



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

**Civil Suit
121 of 2008**

**COLLINS
STEPHEN
FORD**
.....
.....
**.....PLAIN
TIFF/APP
LICANT**

- VERSUS-

1. SULTANA FADHIL

2. MAULICE N. KILONZO

3. NICANORY A. AKANGA

T/A FADHIL KILONZO & COMPANY

Coram:

Mwera J.

Birir for Plaintiff

Waithera for Defendant

RULING

A notice of motion dated 6th March, 2012 was filed by the plaintiff invoking the powers granted by ss. 1A, 1B, 3, 3B of the Civil Procedure Act, ss 54, 55 of the Advocates Act and the now repealed Order L rule 1 of Civil Procedure Rules. The merits of that motion are not under review for now because a notice of preliminary objection dated 12th March, 2012 against it, was filed and had to be disposed of first. Suffice to say that that motion had two main prayers for mandatory injunction orders: to compel the defendant's firm to release several trailer-vehicles plus some other chattles and also to deliver to the plaintiff some documents.

The preliminary objection has 2 points:

- i) The application dated 6th March, 2012 was **res judicata**; and
- ii) This Court has no jurisdiction to determine it.

The defendant/applicant told the court that the present application was almost entirely similar to the one the plaintiff once filed dated 15th May, 2008. That the defendant opposed that application by filing its own summons dated 15th June, 2008 requesting that the application dated 15th May, 2008 be stayed as the parties proceeded to arbitration. Serگون Judge ruled on 27th February, 2009 that parties proceed to arbitration in accordance with Section 6 of the Arbitration Act. The plaintiff issued a notice of appeal dated 27th February, 2009 against Serگون Judge's ruling. No more steps were taken in that regard. So the defendant saw the present application as an abuse of the court process, and that this court having referred this matter to arbitration, it cannot entertain it afresh. It had stayed a similar application by its ruling of 27th February, 2009 and that is that.

On his part the plaintiff's position, is that he filed the application dated 15th May, 2008 seeking release of the chattels held by the Respondent/firm of advocates. And the ruling of 27th February, 2009 on the respondent's summons dated 15th June, 2008 indeed referred the dispute to arbitration. But subsequent developments intervened and the time allowed for arbitration lapsed, hence the present application which this court has a jurisdiction to hear.

Stopping here for a moment to reflect on the preliminary objection as far as parties have submitted, this court is of the view that if time of arbitration lapsed before determination of the matter due to subsequent developments, the proper course the parties could/should take was to return to court, explain the prevailing circumstances and seek directions eg. to extend the arbitration period or make such other

orders as meet the justice of the case. It cannot be by way of restarting the process that led to the order to go for arbitration afresh. Seron Judge did that by his order. It was not appealed against or reviewed. Thus the matter cannot be litigated the way the plaintiff wants now at all. Seron Judge having dealt with a similar application before and given a ruling, pointing to the direction the parties should go, the present motion dated 16th March, 2012 is **res judicata**. It is struck out with costs. The preliminary objection is thus upheld.

Delivered on 3rd May, 2012.

.....

J. W. MWERA

JUDGE