



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 80 OF 2013

EUTYCHUS MWANGI KARANJA

JAMES KAMAU KARUTHUI..... PLAINTIFFS

DAVID MUIGAI MWANGI

JANE WAMBUI MICHUNGU

VERSUS

KENYA TEA DEVELOPMENT AGENCY

MAKOMBOKI TEA FACTORY LIMITED.....DEFENDANTS

RULING

1. Before me is a Notice of Motion dated 11th March, 2013. The application is expressed to be brought under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 and Section 3A and 63(e) of the Civil Procedure Act (Cap 21) Laws of Kenya. The Plaintiffs (hereinafter “Applicants”) seek orders that the Defendants (hereinafter “Respondents”) by themselves or through their authorised agents servants or employees be restrained from in any way deducting any sums of money from the Applicants’ proceeds from the delivery of tea to the 2nd Respondent pending hearing and determination of this suit.
2. Brief facts are as follows. The applicants are tea farmers who supply tea to the 2nd Respondent from which they are paid dues at the end of each month depending on the quantity of tea they supply. Sometime in the year 1993, the 1st Respondent filed a land claim against several parties who included the 1st Applicant vide Nairobi High Court Civil Case No. 4994 of 1993. The said suit proceeded for full trial and judgment was entered in favour of the 1st Respondent. Among the orders that were granted was the one for costs. It was granted in the following terms:

“...5. The defendants/respondents shall pay the plaintiff’s costs in this suit and the same shall bear interest at court rate as from the date of filing suit.”

It is that cost that the Respondents herein have since October, 2012 been recovering from the Applicants’ proceeds of tea delivered to the 2nd Respondent occasioning this application.

3. The application is premised on the grounds on the body of the application and in the supporting affidavits of the applicants sworn on 11th March, 2013. The Applicants claim that they were never involved in the determination of the legal costs and have filed an application seeking the review of

the consent order on the said costs. They aver that the deduction by the 2nd Respondent is illegal since there is no court order to that effect and further that the 2nd Respondent is not an auctioneer authorized to enforce court decrees, execute and attach to satisfy a decree. The Applicants lament that the said deductions have left them destitute since their entire proceeds were deducted yet they wholly depended on the proceeds. That as a result of the deductions they have suffered irreparable loss and damages.

4. In their submissions, the Applicants distinguished the case of **John Gathongo Ndegwa -v- Kenya Commercial Bank Limited (2012) eKLR** relied on by the Respondents and stated that in the instant case, there was no formal decree unlike in the **Ndegwa** case (supra). On the issue of execution of a decree, the Applicants relied on **Republic -v- Resident Magistrates Court at Hola, ex parte Mohamed Salim Gulu (2012) eKLR** where Justice Tuiyott observed that Section 34 (1) provides that questions relating to execution shall be determined by the court executing the decree. In view of the foregoing, they urged that Section 34 (1) does not apply in this suit since there exists no formal decree.
5. The Applicants also faulted the Respondents' mode of execution. They relied on the provisions of Order 22 Rule 6 of the Civil Procedure Rules, 2010 and the case **Rubo Kipngetich Arap Cheruiyot -v- Peter Kiprop Rotich (2006) eKLR** to fortify their argument that the issuance of a certificate of costs as alleged by the Respondents does not in itself entitle them to levy execution against the Applicants without a formal decree.
6. On *sub judice*, the Applicants submitted that the issue for determination in this suit is whether or not the Respondents ought to deduct the Applicants' monies while the issue in Nairobi High Court Civil Case No. 4994 of 1993 was whether the Respondents were entitled to a portion of the Applicants' land by virtue of adverse possession. They submitted that Section 6 of the Act envisages a situation where the previous suit is pending in the same or in any other court. They urged that since Nairobi High Court Civil Case No. 4994 of 1993 was concluded this present case cannot be said to be *sub-judice*. The Applicants relied on the case of **Thiba Min. Hydro Co. Ltd -v- Josphat Karu Ndwiga (2013) eKLR** where it was held that

“It is not the form in which the suit is framed that determines whether it is sub-judice. Rather it is the substance of the suit...”

to emphasize that the substance in this suit is different from that of Nairobi High Court Civil Case No. 4994 of 1993 and thereby cannot be barred by Section 6 of the Act. The Applicants submitted that the issues in this suit are totally different from those in Nairobi High Court Civil Case No. 4994 of 1993 as above mentioned. They therefore urged that the application be allowed.

