



Shri Krishana Overseas Limited v Daminian Limited (Commercial Miscellaneous Application E373 of 2023) [2024] KEHC 6698 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E373 OF 2023**

MN MWANGI, J

MAY 15, 2024

BETWEEN

SHRI KRISHANA OVERSEAS LIMITED APPLICANT

AND

DAMINIAN LIMITED RESPONDENT

RULING

*****ARGUMENTS**

1. The applicant, Shri Krishana Overseas Limited filed a Notice of Motion dated 10th May, 2023 under certificate of urgency seeking the following orders-
 - i. Spent;
 - ii. That this Honourable Court be pleased to summon Anne Njambi and Daniel Mwanthi Mututo who are Directors/Shareholders of the respondent, to attend Court on an appointed day to be orally examined as to the business and affairs of the respondent and/or property or properties of the respondent and/or the respondent's means and ability to satisfy the decretal sum in Milimani Small Claims Court SMCCCOMM Case No. E2763 of 2022 Shri Krishana Overseas v Damian Ltd;
 - iii. That upon the personal attendance and examination of the respondent's Directors and/or Shareholders, namely, Anne Njambi and Daniel Mwanthi Mututo, this Honourable Court be pleased to make an order directing him (sic) to produce before the Court the respondent's books of accounts, audited financial statements, annual returns, VAT returns, bank statements, cheque books, title deeds, bank guarantees and other statutory/relevant document relating to the operations, property ownership and transactions of the respondent for the last five (5) years



and the said Anne Njambi and Daniel Mwanthi Mututo be examined on oath on the said documents;

- iv. That in default of such attendance and/or providing the requested documents as prayed in 2 and 3 above, this Honourable Court be pleased to lift the corporate veil of the respondent and the said Directors and Shareholders namely, the said Anne Njambi and Daniel Mwanthi Mututo be personally held liable to pay the applicant the decretal sum in Milimani Small Claims Court SMCCCOMM Case No. E2763 of 2022 Shri Krishana Overseas v Damian Ltd;
 - v. That this Honourable Court be pleased to issue any other or further orders in the interest of justice; and
 - vi. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn on 10th May, 2023 by Mr. Sonvir Singh, a Director of the applicant Company.
 3. On being served with the said Notice of Motion, the respondent filed a Notice of Preliminary dated 26th June, 2023 raising the following grounds-
 - i. That the application is hopelessly misconceived, frivolous, totally devoid of merits and malafides for the reason inter alia that the applicant seeks to enforce an order/decre against a party that was not a party to the proceedings in Nairobi SCCCOMM/E2763/2023 which violates its right to fair hearing and as such a gross abuse of the Court process;
 - ii. That the present application is an exercise in futility as no judgment has been entered and decree issued against the respondent herein and as such there are no orders/decre to enforce;
 - iii. That the failure by the applicant to amend its pleadings at the Small Claims Court is likely to embarrass and prejudice the Court process before this Honourable Court if at all this Honourable Court were to exercise its discretion and allow the said application; and
 - iv. That the application is bad in law, misconceived and discloses no reasonable cause of action as against the respondent thus rendering it fatally and incurably defective and ought to be struck out.
 4. This ruling relates to the Notice of Preliminary Objection filed by the respondent, Damian Limited. In its written submissions dated 30th September, 2023, Mr. Odeck, learned Counsel for the respondent submitted that the respondent seeks to have the Notice of Motion dated 10th May, 2023 struck out and/or dismissed with costs because the applicant seeks to enforce an order/decre against a party that was not privy to the proceedings in Nairobi SCCCOMM/E2763/2023 Shri Krishna Overseas Limited v Damini Limited thus the same violated the respondent's right to be heard by dint of the provisions of Articles 25(b) and 50(1) of *the Constitution* of Kenya. The respondent contends that no judgment has been entered and decree issued against the respondent herein and as such, there are no orders/decre to enforce. The respondent also contends that the entire suit before the Trial Court and the Notice of Motion dated 10th May, 2023 disclosed no reasonable cause of action against the respondent.
 5. Mr. Odeck relied on the Supreme Court decision in *Aviation & Allied Workers Union Kenya Limited & 3 others* [2015] eKLR, where the Court held that a Preliminary Objection may only be raised on a pure question of law, and to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. That the facts are deemed agreed, as they are prima facie presented in the pleadings on record.



