



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CAUSE NO. 120 OF 2020**

**MAK’OGONYA T.T. TIEGO.....APPLICANT**

**-VERSUS-**

**LIVINGSTON TOMNO KAPTO t/a LITOKI ASSOCIATES.....RESPONDENT**

**AND**

**ONSANDO OSIEMO.....1<sup>ST</sup> INTERESTED PARTY**

**PETER OKUNDI OGONJI.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. Before this court for determination are two (2) applications: the first is the Chamber Summons dated 3rd March, 2020 (“the first application”) brought by the applicant herein and supported by the grounds set out on its body and the facts deponed in the supporting affidavit of the applicant. The applicant sought for the following orders in the aforesaid summons:

*i. Spent.*

*ii. Spent.*

*iii. Spent.*

*iv. THAT this Honourable Court be pleased to grant an order directing that the applicant be furnished with bank statements for the past 13 months for Bank Account No. 01148615390700 held at Co-operative Bank of Kenya Limited Co-op Bank House and any other Bank accounts in the name of LIVINGSTON TOMNO KAPTO trading as LITOKI ASSOCIATES.*

*v. THAT this Honourable Court be pleased to grant an order freezing and suspending operation of Bank Account No. 01148615390700 held at Co-operative Bank of Kenya Limited and operated in the name of LIVINGSTON TOMNO KAPTO trading as LITOKI ASSOCIATES pending the hearing and determination of the suit.*

*vi. THAT this Honourable Court be pleased to grant an order directing the respondent to deliver to the applicant the statements of accounts for the financial years 2019 for the firm of LITOKI ASSOCIATES and particulars of all Bank accounts being operated in the name of LIVINGSTON TOMNO KAPTO trading as LITOKI ASSOCIATES pending the hearing and determination of the suit.*

*vii. THAT this Honourable Court be pleased to grant an order directing that the applicant be furnished with bank statements for the past 13 months for Bank Account No. 01148615390700 held at Co-operative Bank of Kenya Limited Co-op Bank House and any other Bank accounts in the name of LIVINGSTON TOMNO KAPTO trading as LITOKI ASSOCIATES and for an independent auditor to be appointed to investigate and make a report on the account(s) pending the hearing and determination of the suit.*

*viii. THAT this Honourable Court be pleased to order the Institute of Certified Public Accountants of Kenya (ICPAK) to investigate the operations and conduct of LIVINGSTON TOMNO KAPTO trading as LITOKI ASSOCIATES in the fraudulent collusion, conversion and theft of monies of ONSANDO OGONJI & TIEGO ADVOCATES and to submit its report to this court within 30 days.*

ix. *Such further or other orders as this Honourable Court may deem fit and just to grant.*

x. *THAT costs of the application be provided for.*

2. In opposing the first application, the respondent; 1<sup>st</sup> and 2<sup>nd</sup> interested parties raised a notice of preliminary objection and put forward the following grounds:

i. *THAT the application is res judicata, in that the issues raised in the application and the suit are directly and substantially in issue between the parties in an application dated 27<sup>th</sup> June, 2019 filed in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI. The said application, together with other applications in the said suit, was ordered to be stayed pending reference of the said dispute to arbitration.*

ii. *THAT this Honourable Court having ordered that the applicant and interested parties do proceed to arbitration, and having ordered a stay of all proceedings in High Court Misc. Cause No. 122 of 2019, the applicant is estopped from raising any matter pertaining to the affairs of the firm in this court. Any such matters, if at all, can only be raised before the Arbitrator.*

3. The aforementioned parties also put in the replying affidavit of the 2<sup>nd</sup> interested party to oppose the first application.

4. In reply to the preliminary objection and the replying affidavit mentioned hereinabove, the applicant swore a further affidavit on 28<sup>th</sup> July, 2020.

5. Subsequently, the respondent and the interested parties filed the Chamber Summons dated 20<sup>th</sup> April, 2020 (“the second application”) which is supported by the grounds set out on its face and the facts stated in the affidavit of the 2<sup>nd</sup> interested party. In the application the applicants sought for the following orders *inter alia*:

i. *Spent.*

ii. *Spent.*

iii. *THAT the dispute between the parties herein be referred to arbitration as provided for under clause 10 of the consultancy agreement between Onsando Ogonji and Tiego Advocates and Livingstone Tomno Kopto t/a Litoki Associates.*

iv. *THAT there be a stay of all proceedings herein pending reference of the dispute between the parties to arbitration, and pending the hearing and determination thereof.*

v. *THAT the applicants be at liberty to apply for such further or other orders and/or directions as this Honourable Court may deem fit to grant in the circumstances.*

vi. *THAT costs of the application be awarded to the applicants.*

6. The applicant put in a replying affidavit sworn on an unknown date and filed on 18<sup>th</sup> May, 2020 to oppose the second application, to which the 2<sup>nd</sup> interested party rejoined with a further affidavit sworn on 21<sup>st</sup> July, 2020.

