



**Permanent Fold Limited v Zhong Wu E-Commerce Kenya Co Ltd;
Kenya Commercial Bank (Garnishee) (Environment and Land Appeal
E063 of 2023) [2024] KEELC 5263 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E063 OF 2023**

**JA MOGENI, J
JULY 8, 2024**

BETWEEN

PERMANENT FOLD LIMITED APPELLANT

AND

ZHONG WU E-COMMERCE KENYA CO LTD RESPONDENT

AND

KENYA COMMERCIAL BANK GARNISHEE

RULING

1. By a Notice of Motion dated 25/04/2024 brought under Order 23 Rule 1 and 2, of the Civil Procedure Rules, 2010, the Respondent/Decree Holder/Applicant (herein applicant) sought the following orders;
 - a. Spent
 - b. The court do issue a garnishee order nisi against Kenya Commercial Bank Limited directing that the deposits held in account number 1317958152 on behalf of Permanent Fold Limited, the appellant herein be attached to answer the total outstanding decretal sum of Kesh 32,935,957.00.
 - c. At the inter partes hearing of this application, the Garnishee order nisi be made absolute and the monies attached be released to the respondent.
 - d. The costs of this application be borne by the appellant.
2. The application was based on grounds stated in the application itself, supported by the affidavit of Zeng Fei an office administrator of the Respondent sworn on even date together with annexures thereto.



3. There is no dispute that there is a decree in favor of the applicant that has not been settled. The appellant/Judgment Debtor (herein appellant) has not sought to have the decree issued herein on 20/11/2023 set aside neither is there an order for stay of execution of the said decree.
4. Before the application was determined the appellant filed a Notice of Preliminary Objection dated 2/05/2024 seeking the following prayers:
 - a. That the Honorable Court as an appellate Court is not clothed with jurisdiction to hear and determine the motion in respect to execution since it's decree of 20th November 2023 is not a decree for monetary execution and is not capable of being executed in the manner herein.
 - b. That this Honorable Court did not issue the original decree.
 - c. That the respondent motion dated 25/04/2024 is an abuse of the court process.
5. Both the application and the preliminary objection were canvassed by way of written submissions. The appellant's/applicant's learned counsel filed written submission dated 10/06/2024 and the respondent's learned counsel filed theirs date 20/05/2024.

Analysis And Determination

6. In examining the preliminary objection, it is appropriate to begin with the locus classicus on the matter, Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696 where Ojwang' JA. held as follows;

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

7. It is undisputed that the tribunal issued a decree against the applicant/ appellant who sought to have it stayed and set aside on appeal but the application was dismissed. The appellate court upheld the decisions of the Tribunal.
8. Now for preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
9. The preliminary objection challenges the jurisdiction of this court to execute a decree since the one issued on 20/11/2023 was not a money decree and further that the original money decree was issued by the tribunal. I therefore, affirm that the filed Preliminary objection by the applicant/appellants herein is founded on all the key grounds of an objection as stated hereof.
10. So the only issue for determination is whether the preliminary objection raises a pure point of law? The issue of jurisdiction of any court is a pure point of law that must be determined before the court



proceeds to determine any other issues before it. A court not clothed with jurisdiction acts in vain. If one does something in vain, then you do it with no result, or to no effect. Abraham Lincoln delivered the Gettysburg Address to make it clear that the Union soldiers did not die in vain. Thus the courts also are careful not to act in vain especially where jurisdictional issues are raised.

11. In his written submissions, the appellant's/applicant's learned counsel challenged the jurisdiction of this court to determine the application dated 25/04/2024 for execution of a decree issue by the Tribunal on 2/06/2023. The applicant's submissions are that the law, section 14 of Cap 301 clothes the Tribunal with the authority to execute its own decree. He also referred to Sections 34(2) and Section 29 of the [Civil Procedure Act](#). Section 29 embodies a phrase;

“...court which passed the decree..”

