



Ethics & Anti-Corruption Commission v Lodwar Midwest Hotel Ltd (Miscellaneous Application 246 of 2023) [2024] KEHC 3 (KLR) (10 January 2024) (Ruling)

Neutral citation: [2024] KEHC 3 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 246 OF 2023
RN NYAKUNDI, J
JANUARY 10, 2024**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION APPLICANT

AND

LODWAR MIDWEST HOTEL LTD RESPONDENT

RULING

1. On 22.11.2023 EACC herein being the Applicant filed a certificate of urgency accompanied with an originating motion expressed

In the Matter of: The Anti-Corruption and Economic Crime Act No 3 of 2003 & The Ethics and Anti-Corruption Commission AC, 2011

and

In the Matter of: An Application by the Ethics and Anti-Corruption Commission for an Order Under Section 56 of the Anti-Corruption and Economic Crime Act No 3 of 2003 to Prohibit the Transfer or Disposal of or Other Dealings (Howsoever Described) with the Sum of Kshs 3,684, 308.80 and Kshs 2,866,884.15 or any Amount thereof held in Bank Accounts No 1252036280 and 1106297229 Respectively at KCB Bank Kenya Ltd

and

In the Matter of: Account No 1252036280 In the Name of Lodwar Midwest Hotel And Account No. 1106297229 Held in the Name of Samuel Kuwom Eregae, Both Accounts Held at Kenya Commercial Bank Ltd

2. Being filed under certificate of urgency the matter was placed for hearing of certificate on 22.11.2023. During the ex-parte hearing I directed that the Applicant do serve the Respondent in this matter with the Certificate and accompanying originating summons so as to help the court fully understand this



matter in issue. In the same forum this court exercising discretion granted ex-parte interim orders in terms of Prayer No. 2 & 3 of the substantive application as against the respondents. It was not until the 28.11.2023 when the respondent counsel filed a Notice of Preliminary Objection as against the application and orders issued 22.11.2023. In addition, the respondent also file a replying affidavit alluding to the same cause of action. The substratum of the arguments raised by the respondent fall within the scope of the following paragraphs:

1. That the originating motion dated November 22, 2023 is incompetent and fatally defective by dint of section 56(3) of the [Anti-Corruption and Economic Crimes Act, 2003](#)
 2. That Eldoret HC Misc. Civil Application No E109 of 2023, Ethics and Anti Corruption Commission-vs- Lodwar Midwest Hotel Limited, Samuel Kuwon Eregae & KCB Bank (Kenya)Limited. On the same subject matter and between the same parties is still pending for hearing and determination of the dispute and the same is fixed for Ruling on 19.1.2024
 3. That the orders dated 23.11.23 as extracted and served upon the Respondents are final and thereby determining the ex-parte Application without inter-partes hearing of the Application which is contrary to law. The said orders should therefore be discharged forthwith.
 4. That the filing of these proceedings separately is an utter abuse of the court process in view of the pending of Eldoret HC Misc. Civil Application No E109 of 2023, Ethics and Anti-Corruption Commission –vs-Lodwar Midwest Hotel Limited, Samuel Kuwon Eregae & KCB Bank (Kenya)Limited and the same should therefore be struck out with costs to the 1st and 2nd Respondent
3. The record therefore shows that the impugned orders being subject on ex-parte hearing and as extracted by the Deputy Registrar prima facie by dint of it rendered substantially the originating summons determined as if it was on the merits. Subsequently from the filings made by the respondent undoubtedly there is a primary suit filed before the session judge Wananda referenced as Eldoret HC. Civil Application No. E109 of 2023, Ethics and Anti – Corruption Commission –vs- Lodwar Midwest Hotel Limited, Samuel Kuwom Eregae & KCB Bank (Kenya) Limited. Suffices to say that as the matter stands this cause of action is still pending before the High Court No. 2 which is a court enjoying concurrent jurisdiction with this court. I have gone to a long extent to appraise and understand the contents of affidavits filed by both the Applicant and the Respondent. It is clear before me that the applicant is a litigant in that other suit Indexed as Eldoret Mis Application No 109 of 2023 but elected to initiate Misc App. 246 of 2023 knowing very well that this same subject matter is still pending before High Court No. 2 a court with the same status of jurisdiction with this court.
4. The question is whether this court has jurisdiction to admit or even hear the applicant on the same interlocking issues as those raised before that other High Court within the same territorial jurisdiction. Generally speaking a litigant who approaches the court must be clear which jurisdiction he or she intends to invoke for the various remedies pleaded in the plaint, originating summons Notice of Motion or Chamber Summons. From the onset of reading the materials placed before me the question that bothers my mind is whether High Court 1 and High Court 2 can exercise jurisdiction simultaneously on the same subject matter involving identical parties to the litigation to me [the constitution](#) and statute law abhors such procedural defects. Further it is not clear from the applicant’s perspective why it thought it fit to re-open fresh proceedings before this court. A jurisdictional question as raised by the respondent goes to the root of the court’s powers and as a judge presiding over this matter has to inquire into whether a matter under certificate of urgency like in the instant scenario has



