



Hunkar Trading Company Limited v Gazlin Energy Limited (Civil Case E354 of 2023) [2025] KEHC 1774 (KLR) (Civ) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E354 OF 2023**

**CJ KENDAGOR, J
FEBRUARY 21, 2025**

BETWEEN

HUNKAR TRADING COMPANY LIMITED PLAINTIFF

AND

GAZLIN ENERGY LIMITED DEFENDANT

RULING

1. This Ruling relates to two applications. The first application is a Notice of Motion dated 1st September 2023, in which the Applicant (Gazlin Energy Limited) asks the court to strike out the Respondent's (Hunkar Trading Company Limited) Plaint, dated 9th August, 2023 and filed to this Court. The second application is a Notice of Motion dated 4th December 2023, in which the Respondent asks the Court to stay the proceedings at the lower Court in MCCC No E9366 of 2021 Gazlin Energy Limited vs Hunkar Trading Company Limited.
2. The Applicant sued the Respondent at the Chief Magistrate's Court at Milimani via MCCC No E9366 of 2021. However, the parties settled the dispute through a consent which they registered in court on 23rd March, 2022. The Consent read as follows;

"It Is Hereby Agreed By Consent:-

1. That the [Respondent] surrenders the legal and beneficial ownership of Motor Vehicle Reg No KCL 029U and Trailer No ZF6824 to the [Applicant] in full and final settlement of the suit herein subject to;
 - a. The [Respondent] obtaining an equivocal undertaking of the chargor of the said Motor Vehicle and Trailer in favour of the [Applicant's] Advocates, that upon payment of Kshs.5,000,000/= by the [Applicant] to the Chargor, they shall forthwith



discharge the charge over the vehicle and trailer and deliver the original log books over the same to the [Applicant's] Advocates.

- b. Subject to receipts of the unequivocal undertaking by the [Applicant's] advocates the [Applicant] shall pay to the chargor the sum of Kshs.5,000,000/=.
2. That the [Respondent] shall initiate the process of transfer Motor Vehicle Registration number KCL 029U and Trailer Number ZF 6824 on its TIMS, NTSA portal and further issue the [Applicant] with all the necessary documents to effect the change of ownership of the said motor vehicle and the trailer upon fulfillment of the obligations in paragraph 1 above.
3. That subject to completion of the conditions in paragraph 1 and 2 above, the [Applicant] shall unconditionally release the Motor Vehicle Number KCL 028U and Trailer number ZF 6823.
4. That consequent to performance of paragraph 1 to 3 above all the interim orders in the suit shall stand discharged and the entire suit marked as settled.
5. That each party shall bear their own costs.”
3. In compliance with the terms of the undertaking and the consent, the Applicant paid the aforesaid Kshs.5,000,000/= to the bank herein Stanbic Bank, which released the logbook over Motor Vehicle KCL 029U and Trailer ZF 6824 to the Respondent. The Applicant followed up with the Respondent to honour its part of the consent and complete the transfer on its TIMS, NTSA portal but the Respondent refused to cause the transfer.
4. The Respondent filed a fresh suit at this Court on 9th August, 2023, the current suit, in which it accused the Applicant of contractual breach of the recorded consent and sought several orders against the Applicant. It sought compensation for idle machinery, loss of profits, and general and exemplary damages for failing to abide by the orders of the court dated 23rd March, 2022.
5. The Applicant filed a Notice of Motion at this Court dated 1st September, 2023 asking the Court to strike out the Respondent's Plaintiff. It argued that the new proceedings before this Court were sub-judice as there exists proceedings over the same subject matter between the same parties at the Magistrate's Court at Milimani vide MCCC No. E9366 of 2021. It argued that the matter before the lower Court was yet to be heard and determined. The Respondent filed a Replying affidavit dated 22nd September, 2023 in which it asked this Court to dismiss the Applicant's Notice of Motion dated 1st September, 2023.
6. The Applicant filed an application to the lower Court, dated 15th August, 2023 seeking leave to amend its pleadings (the Plaintiff) and for an order to enjoin the bank herein Stanbic Bank in order to compel the parties to honour the consent and/or re-open the matter a fresh to be heard on merit. It sought to amend the Plaintiff to include substantive prayers for discharge of the vehicle and the transfer. The Respondent filed a Replying Affidavit in which it asked the lower Court to dismiss the Applicant's application dated 15th August, 2023.
7. The Respondent also filed a notice of Preliminary Objection at the lower Court dated 1st September, 2023 arguing that the Court was functus officio and did not have the jurisdiction to allow the application. It claimed that the consent settled the matter with finality and that the application had the effect of reinstating the suit. It thus asked the Court to strike out the application for being incompetent.
8. The lower Court delivered a ruling on 17th November, 2023 in which it allowed the Applicant's application dated 15th August, 2023. It gave the Applicant leave to amend pleadings and introduce third parties to the suit.



