



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

ELC CIVIL APPEAL NO. E56 OF 2021

ESS PEE INVESTMENT.....APPELLANT/APPLICANT

- VERSUS -

DEEGISAT SERVICES LIMITED.....OBJECTOR/RESPONDENT

RULING

I. Preliminaries

1. For determination before this Honorable Court is a Notice of Preliminary Objection dated 15th October, 2021. The objection is raised by the Objector/Respondent against the filed application dated 28th September 2021 by the Appellant/Applicant.

II. The Tenant/Respondent's objection

2. The objection seeks for the said application to be struck out the afore – said application on two (2) the grounds, *inter alia*:-

a) That it does not comply with the requirements of Order XX1 Rule 91 (Sic) of the Civil Procedure Rules.

b) That there is a similar application that is still alive at the interlocutory stage dated 14th September 2021 by the Appellant/Applicant before the lower court requesting for stay of execution of the ruling by the Business Premises Rent Tribunal dated 30th August 2021. (Hereinafter referred to as "BPRT") by Honorable P May (Vice Chair) of BPRT.

III. The Submissions

3. On 18th October, 2021 while in the presence of all the parties in Court, directions were made to the effect that the said Preliminary objection by the Objector/Respondent be disposed off by way of written submission. Pursuant to that, all parties obliged and a ruling date was reserved accordingly.

A. The written submissions by the Objector/Respondent

4. On 15th November 2021, the Objector/Respondent through the Law firm of Messers. Kamanza & Partners filed their written Submissions dated 29th October, 2021 in support of the objection. The Learned Counsel submitted that the Notice of Motion application dated 28th September, 2021 by the Appellant /Appellant disregarded the doctrine of "*sub – judice*" as founded under the provision of Section 6 of the Civil Procedure Act, Cap 21. They stressed that the said provision of the law restrains the filing of multiple suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process. The Learned Counsel submitted that when two or more cases were filed between the same parties on the same subject matter before courts of jurisdiction, based on this doctrine, the matter that was filed later ought to be stayed in order to await the determination to be made in the earlier suit. To buttress on this point, the Counsel relied on the said provision of Section 6 of the Civil Procedure Act and the Supreme Court's decision in the case of "**Kenya National Commission on Human Rights – Versus - AG, IEBC & 16 others.**"

5. The Counsel argued that by filing an application before this court, when there was a similar application pending before the Business Premises Rent Tribunal, was an act of forum shopping. They argued that the law did not permit an Applicant to make an application in two different courts at the same time. The contention by the Counsel was that the Appellant/Appellant was gambling with the justice system to see which of the two courts would give favorable orders to them.

6. The Counsel further argued that the Appellant/Applicant endless litigation over the same subject matter was a waste of court's time and could cause production of different court orders to further cause chaos and confusion. The Counsel urged court to find the acts of the Appellant/Applicant were not only wasting court's time but also prejudicial to the Objector/Respondent. They urged Court to dismissed the application with costs.

B. The written Submission by the Appellant/Applicant

7. On 18th November 2021, the Learned Counsel for the Land Lord/Appellant, the law firm of Messrs. Angeline Omollo & Associates filed their written submissions dated 17th November, 2021. They was submitted that the preliminary objection as raised was not on a pure point of law as it called for the examination of facts by the court. The Learned Counsel submitted that the application filed before the BPRT was already withdrawn in the presence of the Counsel for the Tenant/Respondent hence could not be Res judicata. The Counsel argued that the allegation of sub judice, forum shopping or any prejudice to be suffered by the Objector/Respondent should the application be granted were all unfounded and baseless. In the final analysis, the Learned Counsel prayed for the preliminary objection to be dismissed. Further, they urged Court to allow the prayers sought and the application dated 28th September 2021 and costs be awarded to the Appellant/Applicant.

IV. Analysis and Determination

8. The Objector/Respondent herein has raised a preliminary objection to the Appellant/Applicant's application dated 28th September 2021 on the grounds that; it does not comply with Order XXI Rule 91 and that the application is sub judice to the application dated 14th September 2021 before the BPRT.

9. From the very onset, I would wish to clarify that there is no Order 21 Rule 91 in the Civil Procedure Rules 2010, and notwithstanding the provisions of Article 159 (2) (d) of the Constitution of Kenya, that even if, and assuming the Objector/Respondent had made a typographical error of the orders, but then how comes it seem to be replicated in all its pleadings, I wonder. Nonetheless, the court is unable to decipher of which provision of the law the Objector/Respondent intended to make reference to. I am reminded to rely on the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010 where parties cannot depart but are bound by their own pleadings.

10. In the given circumstances, I will therefore be left to only deal with the issue of sub judice, as a preliminary objection.

ISSUE NO. a). Whether the Preliminary Objection dated 15th October, 2021 by the Objector/Respondent meets the fundamental threshold of a preliminary objection.

11. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held ***that a proper preliminary objection constitutes a pure points of law.*** The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

12. I have further relied on the decision of *Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

13. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. For instance that the Appellant holds that he withdrew an application dated 14th September, 2021 vide a Notice of Withdrawal dated 19th October, 2021 filed before the trial court in the presence of the Counsel for the Objector. Based on this legal ratio, I therefore, find that the filed Preliminary objection raised by the Objector/Respondent fails to satisfy this ingredients for a Preliminary objection.

14. Now turning to the issue of Sub judice as provided for by

Section 6 of the Civil Procedure Act which states that:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

15. The Objector/Respondent has submitted that the application herein offends the doctrine of sub judice. That the appellant has instituted two suits between the same parties pending before courts of competent jurisdiction. The appellant has disputed this claim and argued that it withdrew the said application before the rent tribunal.

16. Sub judice only applies when another suit or proceedings is pending in another court involving the same parties over the same subject matter. Upon perusal of the Notice of Withdrawal of the application dated 14th September 2021 filed by the appellant before the Business Rent Tribunal dated 19th October, 2021, the Honorable Court is fully satisfied that the application before the tribunal dated, 14th September 2021 which is said to be sub judice to the application herein was actually terminated or discontinued by Counsel for the Appellant/Applicant. It does not exist and hence no longer a going concern before the BPRT.

17. The application is longer pending and can not be used to successfully invoke the doctrine of sub judice. Furthermore, a preliminary objection ought to be on a pure point of law, argued on the presumption that all facts pleaded by either side are corrected. A preliminary objection cannot be raised and sustained if any fact has to be ascertained. Whenever court retires to ascertain facts, as it has done in this scenario, no objection can be sustained.

V. Determination

18. The upshot of the above, therefore, I proceed to make the following directions/Orders:-

a) **THAT** the Notice of Preliminary Objection dated 15th October 2021 be and is found to lack merit and the same is dismissed with costs to the Appellant/Applicant.

b) **THAT** further, in order to expedite this matter the said the Notice of Motion application dated 28th September, 2021 be canvassed by way of Written submission as follows:-

i. Whereby the Appellant/Applicant is granted 14 days leave to file and serve written submissions; and

ii. Thereafter the Respondent will have 14 days leave to file and serve written submissions.

iii. There be an ‘*Inter parte*’ hearing and/or highlighting of the submissions on 28th April, 2022 and taking a ruling date thereof.

c) **THAT** the Costs of the Notice of the preliminary Objection to be awarded to the Appellant/Applicant and be borne by the Objector/Respondent.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF MARCH 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

1.

In the presence of:-

a) M/s. Yumna, Court Assistant

b) Nonappearance by the Advocate for the Land Lord/Appellant.

c) Nonappearance by the Advocate for the Tenant/Respondent.