prima facie met the jurisdictional threshold. As stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* (2012) eKLR ,

A court cannot assume jurisdiction by way of judicial craft or it will not assume jurisdiction by way of a litigant's pestering it to do so. The court's mandate is to do justice, however that justice can only be dispensed through the laid down framework. Consequently, this court is bound by the provisions of *the constitution* and the statute which instruments donates such powers on jurisdiction. Similarly, the applicant should have considered the relationship of the principle of comity to the above stated litigation. Briefly stated the principle of comity is that the first court to acquire jurisdiction over the subject matter of a cause of action shall retain this jurisdiction to the exclusion of any other court until its duty has been performed. It looks like comity is a legal principle well known and discussed but little applied by litigants.

5. What is the challenge of this case is the sound concern of hopeless conflicts of decisions or orders likely to emanate from the two courts of concurrent jurisdiction. After a careful consideration of these points I hold the view that this court should abate the action in favour of the jurisdiction of the court presided over by Wananda J in Eldoret Mis Application N0. E109 of 2023 because being an earlier suit filed the judgement rendered by it would be a bar to the action pending before me.
6. One question which might be raised is whether the result of this court would be the same with the findings and reasoning of that other court. The answer to me will be in the negative. The primary court upon which the suit was instituted has the powers to handle all issues within the jurisdictional limit of the court conclusively without invoking the jurisdiction of this court. Essentially this court is not a forum of conveniens. Handling this case unless the context dictates it would otherwise result in a mistrial.
7. Regarding the scope of the ex-parte orders as extracted a perusal of the record reveals that they appear fiercely conclusive whereas the spirit of it all was interim interdict pending the interparties hearing on the merits to give effect to the rights of the parties. While this may have been relevant the framers of *the constitution* enacted article 47 on *Fair Administrative Action* and article 50 on Fair trial rights. The right to a fair trial can be violated in many ways but as a general principle it has always been borne in mind that a party to a suit commonly referred to as the respondent /defendant must at all times be given a genuine possibility of answering the claim, challenging evidence, or as the case may be cross -examining witnesses and doing so is in consonant with procedural justice. It is of interest at this stage to point out that ex-parte orders parse are reserved and sustained in circumstances that may impair substantive justice. The essential feature of it is not to express finality of any rights in an adversarial proceeding.
8. However, notwithstanding that position the concerned proceedings before this court are affected by the principle of comity and whether the set jurisdiction of this court was appropriately invoked given the initial suit pending before a court with concurrent jurisdiction. Had this court known of the existence of Miscellaneous Civil Application No. E109/2023 it would not have assumed jurisdiction. In any event, it is for the reasons of good order and good governance in the administration of justice. In my view therefore, I seem to be persuaded that the ex-parte orders extracted might as well occasion prejudice or mistrial in the pendency of the suit or application in E109/2023.
9. As I make this determination herein I am conscious of the gravitas of the ex parte application and subsequent ex-parte orders extracted by the Deputy Registrar. The meaning and effect of it is that in the proceedings held the applicant while fully aware of the original suit on an act of avoidance initiated fresh proceedings in HCMA 246/2023. I think the question of deciding whether to maintain the ex-parte orders as extracted were not meant to dispose of the issues raised in the originating summons.



10. Consequently, the ex parte orders be and are hereby set aside and this case docket be transferred to High Court No. 2 presided over by Wananda J who on 5.12.2023 directed this matter be consolidated with that in his docket. In this respect, a further mention for directions be undertaken on the 15.1.2024 for a status conference. By this ruling both counsels are on notice to attend the conference as scheduled without fail. Each party to be at liberty to apply

It is so ordered

DATED, SIGNED AND DELIVERED VIA E-MAIL AT ELDORET THIS 10TH DAY OF JANUARY 2024.

R. NYAKUNDI

JUDGE