12. The applicant/appellant has also referred to two court cases namely [Jepkemoi vs Zaburi Enterprises Company Ltd & 2 Others \(Misc. Civil Appl. 43 of 2023\)](#) and [Kipteng vs Good Hope Sacco Ltd; Coop Bank of Kenya Ltd \(Garnishee\) \(Misc App E057 of 2023\)](#) [2023] KEELRC 3272 (KLR).
13. It is the submission of the applicant/appellant that since Business Rent Tribunal issue the decree then the applicants in the notice of motion dated 25/04/2024 cannot ignore this procedure and needed to have filed the motion in the same court for execution.
14. In this instant matter, it is not in dispute that the decree sought to be enforced through the present Application was issued in Business Premises Rent Tribunal Case Number E1066 of 2022. Being dissatisfied with the decision the appellant appealed the decision in this Honourable Court and the Tribunal's decision was upheld. The respondent in the present application is seeking execution of the decree and has filed the Motion dated 25/04/2024.
15. When I first laid my eyes on the Notice of Motion Application, my first question was, why has the Application been filed here in the Environment and Land Court (herein ELC). For this reason, I painstakingly combed through the Notice of Motion Application and the Supporting Affidavit with a view to finding out whether any explanation had been given for the choice of the ELC as the forum to hear the application rather than the same being filed before the Tribunal that issued the decree. To my disappointment, there was absolutely no explanation of the issue of choice of forum.
16. I therefore had to go through the sections of the [Civil Procedure Act](#) on Execution of Decrees, to try and find out whether the trial Court has been divested of jurisdiction or whether there is any provision requiring the respondent/applicant to come to the ELC for the relief sought. There, too, I came to nought. As it stands therefore, this Court has not been presented with any justification why it should usurp the role of the Tribunal which is the trial Court which issued the decree and which is the one possessed with the jurisdiction to oversee the execution and/or enforcement of its orders, including decrees. It has not been demonstrated or even alleged, for that matter, that the trial Court is now functus officio.
17. Indeed in its submissions the appellant/applicant has contended that such power lies with the Court of the first instance whose decree is sought to be executed. Section 18 read 34(1) of the [Civil Procedure Act](#) provides as follows:

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”



18. There is then Section 29 of the same Act which defines the term “court which passed a decree” as follows. addresses the same issues. Section 18 states as follows:

“The expression “court which passed a decree”, or words to that effect, shall, in relation to the execution of decrees, except where the context otherwise requires, include: -

- a. Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance;
- b. Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.”

19. Explanation (a) above points to the trial Court as the Court to oversee execution of its decree and the situation cited in (b) above does not arise in the instant situation since the trial Court has not ceased to exist nor has it been alleged or demonstrated that it has since been divested of jurisdiction. In the circumstances, I find that this Court has no original jurisdiction to deal with matters arising out of execution of the decree of the Tribunal. This Court’s jurisdiction is only on appeals. Although the Environment and Land Court has inherent powers, the same has to be exercised within procedural boundaries.

20. The respondent/applicant’s recourse is to therefore file the application before the same Court of first instance, namely, the Business Premises Rent Tribunal that issued the decree.

21. Thus the preliminary objection as filed is on a pure point of law and the prayers therein are merited.

22. This finding is sufficient to dispose of the Notice of Motion Application dated 25/04/2024. I will therefore not delve into its merits since it has been disposed off by the preliminary objection.

Final Orders

23. The upshot of my findings above is that the Preliminary Objection dated 2/05/2024 is merited and the Application dated 25/04/2024 fails due to lack of jurisdiction.

24. Accordingly, I order as follows:

- i. The Respondent’s/Applicant’s Notice of Motion dated 25/04/2024 is hereby dismissed.
- ii. Considering that the Application was necessitated by the appellant/applicant’s failure to settle a lawful decree, each party shall bear its own costs of the Application.

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It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 8th Day of JULY 2024.

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MOGENI J

JUDGE

IN THE PRESENCE OF:

Mr. Ayugi holding brief for Mr. Ojienda Appellant/Respondent



Mr. Makori for the Respondent

Ms Wangare holding brief for Ms. Waitito for Garnishee

Caroline Sagina Court Assistant

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MOGENI J

JUDGE