9. The Respondent was dissatisfied with the Ruling and wished to stay the lower Court's proceedings pending the hearing and determination of its suit at the High Court. It approached this court through a Notice of Motion dated 4th December, 2023 seeking a stay of the proceedings at the lower Court as it pursued the current suit before this court. The Application sought 5 orders, namely,
 - a. Spent.
 - b. That this Honourable Court be pleased to grant an order for stay of proceedings in MCCC No E9366 of 2021 Gazlin Energy Limited vs Hunkar Trading Company Limited pending the hearing and determination of this Application.
 - c. That this Honourable Court be pleased to grant an order for stay of proceedings in MCCC No E9366 of 2021 Gazlin Energy Limited vs Hunkar Trading Company Limited pending the hearing and determination of this suit.
 - d. That the Honourable Court grant any other order it may deem just and fit to grant.
 - e. That costs of this Application be provided for.
10. The Applicant opposed the said Application vide a Replying Affidavit dated 16th April, 2024. It stated that the Court should not grant the orders sought because it did not properly invoke the court's jurisdiction.
11. The two applications were canvassed by way of written submissions.

The Applicant's Written Submissions

12. The Applicant filed its submissions dated 12th July, 2024 in response to the two applications. The submissions are in support of the Applicant's application dated 1st September, 2023, and in opposition to the Respondent's Application dated 4th December 2023. It submitted that the Respondent's Plaint dated 9th August, 2023 and filed to this Court should be struck out for being sub judice. It argued that the issues raised in the Respondent's Plaint are still under consideration in the lower Court. It submitted that the Respondent's instant suit before this Court should not be allowed because it has the effect of relitigating the matter afresh under the pretence of the different issues over the same subject.
13. The Applicant also submitted that the Respondent should not be granted the stay orders stopping the proceedings at the lower Court. It argued that the Respondent did not use the proper procedure of challenging the lower Court's Ruling allowing the Applicant to amend its pleadings and include other parties. The Applicant argued that, since the Respondent was dissatisfied with said ruling, it should have sought for review of the ruling at the lower Court or should have appealed the said ruling to this Court. It thus argued that the stay orders should not be granted as the Ruling has not been challenged or set aside.

Respondent's Written Submissions

14. The Respondent filed its submissions dated 19th June, 2024 in response to the two applications. The submissions are in support of the Respondent's Application dated 4th December, 2023, and in opposition to the Applicant's application dated 1st September, 2023. It submitted that its Plaint dated 9th August, 2023 and filed to this Court should not be struck out. It argued that the issues raised in the Plaint are different from the issues canvassed at the lower Court and hence it cannot be said to be sub judice. It argued that the instant suit is different from the suit at the lower Court in that the new suit is seeking compensation for idle machinery and for loss of profits.



15. It also submitted that this Court should stay the proceedings at the lower Court. It argued that the lower Court does not have the authority to continue entertaining the matter at the lower Court because the Court had become functus officio once the parties recorded the consent judgment on 23rd March, 2022. It submitted that the consent judgment prevents the lower Court from entertaining substantive proceedings or applications by parties. It argued that the proceedings at the lower Court are improper because they are relitigating on issues already covered in the consent judgment.

Issues for Determination

16. I have considered the two Applications, their respective supporting affidavits, replying affidavits, and the submissions from both parties. I take the view that there are two issues for determination.
 - a. Whether the Respondent's Plaintiff 9th August 2023 is competent.
 - b. Whether orders for Stay of Proceedings are warranted.
17. The two issues are related to each other because the finding on the first issue will inform whether this Court will investigate the second issue. If the Court finds Respondent's Plaintiff 9th August, 2023 is competent, it will go ahead and investigate the second issue. However, if the Court finds that Respondent's Plaintiff 9th August, 2023 is incompetent for being sub judice, then the Court will dispense with the second issue.

Whether the Respondent's Plaintiff 9th August 2023 is competent.