6. The respondent's Counsel submitted that the facts not in dispute are that vide a statement of claim dated 19th February, 2022, the applicant herein instituted the suit to wit Nairobi SCCOMM/E2763/2023 Shri Krishna Overseas Ltd v Damianian Limited. That on 1st September, 2022, the applicant herein obtained judgment in default against Damianian Limited in the said suit for the sum of Kshs.391,115.31 together with costs and subsequently, the decree dated 20th March, 2023 was against a Company that is a total stranger to the respondent Company and its directors. The respondent's Counsel stated that it is an undisputed fact that the applicant sought to execute the said decree against the respondent herein, namely, Damian Limited, failure to which it proceeded to file the Motion dated 10th May, 2023 seeking to lift the respondent's corporate veil and/or to have its Director's cross-examined for alleged fraud, and that led the respondent to file the present Preliminary Objection.
7. It was submitted by the respondent's Counsel that the Notice of Motion dated 10th May, 2023 is misconceived, bad in law and fatally defective and ought to be struck out for reasons that the Motion and the decree the basis of it are dead on arrival by dint of the provisions of Article 25(b) and 50(1) of the Constitution, and that there is no judgment and/or decree issued as against the respondent Company herein. Further, that the suit before the Trial Court, the basis of the Motion herein discloses no cause of action, reasonable or otherwise as against the respondent.
8. The respondent asserted that the judgment in default in the Trial Court was delivered on 1st September, 2022 and a decree issued on 20th March, 2023 for an entirely different company namely, Damianian Limited and not the respondent herein Damian Limited, which was not a party to the suit and could not participate in the same. Counsel stated that the applicant never amended their pleadings at any stage to enable the respondent herein to exercise its right to be heard and participate in the said suit. He cited the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 which allows the Court to add a defendant on its own motion or on application by either party either orally or formally. He contended that the applicant failed, refused and/or neglected to exercise its duty and right of amendment, thus it cannot now cry foul as it has itself to blame as it ought to have instituted proper proceedings against the respondent and/or amended its pleadings to afford the respondent the right to be heard and defend the suit.
9. In written submissions filed by the applicant dated 22nd September, 2023 the applicant contends that the issues raised by the respondent do not constitute pure points of law but is founded on disputed issues of facts and should be dismissed.

ANALYSIS AND DETERMINATION

10. The issue for determination is if the Notice of Preliminary Objection is merited.
11. A Preliminary Objection should only raise a pure point of law. It should be 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. See *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*). The Court in the case of *Oraro v Mbaja* [2005] 1KLR 141 made the following observation in this regard –

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
12. It is not disputed that the respondent entered appearance but failed to file a defence. The respondent contends that it failed to do so because the company that was sued was Damianian Limited and not



Damian Limited. In this Court's considered view, that cannot constitute a pure point of law as in order to prove that the applicant sued the wrong company in the lower Court, the respondent would have to adduce evidence on factual issues to prove that it was established as Damian Limited and not otherwise. The respondent would also have to explain why it entered appearance if the name appearing on the Summons to enter appearance was Daminian Limited and then failed to file a statement of defence.

13. Having found that the Notice of Preliminary Objection does not raise pure points of law, I will not delve into other issues contended by the respondent in its written submissions such as, that it was denied the right to be heard and now there is a looming execution against it whereas it was not a party in the lower Court. Those to me are issues that should be canvassed in the application dated 10th May, 2023.
14. The upshot is that the Notice of Preliminary Objection dated 26th June, 2023 is hereby dismissed with costs. The supporting affidavit filed by the respondent sworn on 15th June, 2023 by Daniel Mututo is hereby struck out as there is no application that the said affidavit is meant to support. The respondent was required to file a response to the application dated 10th May, 2023. A supporting affidavit cannot be deemed to be a proper response to an application that the respondent sought to oppose.
15. The application dated 10th May, 2023 shall be heard in its merits.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kariuki for the applicant

Mr. Odeck for the respondent

Ms B. Wokabi – Court Assistant.

Page 2 of 2 NJOKI MWANGI, J