7. When the Motion came up for interparties hearing before this court, the parties were directed to file and exchange written submissions.

8. In his submissions dated 5<sup>th</sup> October, 2020 the applicant contends that the first application is not *res judicata* as claimed in the preliminary objection since the respondent was not a party in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI and that the issues raised in the first application are distinct from those raised in the above-cited case, as are the orders being sought in the first application.

9. The applicant cited the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** where the Court of Appeal in discussing the doctrine of *res judicata*, rendered itself thus:

*“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;*

*(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those parties were litigating under the same title.*

*(d) The issue was heard and finally determined in the former suit.*

*(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

10. The applicant further contends that the interested parties have declined to honour the arbitration process and hence the preliminary objection lacks merit and ought to be dismissed with costs.

11. In respect of the first application, the applicant submits that there is evidence to show that the respondent; not being an advocate; received monies from clients of the firm of ONSANDO OGONJI & TIEGO ADVOCATES on various occasions, with the admission of the interested parties and with the aim of defrauding the applicant.

12. The applicant is of the opinion that the above acts by the respondent and the interested parties are criminal in nature and that it is therefore imperative for the orders sought in the first application to be granted, to shield the applicant from any potential risks on account of professional negligence and to bring the respondent to account for the monies received.

13. In respect to the second application, it is the submission of the applicant that no consultancy agreement existed between ONSANDO OGONJI & TIEGO ADVOCATES and the respondent as alleged, since the consultancy agreement referred to was entered into without the consent or authority of the applicant.

14. Consequently, the applicant argues that there exists no arbitration agreement in the context of the definition provided for under **Section 3** of the **Arbitration Act** that:

*“arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not”*

And **Section 4** which stipulates that:

*“(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

*(2) An arbitration agreement shall be in writing.”*

15. From the foregoing, the applicant submits that there is no basis on which to grant the orders sought in the second application.

16. In reply, the respondent and the Interested parties who filed joint submissions argue that the first application is *res judicata* since this court in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI entertained a similar application by the applicant and upon hearing the parties, ordered that there be a stay of all proceedings between the parties pending arbitration.

17. The abovementioned parties went on to argue that the fact that the respondent was not a party to the previous Miscellaneous Cause does not disqualify the application of the *res judicata* doctrine since the prayers sought are directly and substantially similar. The parties relied upon the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR** in which the court determined the following:

*“The introduction of the 3<sup>rd</sup> Respondent as a plaintiff in this matter does not change the design of the respondents’ claim. The fact that the respondents’ claim is res judicata cannot be upset by bringing on board the 3<sup>rd</sup> Respondent. Litigating a concluded matter under surrogates or uploading more parties to a claim does not change the conclusion already reached by the court in the former trial...”*

18. The respondent and the interested parties further submit that in view of the provisions of **Section 6** of the **Civil Procedure Act** which provides that a court cannot proceed with a suit or proceeding where the issues raised therein are directly and substantially in issue in a previous suit or proceeding which is pending between the parties or between parties under whom they claim, litigating under the same title; the applicant is estopped from instituting other suits pegged on the issues already raised in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI which has been referred to arbitration.

19. The respondent and the interested parties are of the view that the instant suit should therefore be stayed.

20. On the second application, it is the submission of the respondent and the interested parties that they have met the criteria for the granting of an order for a stay of proceedings, citing *inter alia*, the case of **Muriuki Mugambi v Suzanne Muthaura & 2 others (all t/a Muthaura Mugambi Ayugi & Njonjo Advocates) [2015] eKLR** in which the court held that:

*“However before making such orders staying proceedings, the court has to satisfy itself that:*

*The application seeking a stay of the proceedings with a view to having the matter referred to arbitration is presented to the court not later than the time when the applicant enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought.*

*a) That the arbitration agreement is not null and void, inoperative or incapable of being performed or*

*b) That there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration.”*

21. According to the aforesaid parties, there being a consultancy agreement with an arbitration clause providing for arbitration in the event of a dispute, this court is mandated to stay the proceedings and refer the matter to arbitration.

22. In submitting on the first application, the respondent and the interested parties aver that the freezing orders sought would amount to an injustice since the dispute in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI had been referred to arbitration and that upon being served with a proposal for an arbitrator, the applicant opposed the arbitration by claiming that he wishes that the matter proceed for mediation and that he has filed an appeal against the order made by this court in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI.

23. The parties further argue that the consultancy agreement permits the respondent to conduct secretarial services on behalf of the firm of ONSANDO OGONJI & TIEGO ADVOCATES.

24. I have considered the grounds laid out on the body of the respective Motions; the facts deponed in the affidavits supporting and opposing the respective Motions; the notice of preliminary objection; and the rival submissions and authorities cited.

