



NK v AOA (Family Appeal E021 of 2022) [2024] KEHC 6964 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 6964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E021 OF 2022
G MUTAI, J
FEBRUARY 16, 2024**

BETWEEN

NK APPELLANT

AND

AOA RESPONDENT

RULING

1. The decision of the Court of Appeal of East Africa in *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* [1969]EA 696 is rightly famed for the delineation therein of what amounts to a preliminary objection. Law, JA wrote that:-

“so far as I am aware, 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.”

2. Sir Charles Newbold, P, in his concurring opinion, added, in part, that:-

“A preliminary objection is in the nature of what used to be called 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.”



3. What is not often cited is the Court’s caution against the liberal use by counsels of preliminary objections in matters which should rightly be heard on merits. Sir Charles Newbold, P, in the said decision, wrote that:-

“the improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.
4. His Lordship’s laconic observation is apt in this matter. In my view, this is a preliminary objection which should not have been raised as it is so clearly bereft of merit.
5. Vide Notice of Preliminary objection dated 26th September 2022, the Respondent’s counsel objected to the appeal on the following grounds:-
 1. That the matter herein offends provisions of sections 6 and 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya;
 2. That the matter herein is frivolous, vexatious and an abuse of the Court process; and
 3. That the matter herein should, therefore, be dismissed with costs.
6. The Respondent submits that the appeal offends sections 6 and 7 of the Civil Procedure Act, which sections bar, respectively, the prosecution of a suit when the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed, and where the matter is directly and substantially in issue in a former suit between the same parties and the matter has been heard and finally determined by a competent Court.
7. In my view, section 6 of the Civil Procedure Act is inapplicable herein as there is no pending matter before this or other court with respect to the subject matter of this appeal. Family Appeal No. E008 of 2021, between the parties herein was determined in a judgment delivered on 30th May 2022. In the said decision, this Court dismissed the appeal against the judgment of the Hon. Sindani that she delivered on 31st March 2021 in Tononoka Children Cause No. 129 of 2020. The Court had previously dismissed a Judicial Review application, to wit, Mombasa High Court JR E034 of 2021, dated 26th July 2021, vide which orders of certiorari and prohibition were sought against the decision of the Court below, in the ruling delivered on 21st September 2021. There are, therefore, no pending proceedings to which this appeal can be considered as being sub judice.
8. From the foregoing, it is clear that to determine this preliminary objection, the Court must consider, as it has done when determining whether the appeal is sub judice, the previous appeal and establish if this latter appeal is res judicata.
9. EC Mwita, J in CK Bett Traders Ltd & 2 others versus Kennedy Mwangi & Another [2021]eKLR set out the elements that must be present for a suit to be deemed as being *res judicata*. These are that:-
 - a. The suit or issue was directly and substantially in issue in the former suit;
 - b. The former suit was between the same parties or parties under whom they or any of them claim;
 - c. Those parties were litigating under the same title;
 - d. The issue was heard and finally determined in the former suit; and



- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or suits in which the issue was raised.
10. I am not persuaded that it is possible to determine whether this appeal is *res judicata* the previous appeal without first looking at the respective records of appeal. Since the Court must establish factual matters, it is thus clear that a preliminary objection cannot be rightly raised.
11. The foregoing notwithstanding, it is clear that the two appeals arise from different decisions of the Court below. The Appeal No. E008 of 2021 between the same parties, which this Court determined on 30th May 2021, arose from the decision the Hon Sindani delivered on 31st March 2021. This instant appeal arises from the decision the Hon V.J Yator made on 20th July 2022. The two impugned decisions, though similar, are separate and distinct.
12. The upshot of the foregoing is that I find no merit in the preliminary objection. The same is dismissed.
13. As this is a matter regarding the welfare of children, each party shall bear his or her own costs.
14. The matter will be mentioned on 12th March 2024 for directions on how the appeal will be canvassed so that this old matter may be determined as soon as possible.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 16TH DAY OF FEBRUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

No appearance of the Appellant;

No appearance for the Respondent; and

Arthur - Court Assistant

