



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 658 OF 2009

JAMES GATHIRWA NGUGIPLAINTIFF

VERSUS

MULTIPLE HAULIERS (E.A).....1ST DEFENDANT

MOSES KIASALU KILONZO2ND DEFENDANT

AND

LEE COACH SERVICES LIMITED.....3RD PARTY

RULING

This ruling determines the plaintiff's preliminary objection dated 3rd December 2015 and filed on 4th December 2015. The preliminary objection seeks to have the application filed by the defendants dated 23rd November 2015 dismissed in limine for reasons that:

1. The application is incompetent, vexatious, misconceived and otherwise an abuse of the court process.
2. The application is subjudice Notice of Motion dated 8th May 2015 herein and the decree holder shall at the first instance apply for its dismissal.
3. The application is further resjudicata chamber summons dated 27th January 2014 by the defendant/judgment debtors herein.
4. The applicants/judgment debtors herein have not satisfied the decree as between themselves and the respondent/decree holder as per the court judgment and decree herein.
5. The court cannot sit on an appeal on matters already adjudicated by this Honourable court.
6. The court is thus not properly seized with jurisdiction to grant the orders sought.
 - a. The judgment and decree of the court against the judgment debtors/applicants in favour of the decree holder/respondent's for kshs 2,394,744.20 plus interest and costs.
 - b. There has been no satisfaction of the said decree issued on the 13th February 2015 against the judgment debtors.
 - c. The provisions of Order 1 Rule 21 of the Civil Procedure Rules 2010 (sic).
7. The court is functus officio on issues between the judgment debtors/applicant and decree holder/respondent.
8. The multiplicity of applications by the judgment debtors/applicants herein (sic).

9. The application is an abuse of and a waste of the court's judicial time and is solely meant to defeat the overriding objective of the court as per the provisions of Section 1A and 1B of the Civil Procedure Act.

And shall pray that the application be dismissed forthwith.

The preliminary objection was taken on 9th December 2015 with Miss Obaga representing the respondent decree holder, urging the court not to allow the prosecution of the application by the judgment debtor dated 20th November 2015 as it is resjudicata the application dated 27th January 2014 which was argued before Ougo J on 24th March 2014 and a ruling reserved and rendered together with the judgment on 13th February 2015. That Honourable Ougo J stated at pages 17 and 18 of her judgment that she could not enter judgment against the third party in default of defence and that the defence should move the court appropriately.

Further, that the learned judge did apportion liability and the defendants were advised on how to proceed against the third party. That on 8th May 2015 the defendant filed an application which was placed before Honourable Justice Mboghli who granted counsel leave to come on record for the defendant and also ordered for stay of execution pending interpartes hearing. That the plaintiff's counsels were served and they did file grounds of opposition on 9th September 2015. It was contended that the said application is pending and that it seeks the same orders as the orders being sought in the application dated 20th November 2015 hence the current application is subjudice the application dated 8th May 2015.

Miss Obaga further submitted that Order I Rule 21 of the Civil Procedure Rules is clear that if a judgment debtor seeks indemnity then they have to satisfy judgment passed against them first before seeking to be indemnified by the third party since there was no decree between the judgment debtor and the third party and neither was there a decree between the plaintiff and the 3rd party.

Counsel submitted that the previous advocates for the defendants had correctly advised their clients to pay the decretal sum and seek indemnity from the third party but instead the defendant judgment debtor had brought several 8 applications. She maintained that this court was functus officio and the application is an abuse of the court process hence it should be dismissed and the exparte orders made by the duty judge lifted for non disclosure. She urged the court to allow the preliminary objection.

In response to the preliminary objection, Miss Kisaka counsel for the defendant judgment debtor submitted that the defendant had filed notice of withdrawal of the application dated 8th May 2015 in 24th November 2015. She maintained that the defendants should only pay 50% of the decretal sum which they had issued cheques to the decree holder but that the said cheques were rejected and returned asking for the full decretal sum.

Miss Kisaka also submitted that the delay in filing the application was occasioned by the process of assessing costs and urged that her client's application was meritorious hence the preliminary objection should be rejected.

I have carefully considered the preliminary objection by the plaintiff /decree holder, the submissions by Miss Obaga and the response thereto by Miss Kisaka.

There are several issues for determination in the preliminary objection as raised and these are:

- a. Whether the preliminary objection as taken was well founded.
- b. Whether the defendant's application dated 20th November 2015 is res judicata the judgment of Ougo J.
- c. Whether the application dated 20th November 2015 is subjudice the application dated 8th May 2015.

- d. Whether the defendant can seek indemnity from the third party under Order 1 Rule 21 of the Civil Procedure Rules before settling the decree with the plaintiff.
- e. What orders should this court make?
- f. Who should bear the costs of the preliminary objection?

On whether the preliminary objection(s) raised were well taken by the plaintiff/decree holder, the celebrated case of **Mukisa Biscuits Manufacturing Ltd V West End distributors Ltd CA 9 of 1969[1969] EA 696** is instructive. In that case, the Court of Appeal lay down or established what should be considered to be a preliminary objection and that the court should only consider matters of law not matters of fact. Thus, a preliminary objection must be confined to matters of or points of law which may be argued before the court based on the assumption that all facts pleaded are correct. In **Oraro V Mbaja [2005] 1 KLR 141** Ojwang J. (as he then was) citing with approval the Mukisa Biscuit case(supra) held as follows:-

“ 1.A preliminary objection correctly understood, is 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.

2. Any assertion which claims to be a preliminary objection, and yet it bears s 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.

3. If a matter comes before the court dressed as a” preliminary objection” it will not come co-exist with such factual scenarios as may lead to the court to exercise its discretion by virtue of Section 3A of the Civil Procedure Act.

4. The court’s discretion is never exercised just on the basis of proposition of law: there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised .

5. It has to be appreciated that the court’s discretion exercised by virtue of Section 3A of the Civil Procedure Act is always of for the purpose of upholding the law as far as is possible; and this would require preserving the claims of parties so that they may be heard and determined according to law.

6. The applicant’s plea is that the respondent’s pleadings be terminated in limine. There is no consistency between such a prayer, which belongs to the normal practice attending preliminary objection(matters of law), on the one hand, and the case for ensuring fair trial which the applicant has also urged. On the other hand.”

From the above decision, this court has therefore to determine whether issues of Resjudicata, subjudice and requirements under Order 1 Rule 21 of the Civil Procedure Rules can be raised as preliminary objections.

In **Omondi Vs National Bank of Kenya Ltd & Others [2001] KLR 579 [2001] I EA 177** it was held that:

“ The objection as to the legal competence of the plaintiffs to sue in their capacity as directors and shareholders of the company under receivership) and the plea of Resjudicata are pure points of law which if determined in the favour of the respondents would conclude the litigation and they were accordingly well taken as preliminary objection. In determining both points the court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters. What is forbidden is for counsel to take, and the court to purport to determined, a point of preliminary objection on contested facts or in the exercise of judicial discretion and

therefore the contention that the suit is an abuse of the process of the court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."

From the above decision, I hold that the doctrine of Resjudicata as taken was properly taken in these proceedings.

However, the principle of subjudice would not be a true point of preliminary objection because it invokes the court's discretion to stay or not to stay the subsequent suit (or application) until the earlier application is heard and determined and further, a determination that a matter is subjudice does not finally and conclusively determine the rights between the parties.

In **Lotta V Tanaki [2003] 2 EA 556** it was held:

" The doctrine of Resjudicata is provided for in Section 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality in litigation it makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them (iii) the parties must have litigated under the same title in the former suit;(iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

Having found that Resjudicata was well taken as a preliminary point of law, the question that follow is whether the application dated 20th November 2015 is Resjudicata the decision of Honorable Ougo J, delivered on 13th February 2015. The object of Honourable Ougo's judgment that is relevant to this preliminary point of law as taken by the plaintiff is that the defendant vide a third party notice dated 16th June 2011 sought to enjoin a third party Lee Coach Services Limited the owner of KAR 129B to these proceedings. However, despite service the 3rd party never entered appearance. The defendant therefore urged the court to find that the third party be deemed to have admitted the plaintiffs claim against it. However, the learned judge at page 17-18 of her judgment was categorical that third party proceedings raise questions between the defendant and the third party on liability of third parties to make contribution or indemnity and normally proceed after the trial suit between the plaintiff and the defendant. She relied on **Sango Bay Estates Ltd and Others V Dresdner Bank AG [1971] EA 17** and declined to enter judgment against the third party in default of defence and ordered **" should the defendant seek to pursue the third party for contribution in liability they should move the court appropriately"**

The Learned Judge proceeded at page 18 of her judgment to enter judgment for the plaintiff against the defendants jointly and severally and further ordered thus: **"The defendant may proceed as provided under Order 1 Rule 21 against the third party."**

The learned judge had at paragraph 29 of the judgment found that the driver of the third party's bus too ought to have exercised due care and caution on the road as he approached the stationery vehicle. She therefore was of the view that liability should be apportioned 50:50 between the defendants and the third party.

The plaintiff proceeded to assess costs of the suit and applied for execution of the decree which prompted the defendants herein to lodge an application dated 8th May 2015 seeking to engage the firm of Muriithi Ndonge Advocates to come on record in the place of the firm of Kairu Mbuthia & Kiingati Advocates; stay of execution of the judgment pending hearing and determination of the application; and

that the court do pass half of the judgment delivered in 13th February 2015 to the 3rd party as it was apportioned in the said terms of the judgment delivered by the court.

The above application dated 8th May 2015 was filed under certificate of urgency on 11th May 2015 and placed before the presiding judge on 12th May 2015 who certified the application as urgent, granted leave for the incoming advocate to represent the defendants and also granted a temporary stay of execution for 30 days and directed service of the application upon the plaintiff/respondent for interpartes hearing on a date to be taken in the registry.

In the meantime, the matter went before Honourable Ougo J for review of her judgment to correct arithmetical errors on the awards made and a ruling was delivered on 16th June 2015 in favour of the plaintiff/applicant. The application for stay and passing off 50% to the third party was served upon the plaintiff's counsel who filed grounds of opposition on 9th September 2015. By a notice of withdrawal of application dated 23rd November 2015 and filed on 24th November 2015 the defendants sought to wholly withdraw their application dated 8th May 2015 and filed on 11th May 2015 against the respondent with no order as to costs.

However, there is no evidence of any endorsement by the court of the purported withdrawal of that application. Furthermore, as correctly submitted by Ms Obaga, it is trite law that an application upon which orders had been made and the respondent having been served and filed grounds of objection, could only be withdrawn with leave of court or by consent of both parties. It therefore follows that the application dated 8th May 2015 is validly on record and undetermined.

On 24th November 2015 by another application dated 20th November, 2015 the defendants filed another application by way of Notice of Motion, similar to the one dated 8th May 2015 save that the prayer for coming on record of advocate for the defendant was not part of the latter application.

It is that application dated 20th November 2015 which the plaintiff respondent contends is Resjudicata the judgment of Honourable Ougo J delivered on 13th February 2015 touching on the status of the third party and that it is subjudice the application dated 8th May 2015 hence an abuse of the process of the court and should therefore be dismissed in limine.

The general rule under Section 6 of the Civil Procedure Act is that where the court finds a matter subjudice, then it should stay the latter matter until the former matter is heard and determined. However, the situation is different where the court finds a matter Resjudicata. To determine the issue of Resjudicata in this case this court has to read Section 7 of the Civil Procedure Act together with Order 1 Rule 21 of the Civil Procedure Rules for reasons that the learned judge Ougo was clear that she could not enter judgment against the third party upon being asked by the defendant to do so, despite the fact that she did apportion liability in the ratio of 50:50 between the defendants and the third party. She however entered judgment against the defendants in favour of the plaintiff and advised the defendants that they could proceed as provided under Order 1 Rule 21 (1) of the Civil Procedure Rules against the third party.

