. For the present suit, he maintained that the subject matter is Kshs.20,330,632.75 while the subject matter in the suit before the lower court was undisclosed, there being no pleadings in that suit presented before this court. He was however of the view that the issue of sub-judice ought to have been raised through a **Notice of Motion** application but not through a **Notice of Preliminary Objection**.

Analysis and Determination

7. In considering the grounds raised in the Notice of Preliminary Objection and the submission by either counsel for the parties together with cited statute and case law, the only issue for determination is whether the instant suit filed in this court by the Plaintiff is sub-judice and offends **Section 6** of the **Civil Procedure Act, Cap 21 Laws of Kenya** given that **CMCC No.111 of 2020 (Mombasa)** involving the same parties and relating to the same subject matter is still pending before the lower court.

8. However, it is instructive to point out that a **Preliminary Objection** is correctly understood and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, so be proved through the process of evidence. Any assertion which claims to be **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.

9. Therefore, as was rightly defined in the case of **Mukhisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd 1969 E.A. 696**, a **Preliminary Objection** is in the nature of what used to be a demurrer and 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. The **Preliminary Objection** is grounded on the provisions of **Section 6** of the **Civil Procedure Code**. **Section 6** states as follows:-

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

11. From the above section, the sub-judice rule under **Section 6** of the **Civil Procedure Act** is satisfied if the following conditions are established:-

(a) *Existence of two or more suits.*

(b) *Issues in contention in one sit should be directly and substantially in issue in the other suit or suits.*

(c) *The suits should be between same parties or parties who are litigating under the same title.*

(d) *Each of the two or more Courts should have competent jurisdiction to determine all issues in the suits.*

12. In the case of **Ismail S Mbaya And Others –vs- Mohamed Haji & Others, Kisumu HCCC NO.106 OF 2003** (unreported) it was held:-

“Where there is a matter pending in Court of competent jurisdiction been substantial the same parties touching on same issues, the court lacks jurisdiction to entertain a similar matter.”

13. In the instant case, it is undisputed that besides the present case, there exists another suit in the lower court between the two parties over the same debt as owed to the Plaintiff in this suit by the Defendant. As it appears to me, the point of contention seems to be whether the Plaintiff is justified to claim the sum of Kshs.20,330,682.75 which the Defendant thinks was maliciously claimed so as to give this court jurisdiction over the matter ignoring the fact of the existence of the lower court matter. The Defendant also thinks that this suit ought to be stayed for the lower court matter to take precedence since it was the first to be filed.

14. Nonetheless, the pleadings in the lower court case were not availed to this court, thus I am unable to appreciate the nature of the relief sought in that suit. What appears to be clear is that the suit is between the same parties as in the present case and it involves a dispute over monies advanced by the Plaintiff herein to the Defendant vide agreements executed by both parties.

15. **Section 6** of the **Civil Procedure Code** was introduced in order to avoid duplicity of cases and also avoid conflicting decisions on the same issue between the same parties.

16. Since I have not had the benefit of reading through the pleadings in **Mombasa CMCC No.111 of 2020**, it is prudent that the file is called over and be mentioned alongside the present suit for further directions to issue. Both parties are therefore directed to ensure that the order is complied with.

17. Should it appear to the court that the nature of relief and the subject matter in both suits is similar, then this suit will automatically be declared sub-judice. And to ensure neatness, the Plaintiff herein will proceed to address its grievances vide a counter claim in **Mombasa, CMCC No.111 of 2020** and have it transferred to the High Court in the event that the counter claim exceeds the lower court’s pecuniary jurisdiction.

18. In any event, if the court finds the subject matter in both suits not to be similar so as not to be subjected to the doctrine of sub-judice, then the matters will be mentioned for a possible consolidation.

19. According, parties to fix a mention date for further directions in 30 days.

20. Costs shall be in the cause.

It is hereby so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 30TH day of SEPTEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Mainga counsel holding brief for M/S Waihenya for the Appellant

No appearance for and by the Respondent

Court Assistant - Winnie