7. The Respondents opposed the application vide the Replying Affidavit of Florence Mitey sworn on 15th March, 2013 and a Preliminary Objection dated 4th December, 2013. The Respondents contended that since 2006 when costs were awarded, the Applicants have never attempted to settle the said costs. That it is as a result of the said refusal that the Respondents opted to recover the monies from the Applicants' proceeds which recovery, according is legal. Further, it was contended that the court order on costs is enforceable since it has not been set aside; that the Applicants contradict themselves when on the one hand they concede that there exists costs awarded in the previous suit and on the other hand purport that they owe no costs to the Respondents. The Respondents took issue with the Applicants' move to file this suit and contested that this suit is *sub-judice* of the pending application for review, is *res judicata* of Nairobi High Court Civil Case No. 4994 of 1993 and contravene Sections 5, 6, 7 and 34(1) of the Civil Procedure Act.
8. The Respondents reiterated their averments on the issue of *sub judice* and *res judicata* and relied on **Ndegwa** case (supra) in which it was held that

“...the provisions of section 34 (1) and (2) of the Civil Procedure Act bar the plaintiff from filing a separate suit seeking to resolve any question arising from the decree that was passed in the Nyeri case, any such question must be determined by the court that is executing the decree...”

9. The Respondents urged that the application be dismissed. I have considered the depositions and the rival submissions together with the authorities cited by both parties. It is my considered view that the preliminary issue to consider is whether or not this application is *sub-judice* and suit *res judicata*.
10. Section 7 of the Act 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, litigation 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.”

It is clear from the annexed judgment in Nairobi High Court Civil Case No. 4994 of 1993 that the parties, issues and the pleadings were not similar to those in this suit. In that suit, it was a claim on land whilst in the current suit, the issue is whether the Respondents are entitled in law to deduct from the Applicants' proceeds what they consider to be legal costs awarded in the previous suit. In this regard, I am not persuaded that the suit is *res judicata*. This suit can therefore not be said to be *res judicata*.

11. A case is *sub-judice* if it is under judicial consideration. The application pending determination is for review of the order for costs while the current application is for injunction to restrain the Respondent from making deductions from the Applicants to the 2nd Respondent. Clearly, these are two different issues as day is from night.
12. It is true that costs were awarded in HCCC NO. 4994 of 1993. Those costs may not have been paid yet by the Applicants. It is claimed that there has not been any decree passed or extracted which could be the subject of execution. From the Replying Affidavit of the Respondents, it would seem that the deductions of the monies is in purported recovery of the alleged costs. The questions that arise are; even if the costs had been ascertained through the certificate of costs 31st July, 2006 was there any application to execute for the same? If so, when was that application made and what was the result? The decree having been made in 2006 when the order for costs was made, was there any notice to show cause issued? If so, when and what was the result thereof?
13. Since all the foregoing was not disclosed or shown to this court, it may as well be that the deductions complained of has not been authorised by any court order or is there a garnishee order that entitled the Respondents to deduct the monies due to the Applicants? To my mind these are not issues that are capable of being dealt under Section 34 of the Civil Procedure Act. If the Respondents were contending that there was a court order attach the proceeds of the Applicants and that the deductions were pursuant to such an order, then the suit would have been caught up by the provision of Section 34 of the Civil Procedure Act. Since that is not the case, I hold that that Section is not applicable to the present case.
14. Indeed if there was an order of attachment, won't any court of law or even equity move with speed to block an illegal execution? Can any court order attachment of one's entire income. I have always believed that if it is an attachment on ones income, it is only a percentage thereof not exceeding one third. In the instant case, the Applicants entire income is deducted in purported execution. To my mind that it illegal and cannot stand.
15. This being an injunction application, the court is at this stage only concerned with the Applicants establishing a prima facie case and that irreparable loss would be occasioned to them if the order is not granted and lastly, when this court is in doubt, it will decide the application on a balance of convenience. The court in **Mrao Ltd –v- First American Bank Ltd & 2 Others (2003) KLR 125 at page 137** defined prima facie case as follows:-

“In civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

16. The Applicants have asserted their right to their monies which the Respondents have infringed by

deducting entirely without any colour of right as I have enumerated above. The respondents on the other hand claim that they are recovering the costs owed by the Applicants. The Respondents have failed to establish that they obtained a formal decree which they are in the process of executing. They have not shown that there was any order allowing such an attachment. In the circumstances, I find that the Applicants have established a prima facie case with a probability of success.

17. On loss, the Applicants position that their entire proceeds have been deducted and that they are left destitute has not been controverted. To my mind, no court with any conscience will allow a party to be destitute through irregular means. No amount of damages can compensate the damage to be suffered by the Applicants.

18. For those reasons, I find merit in the application and accordingly allow it with costs to the Applicants.

A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 26th day of November 2014

J. SERGON

JUDGE