From the judgment of Honourable Ougo J, it is clear that she never entered any judgment in favour of the plaintiff against the third party. It would therefore be impossible for this court to pass over or ask the third party to settle the decree herein in the ratio of 50:50 contribution as there is no judgment against the third party in favour of the plaintiff. Secondly, the Learned Judge correctly advised the defendant that it could proceed as provided for under Order 1 Rule 21(1) of the Civil Procedure Rules against the third party to recover the contribution. Order 1 Rule 21(1) of the Civil Procedure provides:

“Where a defendant desires to claim against another person who is already a party to the suit;

- a. ***That he is entitled to contribution or indemnity or***
- b. ***That he is entitled to any relief or remedy relating to or connected with the original subject***

matter of the action which is subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff or

- c. *That any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should be properly determined not only between the plaintiff and defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such claims or issue .*

What clearly emerges in this case is that no directions were ever given on the third party notice issued. It is for that reason in my view, that the learned Honourable Ougo J declined to enter judgment against the third party since there was no order that the question of indemnity between the 3rd party and the defendant be tried and determined at the same time as the trial of the action. Neither were there any directions as to the filing of defence and any other relevant pleadings by the 3rd parties. The question of indemnity as exemplified in Order 1 Rule 18 of the Civil Procedure Rule can only arise after judgment. The rule contemplates that such a question may be tried at or after the trial of the suit. Since the question was not tried at the trial of the suit, it follows that the same can only be tried after the suit, and in this regard, the suit as against the defendant having been fully determined, the defendant can only seek to have that question tried as between him(it) and the third party after settling the judgment in favour of the plaintiff. No directions were given on the liability of the third party to the plaintiff. The defendant did not therefore seek or obtain judgment against the third party to be entered alongside judgment for the plaintiff.

Third party notice serves as a plaint or claim by defendant against third party. The plaintiff had no claim against the third party hence he cannot enforce a judgment against the third party. The defendant must settle the plaintiff's claim and seek to be indemnified by the third party. There is no short cut for him In view of the judgment and finding by Ougo J and her refusal to enter judgment against the third party and in advising defendant to lay claim as appropriate which part of judgment has not been varied , reviewed or set aside, and in view of the fact that this court has not been asked to review, vary or set aside that judgment by Honourable Ougo which was clear at pages 17-18 (material) that.

“ Third party proceedings raise questions between the defendant and the third party(sic) of liability of third party to make contribution or indemnity and normally proceed after the trial suit (sic) between the plaintiff and the defendant this (sic) in essence is a suit between the defendant and third party (see the case of **Sango Bay Estates Ltd and Others Vs Dresdner Bank A.G. [1971] EA 17.**” The third party herein was served with the third party notice but failed to file a defence. Order 1 Rule 17 of the Civil Procedure Rules further provides that,..... as a third party cannot be in default of defence unless he has been ordered to do so.” Guided by this authority this court cannot in essence enter judgment against the third party in default of defence. Should the defendant seek to pursue the third party for contribution in liability they should move the court appropriately.”

From the above holding by Honourable Ougo J, it cannot be that the appropriate way of pursuing the third party is simply asking this court to order that the plaintiff do pursue ½ of the decretal from the third party which would in essence defeat the purpose of the judgment of Honourable Ougo J and in effect reviewing it or sitting on appeal of the learned Judge's judgment and which this court is not sized of the jurisdiction to review without being moved by any party or sit on appeal as that is the preserve of the Court of Appeal.

It is for that reason, therefore that I find the preliminary objection raised by the plaintiff to the defendant's application well taken and meritorious and which this court has jurisdiction to hear and determine.

Accordingly, I allow the preliminary objection and dismiss the defendant's application dated 8th May 2015 with costs to the plaintiff/decree holder.

Dated, signed and delivered at Nairobi this 19th day of January 2016.

R.E. ABURILI

JUDGE