25. Before considering the merits of the two applications it is appropriate to first deal with the notice of preliminary objection raised by the respondent and the interested parties.

26. In the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** the court defined the term ‘**preliminary objection**’ in the following manner:

*“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”*

27. The above definition was further advanced in the Supreme Court of Kenya in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** in part as follows:

*“It is quite clear 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.”*

28. The first limb of the preliminary objection touches on whether the first application is *res judicata*.

29. In his further affidavit sworn on 28<sup>th</sup> July, 2020 the applicant stated that the instant cause is separate and distinct from Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI in terms of the parties involved; the orders sought and the substratum of the dispute.

30. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** offered the following interpretation on the legal term ‘res judicata’ in the manner hereunder:

*“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;*

*“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 the 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.”*

*Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;*

*(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those parties were litigating under the same title.*

*(d) The issue was heard and finally determined in the former suit.*

*(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

31. After a critical examination and consideration of the instant application it is apparent the applicants are seeking for the same orders as those sought in the first application.

32. A further scrutiny of the application dated 27<sup>th</sup> June, 2019 and filed by the applicant in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI a copy of which is annexed to the replying affidavit of the 2<sup>nd</sup> interested party, it is noted that the orders sought therein are almost identical to those sought in the first application.

33. The 2<sup>nd</sup> interested party also annexed to his replying affidavit a copy of the ruling delivered by this court on 25<sup>th</sup> September, 2019 in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI.

34. The record shows that this court upon hearing various applications preceding that of 27<sup>th</sup> June, 2019, ordered that the dispute between the parties therein be referred to arbitration and that there be a stay of the proceedings in the Originating Summons therein and applications emanating from the dispute, pending the referral; hearing and determination of the arbitration proceedings.

35. I have already stated that the orders sought in the aforementioned application of 27<sup>th</sup> June, 2019 and the first application herein are substantially similar. It is also apparent that the parties in both instances are the same, save for the respondent who was included in the instant Cause. In my view, the mere fact that the respondent is not a party in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI would not automatically disqualify the applicability of the doctrine of *res judicata/sub judice* doctrine. It is further noted that the issues arising for

determination in both instances are interconnected.

36. From the foregoing, I am convinced that the first application is *sub judice*, rather than *res judicata*, since this court in its ruling delivered on 25th September, 2019 did not hear the merits of the application of 27th June, 2019 and make a determination on it, but instead stayed it. The res-subjice principle is clearly sated, under **Section 6 of the Civil Procedure Act**, 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 proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

37. In the *second* limb of the preliminary objection the question to be answered is whether the applicant is estopped from raising any matter pertaining to the dispute between the parties. On my part, I am satisfied that having found that the first application is *sub judice* and that an order staying all further proceedings relating to the dispute and referring the matter to arbitration had previously been made by this court and in the absence of any indication that such order have been set aside, the applicant cannot seek to litigate similar issues through another application but in a separate Cause.

38. Consequently, I find merit in the preliminary objection. The same is upheld, hence the first application is dismissed with costs to the Respondent and the Interested parties.

39. Having dismissed the first application on the above grounds, I am left to consider the second application, which primarily seeks for two (2) orders: one for referral of the dispute to arbitration and the other is for a stay of all proceedings pending the hearing and determination of the arbitration dispute.

40. Upon my perusal of the Originating Summons and record, it is apparent that the issues arising in the present Cause are substantially similar to those arising in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI even though the orders sought in both instances may slightly vary.

41. It is also apparent from the record that the applicant lodged an Appeal in the Court of Appeal against the ruling and order made by this court on 25th September, 2019 vide the memorandum of appeal lodged on 22nd November, 2019. It remains unclear whether the appeal has been heard and determined.

42. In my view therefore, it would serve no useful purpose for this court to make a determination on the second application at this stage in the absence of an indication as to the outcome of the appeal.

43. Having found that the issues arising in the present instance are substantially related to those in Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI and in view of the fact that the appeal will have a direct impact on the instant Case, I am unable to consider the merits of the second application at this stage. I however find it necessary for the two cases to be heard together.

44. In the end this court makes the following orders and directions:

- a) The Chamber Summons dated 20<sup>th</sup> April, 2020 is stayed until the appeal in the Court of Appeal is heard and determined.
- b) The Chamber Summons dated 3<sup>rd</sup> March, 2020 is hereby dismissed with costs to the Respondent and the Interested parties.
- c) Nairobi Misc. Cause No. 120 of 2020 (OS): MAKONGONYA TIEGO V LIVINGSTONE TOMNO T/A LITOKI ASSOCIATES & 2 OTHERS and Nairobi High Court Misc. Cause No. 122 of 2019 (OS): MAKONGONYA TIEGO V ONSANDO OSIEMO & PETER OGONJI are hereby ordered consolidated.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13<sup>th</sup> day of November, 2020.

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties