



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF NAIROBI**

**MISC. APPLICATION NO. 309 of 2018**

**JOSEPH MUISYO NZIOKA.....APPLICANT**

**VERSUS**

**KANGUNDO MULTIPURPOSE CO-OPERATIVE**

**SOCIETY LIMITED.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 30<sup>th</sup> May, 2018 for orders that there be a stay of execution of the decree dated 4<sup>th</sup> February, 2015 and that the applicant be granted leave to appeal against the judgment entered by the Co-operative Tribunal on 16<sup>th</sup> December, 2014.

Following the filing of that application the respondent filed a replying affidavit through Alfonse Muema Mbindyo, the advocate appearing for the respondent and preliminary point of objection on 22nd June, 2018.

Parties have made oral submissions before me and there is also a response to grounds of opposition filed by the advocate for the applicant. This ruling relates to the subject of jurisdiction of this court to make a determination on the application aforesaid.

In the preliminary point of objection, it is alleged that the applicant is guilty of non-disclosure in that, there exists an order of the Tribunal dated 24<sup>th</sup> February, 2017 where he offered to pay the decretal sum in tribunal case No. 95 of 2014 within 30 days and in default execution would issue. It is the respondent's position that the said order has not been reviewed, set aside and or appealed. Further, the applicant is accused of non-disclosure for failing to disclose that he had filed Miscellaneous Civil Application No. 175 of 2017 in the Judicial Review Division of the High Court on 11<sup>th</sup> April, 2017 seeking leave to apply for an order of certiorari, to quash the order made by the Co-operative Tribunal on 23<sup>rd</sup> November, 2016 and further that, there be leave which should operate as a stay of execution of the decree of the Tribunal dated 4<sup>th</sup> February, 2015.

The respondent contends that the application before this court that is, the Notice of Motion dated 30<sup>th</sup> May, 2018 offends the provisions of Section 7 of the Civil Procedure Act in view of the Miscellaneous Application No. 175 of 2017. The respondent pleads that by the ruling dated 25<sup>th</sup> January, 2018 from the Miscellaneous Application No. 175 of 2017 dealt with all issues sought to be raised in the draft Memorandum of Appeal annexed to this application. There was no appeal that was filed against the said ruling which remains in place to date, and therefore the applicant seeks to have this court sit on appeal against the ruling of 25<sup>th</sup> January, 2018 which was by a court of equal standing.

I have considered the material placed before me and the oral submissions by both learned counsel. From the submissions, I gather the point for determination is whether or not the application is *res judicata*. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides 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.”**

I have looked at the facts as set out in the ruling of Aburili J in Miscellaneous Application No. 175 of 2017 delivered on 25<sup>th</sup> January, 2018. The facts set therein and the analysis by the learned Judge have a direct co relation to the orders set out in the application dated 30<sup>th</sup> May, 2018 by the applicant. In that application, the applicant was Joseph Muisyo Nzioka, and the 3<sup>rd</sup> respondent therein was the respondent in the present applicant. It is not clear why the Chairman of the Co-operative Tribunal was sued as the 1<sup>st</sup> respondent in that application, because that is tantamount to suing a court that makes a determination of a dispute between parties.

The submission by the respondent in the present application that no appeal followed that ruling is true and, if any appeal followed therefrom, the applicant ought to have presented the same. There is also an annexure "AMM2" relating to as claimant Co-operative Tribunal Case No. 95 of 2014 between Kangundo Multipurpose Co-Operative Society Limited vs Joseph Muisyo Nzioka.

There is an order which reads as follows,

**"Upon hearing counsel for the claimant and counsel for the respondent, IT IS HEREBY ORDERED;**

**1. THAT the proposal by the respondent to pay the full amount in 30 days is granted.**

**2. THAT in default execution issue by way of warrant of arrest."**

This order was given on 24<sup>th</sup> February, 2017. There is no evidence on record that the order was reviewed or appealed. It is also a clear demonstration that the proposal was at the instance of the applicant herein.

This brings to the fore the provisions, impact and effect of the Section 7 of the Civil Procedure Act aforesaid. There was an issue between the same parties before the Tribunal and Judicial Review Division of the High Court. These two platforms were competent to try the issue. The issue has been heard and finally decided before the two platforms. The law as contemplated under Section 7 of the Act aforesaid has been fully satisfied. There is no way any other interpretation can be invoked in the circumstances of this case. If that be the case, can the application be sustained or should a preliminary objection be upheld? The answer lies in one of the celebrated cases relating to the subject of preliminary objections. In the case of Mukisa Biscuit Manufacturing Compnay Limited vs. West end distributors limited (1969) EA 696 at page 700 the court observed (as per LAW, JA ),

**"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration."**

Following the said guide, the material placed before me and submissions by counsel, I am persuaded that nothing remains to be adjudicated by the applicant herein which may lead to a different conclusion other than what has already been adjudicated in the same dispute. If I were to hold otherwise, I will be sitting on appeal from the decision of Aburili J which is a court of concurrent jurisdiction.

Further, the applicant is guilty of non-disclosure because, he made an undertaking to the Tribunal at his own request which remains in place to date, yet he has maintained a studious silence about the same in this application.. His application dated 30<sup>th</sup> May, 2018 amounts to an abuse of the court process which cannot be sustained. In view of the foregoing, the objection succeeds and this application is therefore dismissed with costs to the respondent.

*Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of November, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**