



Sunfunder Inc & another v Mayfair Insurance Company & another (Civil Case E158 of 2019) [2024] KEHC 9156 (KLR) (Commercial and Tax) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E158 OF 2019
JWW MONG'ARE, J
JULY 15, 2024**

BETWEEN

SUNFUNDER INC 1ST PLAINTIFF

BEYOND THE GRID SOLAR FUND, LLC 2ND PLAINTIFF

AND

MAYFAIR INSURANCE COMPANY 1ST DEFENDANT

UNDERWRITING AFRICA LIMITED 2ND DEFENDANT

RULING

1. The 1st Defendant has by a Notice of Motion Application dated 5th June 2023, moved this Honourable Court seeking for orders for security for costs to be provided by the 2nd Plaintiff, pending the hearing and determination of this case by the court.
2. To support the said Application, the Applicant has filed a supporting affidavit and a further affidavit sworn by Consolata Kiura dated 5th June 2023 and 6th October 2023 respectively.
3. The Applicant argues that as a result of the amendment of the Plaint a 2nd Defendant was introduced to the suit and that the said Defendant is a company domiciled in the State of Delaware in the United States of America and therefore outside the jurisdiction of this court. The Applicant argues that it has tendered a good defence with high chances of success and that in the event that it succeeds, it will have difficulties collecting its party and party costs against the 2nd Defendant, since the said 2nd Defendant has no known assets within the Republic of Kenya capable of being attached to satisfy a decree of this court.



4. The Applicant further takes issue with the deponed of the Replying affidavit from the Plaintiffs, Mr. Ritesh Shah, who, it argues, has not provided authority from the Plaintiffs to swear the affidavit on their behalf and hence the said Replying Affidavit violates the provisions of the Companies Act.
5. The 2nd Plaintiff opposes this Application. In its affidavit sworn by Mr. Ritesh Shah sworn on 16/8/2023 the Respondent has raised the defence of res judicata to the application. The 2nd Defendant argues that the Applicant have previously a similar application seeking security for costs, this time against the 1st Plaintiff, which application this court heard and determined against the Defendants by a ruling delivered on 4/3/2021. It is the position taken by the Respondent that the application is vexatious, frivolous and an abuse of the court process and urges the court to dismiss the same.
6. In any event, the Respondent argues that, the application seeking security for costs is not merited. The Plaintiffs argue that they have before the court a good case with likelihood of success and that the application has not met the threshold for the grant of the reliefs sought. That the reliefs sought are discretionary and for a court to grant the same pending the hearing and determination of the suit before it, the court must be satisfied that indeed the Defendant has no means of satisfying a decree from the court, should the suit be determined against it. The Respondent argues that it has a local presence through its fund manager and has capacity locally to meet its obligations, if any, arising from orders of this court. The Applicant urges the court to dismiss the application as filed for want of merit.
7. Both parties have filed written submissions which were orally highlighted before the court.

Analysis And Determination:-

8. I have carefully considered the application, the affidavits both in support and opposition to the said application and rival submissions filed thereto. I note that three issues arise for determination by the court, to wit:-
 - i. Whether the application as filed is res judicata.
 - ii. Whether the replying affidavit by Ritesh Shah should be struck out.
 - iii. Whether the applicant has met the threshold for grant of the orders of security for costs sought.
9. Res judicata is a jurisdictional issue. Before delving to the core of the application before this court, it is important to determine whether the court has jurisdiction to entertain the application as filed. The essentials of Res judicata have been set out in the Black's Law Dictionary, 11th Edition as follows; "(1) an earlier decision on the issue; (2) a final judgment on the merits; (3) the involvement of same parties, or parties in privity with the original parties....."
10. Section 7 of the Civil Procedure Act, CAP 21, Laws of Kenya provides that:-

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”



11. In the decision of *Kenya Commercial Bank vs Benjob Amalgamated Ltd*(2017) eKLR , it was held as follows:-

“ the elements of res judicata have been held to be conjunctive rather than disjunctive. As such, elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit.

- a. The suit of issue was directly and substantially in issue in the former suit
- b. The former suit was between same parties or parties under whom they or any of them claim
- c. Those parties were litigating under the same title.”

12. It is common ground that the Applicant in the present suit moved the court by a similar application against the 1st Defendant dated 23rd August 2019 and a determination made vide a ruling of this court. Subsequently, an application to amend the Plaint to include the 2nd Plaintiff was allowed by the court and thereafter the Applicant moved this court through the present motion seeking similar orders against the now 2nd Plaintiff.

13. I note from a perusal of the previous motion that the orders sought are similar to those in the present application and that the grounds supporting the said motion are substantially the same in that the Applicant has advanced the argument that the 2nd Plaintiff, just like the 1st Plaintiff, is a foreign registered company with no known local address and that in the event that it succeeds in defending the suit, it will encounter difficulties in pursuing any orders for costs awarded to it on the basis that there no locally identifiable assets of the 2nd Plaintiff capable of being attached by the court to satisfy such a decree.

14. I have perused the amended Plaint and note that the 2nd Plaintiff and the 1st Defendant are similarly described. I have also noted that the cause of action for the suit before the court emanates from a common set of facts for both Plaintiffs and having filed the suit jointly as Plaintiff, any award for costs can be settled by either party. I am therefore satisfied that this application is res judicata as the issues the court is being invited to consider were already considered in the previous motion and the court at that time declined to order security for costs against the 1st Plaintiff.

15. I am satisfied therefore that the present motion meets the elements of res judicata as set out under section 7 of the *Civil Procedure Act*. Subsequently, the said motion is dismissed and the court will not proceed to consider the two other issues set out thereunder. Costs of this application are awarded to the 2nd Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Zakayo for the 1st Defendant/Applicant.

2. Mr. Wachira for the Plaintiffs.



3. Amos - Court Assistant

