



REPUBLIC OF KENYA



**Kangethe v Kiarie (Civil Appeal E006 of 2024)
[2025] KEHC 2381 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2381 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E006 OF 2024**

JN NJAGI, J

MARCH 6, 2025

BETWEEN

BONIFACE KAMAU KANGETHE APPELLANT

AND

SUSAN WAITHERA KIARIE RESPONDENT

RULING

1. The Appellant herein has filed an application dated 30th December 2024 seeking the following orders:
 1. Spent
 2. Spent
 3. That the garnishee Nisi Order issued on 17th December 2024 in relation to Safaricom Limited in the name of Trident Insurance Company Ltd pay bill No. 985850 or any other bank account held by the garnishee on behalf of Trident Insurance Company Ltd be stayed and lifted pending the hearing and determination of this application.
 4. That the Garnishee Nisi Order issued on 17th December 2024 in relation to Safaricom Limited in the name of Trident Insurance Company Ltd pay bill No. 985850 or any other bank account held by the garnishee on behalf of Trident Insurance Company Ltd be reviewed and set aside.
 5. That the costs of the application be provided for.
2. The Respondent thereupon filed a Preliminary Objection dated 21st January, 2025 on the grounds that this court lacks jurisdiction to hear the application and also to issue any orders in regard to staying, lifting, reviewing and or setting aside the garnishee order nisi issued by the trial court.
3. This court did however grant prayer No.3 which had the effect of lifting the garnishee orders pending inter partes hearing of the application.



4. The Preliminary Objection was canvassed by way of written submissions of the respective advocates appearing for the parties.

Submissions

5. Mr. Wambua Kilonzo for the Respondent/Applicant filed submissions dated 21st January 2025 in which he submitted that the orders being sought to be reviewed were issued by the trial court in Hola and as such, the prayer for review can only be granted by the same court. Counsel quoted the provisions of Section 80 of the *Civil Procedure Act* and Section 45 (1) of the Civil Procedure Rules in regard to review of judgments, decrees and orders of the court and submitted that this court cannot give itself powers to review orders of the lower court in that this would be acting ultra vires.
6. Counsel submitted that the ex parte orders issued by this court were final orders as once the garnishee order nisi was lifted, the funds held were released and the Respondent was left exposed without being heard. He submitted that a mandatory injunction cannot be issued ex parte as a party has the right to be heard. Counsel in this respect relied on the cases of *JMK v MWM & Another* (2015) eKLR, *Board of Education vs Rice* (1911) AC 179 and *Msagha vs Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004* (Lessit, Wendo & Emukule, JJ ON 3/11/06) (HCK) (2006) 2 KLR 553, which cases emphasized the right of a party to be heard.
7. It was the submission of the Respondent that the Appellant filed a similar application at the trial court dated 20th December, 2024 seeking similar orders as in the present application. That the said application is pending determination and therefore this court lacks jurisdiction to determine this application since the application violates the provisions of Section 6 of the *Civil Procedure Act* which bars a court from proceeding 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. The respondent in this respect relied on the case of *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)*, where the Supreme Court held the following on the issue of sub judice:

....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.
8. The Respondent submitted that the subordinate court at Hola has jurisdiction to review its own orders and thus the appellant's action of instituting a similar application in the High Court and the lower court is outright abuse of the court process and the sub judice rule.
9. The Appellant on the other hand filed submissions dated 29th January, 2025 through the firm of Wesonga Wamalwa & Kariuki Associates. Mr. Wamalwa pointed out that this court by its ruling dated 16th December, 2024 directed that there be stay of execution of the consent judgment as well as the declaratory proceedings in Hola CMCC No. 052 of 2024, E056 of 2024, E062 of 2024, E067 of 2024, E074 of 2024 and E101 of 2024 pending the hearing and determination of this appeal.
10. Counsel submitted that the orders obtained in the declaratory suits were obtained by concealing material facts on the orders of this court issued on 16th December 2024 staying the subject declaratory suits that were before the lower court. It was submitted that this court has power to review and set



aside orders issued by the lower court which are in conflict with the orders issued on the 16th day of December, 2024.

Analysis and Determination

11. I have considered the grounds advanced in support of the Preliminary Objection and the grounds in opposition thereto. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. Sir Charles Newbold P. stated: -

A preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

13. Similarly, in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

14. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable

15. It is not contested that there was a consent judgment recorded in favour of the Respondent as against the Appellant and as a result, the consent judgment provoked a number of declaratory proceedings. Aggrieved by that decision, the appellant preferred an appeal to this court and in the interim, the court directed that there be a stay of the consent judgment as well as a stay in the declaratory proceedings in *Hola* CMCC No. E052 of 2024, E056 of 2024, E062 of 2024, E067 of 2024, E074 of 2024 and E101 Of 2024 pending the hearing and determination of the appeal.

16. Subsequently, the Respondent proceeded to obtain a Garnishee Nisi Order on the 17th day of December, 2024 after an order by this court to stay all the primary suits as well as the declaratory suits had been issued.

17. For a 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.



18. The Respondent submits that the ex parte orders issued by this court were final orders as once the garnishee order nisi was lifted, the funds held were released and the Respondent was left exposed without being heard. He submits that a mandatory injunction cannot be issued ex parte since a party has the right to be heard.
19. The Appellant on the other hand submits that the orders obtained in the declaratory suits were obtained by concealing material facts and that this Honourable court has powers to review and set aside such orders which are in conflict with the orders issued on the 16th day of December, 2025.
20. As already been stated, one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. While no proof that the funds held were released, the ground of objection would in itself call upon the Court to inquire into the conduct of the parties and the events leading to filing and execution of the declaratory suits. The Court will be called upon to inquire of the pleadings to ascertain whether or not the Garnishee Order Nisi was issued during the pendency of the stay period issued by this court. Equally the Court will have to inquire into evidence to find out if the Judgment Debtor complied with the Orders of this court of 16th December, 2024 and whether the Garnishee Order Nisi was procedurally granted. Such inquiries would oust the Preliminary Objection from being one arising from a pure point of law.
21. The Respondent also contends that the suit herein offends the provisions of Section 6 of the [Civil Procedure Act](#) which provides that:

Stay of suit -

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.
22. It has to be noted that Preliminary Objections have limited scope in their area of application. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly”.
23. Although the issue that the application is sub judice raises a pure point of law, its effect would in my view not result in the dismissal of the claim but it would merely result in an order staying the latter suit pending the determination of the suit that was the first to be filed. Consequently, I am of the view that this ground is not a proper one to be raised in a Preliminary Objection. The issues raised in the preliminary Objection ought to be canvassed in the application dated 30th December, 2024.
24. The upshot is that I find that the Preliminary Objection dated the 21st day of January, 2025 does not raise pure points of law and is thus without merit. The same is dismissed with costs to the Appellant.



25. This court on the 8th January 2025 did grant Prayer 3 of the Notice of Motion dated 30th December 2024 in its entirety. Having re-examined the pleadings and in view of the fact that the application dated 30th December 2024 is still pending, the orders issued by this court on 8th January 2025 which had the effect of lifting the garnishee orders of the lower court are hereby set aside and the orders of the lower court thereof are instead stayed pending the hearing and determination of the application dated 30th December 2024.

26. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MALINDI THIS 6TH DAY OF MARCH 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Nyabuto HB for Mr. Kilonzo for Respondent/Applicant

Mr. Wamalwa for Appellant

Mr. Kilonzo present

Court Assistant – N/A.