18. The Applicant submitted that the Respondent's Plaintiff 9th August, 2023 is incompetent for being sub judice and should be struck out. On the other hand, the Respondent argued that its Plaintiff dated 9th August, 2023 is competent and properly before this court. It maintained that the issues raised in the instant Plaintiff are new and different from the issues raised at the lower Court.
19. I have relooked at the Plaintiff before this Court and the consent judgment recorded at the lower Court with a view to ascertaining whether the two address similar issues and the same subject matter. In other words, does the Plaintiff raise issues previously addressed in the Consent Judgment.
20. In the Plaintiff, the Respondent states that it is suing the Applicant for breach of contract. It outlines the background of the dispute and admits that the dispute was settled vide a consent judgment in Milimani Courts MCCC No. E9366 of 2021. It states that, subsequently, the Applicant refused to adhere to the terms of the consent judgment by failing to release the Motor Vehicle No KCL 028U and Trailer Number ZF 6823. It argued that, as a result of failing to release the said Motor Vehicle and Trailer, it has suffered losses for idle machinery and had lost profits that it would have earned if the motor vehicles had been released to it.
21. I have also seen the consent judgment dated 23rd March, 2022. The consent judgment relates to the Motor Vehicle No KCL 028U and Trailer Number ZF 6823. It required the Respondent to initiate the transfer of Motor Vehicle No KCL 028U and Trailer Number ZF 6823 on its TIMS/NTSA Portal and give the Applicant all the necessary documents to effect change of ownership. On the other hand, the consent judgment requires the Applicant, once the Respondent had fulfilled part of its obligations under the judgment, to release the Motor Vehicle No KCL 028U and Trailer Number ZF 6823 to the Respondent.
22. In my view, the dispute articulated in the Plaintiff emanates from the enforcement of the consent judgment. It appears that, for some reasons, the Applicant and the Respondent did not discharge



their obligations under the consent judgment. Based on this background, was it then proper for the Respondent to initiate a new suit at this court? Is the current suit sub judice?

23. The provisions of Section 6 of *Civil Procedure Act* defines the principle or the doctrine of sub judice as follows;

“..... No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”

24. The Court in *Kenya Bankers Association versus Kenya Revenue Authority (2019) eKLR*, interpreted the doctrine in the following terms;

A cursory look at the prayers sought in this case show that they relate to the same subject matter. However, the principle of sub judice does not talk about the “prayers sought” but rather “the matter in issue” I find that the matters in issue in the suits are substantially the same. In *Re the matter of the Interim Independent Electoral Commission*, the Supreme Court cited with approval the Australian decision where it was held: -

“... we do not think that the word “matter” ...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

25. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*, the Supreme Court pronounced itself on the subject of sub judice as follows;

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

26. I take note that the case at the lower Court is still active and revolves around the same subject matter. In my opinion, the subject matter in the two suits is the same. Both suits are more or less required to determine the parties’ obligations under the consent judgment and probably determine whether any of the parties is guilty of failing to fulfill its obligations under the consent judgment.

27. The Respondent argued that the parties at the suit in the lower Court are different from the parties in the instant Plaintiff. I note that indeed, there is a new Defendant in the lower Court, by the name Stanbic Bank Limited, who is not a party to the instant Plaintiff before this Court. Does this create any difference? I do not think so.



28. On this issue, I am persuaded by the decision of the Court in *Business Partners International Kenya (Ii) Limited v Otundo & another* (Miscellaneous Civil Suit E567 of 2021) [2022] KEHC 3288 (KLR) (Commercial and Tax), where it faced a similar question and held as follows;

“It is obvious from the above that the sub judice rule only applies where another “suit or proceeding is pending” in another court involving the same parties and over the same subject.....

It is noteworthy that there is an addition of a new party to the current suit. The mere addition of a party or parties to a suit does not alter the substance of the suit as was held in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR (supra)”

29. Although the matter at the lower court had initially been settled by consent, I note that the lower Court delivered a ruling on 17th November, 2023 in which it gave the Applicant leave to amend pleadings at the lower Court and introduce third parties to the suit. I note that the Respondent was dissatisfied with the said ruling, but I also note that the said ruling has never been challenged in Court, appealed or set aside. Thus, as it stands, the lower court is rightly seized of the matter and the issues raised in the Respondent’s Plaintiff are alive at the lower Court.

30. Having found that the Respondent’s Plaintiff is incompetent, the second issue for determination becomes moot and this court shall not determine the same. The stay orders sought by the Respondent are hereby denied.

Disposition

31. The Respondent’s Plaintiff dated 9th August, 2023 is incompetent for offending the doctrine of sub judice and is hereby struck out with costs to the Applicant.

32. The Respondent’s application for stay of proceedings in MCCC No E9366 of 2021 *Gazlin Energy Limited vs Hunkar Trading Company Limited* is hereby dismissed.

33. The Applicant is awarded costs of the two Applications.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM THIS 21ST DAY OF FEBRUARY, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Mwenda Advocate for Plaintiff

