



Kogi v Biashara Sacco Society Limited & another (Miscellaneous Civil Application E034 of 2024) [2024] KEHC 12497 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E034 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

JACKSON KAMAU KOGI APPLICANT

AND

BIASHARA SACCO SOCIETY LIMITED 1ST RESPONDENT

METROPOLITAN CREDIT REFERENCE BUREAU 2ND RESPONDENT

RULING

1. The applicant herein, Jackson Kamau Kogi, filed the Notice of Motion dated the 30th May 2024 seeking the following orders;
 1. That this Honorable court be pleased to make an order expunging, deleting and removing the plaintiff's name from such records held by the second Respondent or any other body to pave way to the Applicant to apply for financial loans from his other financial institutions to include Banks, Saccos or any other Financial lending institutions.
 2. That this Honorable court be pleased to cite, pronounce and declare that reference by the first Respondent to the second Respondent instructing them to list and register the applicant as an incompetent and illegal person to receive any financial assistance or loan from financial institutions, Banks, Societies, Saccos or any other financial bodies is illegal, oppressive, defamatory of the applicant's personal reputation, integrity, dignity and character, is in bad faith, ill will and extremely malicious under all circumstances.
 3. That this Honorable court be pleased to order that registering and /or entering the applicant's name in the 2nd Respondent's records as a person of no financial means when there is a pending suit before the Co- operative Tribunal in Nairobi being case Number E211 of 2023 is a breach and an abuse of court process and general provisions of the Bill of Rights as set out in the Constitution of Kenya 2010 which provides that " Every Person Shall Enjoy The Rights And



Freedoms In The Bill of Rights To The Greatest Extent Consistent With The Nature of The Right”.

4. That this Honorable court be pleased to order that the second Respondent’s illegal actions to enter the applicant in its bad records that the applicant cannot qualify to apply for any financial assistance in any financial institution to include Banks, Saccos, Societies or any other financial institution is punitive, a violation and denial of his rights set out in the Bill of Rights
 5. That pending the hearing and determination of the existing Tribunal case no. E211 of 2023 before the co-operative Tribunal in Nairobi, this Honorable court be pleased to issue an injunction restraining the first and the second Respondents by denying the Applicant his Constitutional rights as set out in the Bill of Rights by continuing to register or list the applicant’s name in their books as a bad debtor or as a person not qualified to seek for any financial assistance from other banks, saccos or any other financial institution.
 6. That the Honorable court be pleased to make such necessary orders as it may deem fit or expedient in favour of the applicant herein.
 7. That the costs of this application be provided for.
2. Before the application could be heard, the second Respondent filed a Preliminary objection dated the 15th July, 2024 on the following grounds;
- 1) That the remedies sought cannot issue in a miscellaneous application.
 - 2) That the suit is to that extent incompetent, bad in law, fatally defective and otherwise an abuse of the court process.
3. The court gave directions that both the Preliminary objection and the application be heard together by way of written submissions and all the parties complied with the said directions
4. This court has duly considered the application, the responses thereto and the submissions filed herein and it is my considered view that the outcome of the Preliminary objection will determine the application. In the premises aforesaid, the court will first consider the Preliminary objection.
5. In support of the Preliminary objection, the 2nd respondent has argued that the application is misconceived and premature in that the orders of injunction prayed for in the application cannot be mounted on an application without a substantive suit being filed. That the first step would be to institute a suit which discloses a prima facie case with arguable issues. Reliance was placed on the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR and on the Provisions of the *Civil Procedure Act* on the procedure of instituting a suit. It submitted that there are no competent proceedings before the court upon which the reliefs can be granted.
6. The 1st respondent submitted along the same lines as the 2nd respondent and stated that this court lacks jurisdiction to determine the application because the remedies sought by the Plaintiff cannot issue in a miscellaneous application.
7. On his part, the applicant urged the court not to pay undue regard to procedural technicalities. That the form of the application is a technical matter which, if regarded in its entirety, will be to the detriment of the applicant and the applicant will be dismissed unheard. In support of this contention, reliance was placed on the case of *Simon Ogada Andiwo v Safaricom Plc & 15 others* [2021]



8. The essence of a Preliminary Objection was given by Law JA and Sir Charles New bold P, in the case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors* [1969] E.A 696 at page 700 where the court 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 jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Sir Charles new bold P. added as follows page 701

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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”

9. The court has considered the Preliminary objection and the submissions in support of and in opposition of the same.

10. It is true that the applicant has moved this court by way of a miscellaneous application dated the 30th May 2024 through which he has sought substantive orders. In order for this court to effectively hear the application, it will be required to take evidence and /or enquire into the facts of the case, which cannot be done in a miscellaneous application. The court has also been moved to grant an injunction against the respondents pending the hearing and determination of an existing Tribunal case no. E211 of 2023 before the Co-operative Tribunal in Nairobi.

11. As rightly submitted by the 2nd respondent, there is no case pending before this court on the basis of which it can issue an injunction or any other remedy prayed for in the application. The remedy for temporary injunction is provided for under order 40 of the *Civil Procedure Rules*, as follows;

“The court may by order grant a temporary injunction to restrain such an act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”

12. This provision of the *Civil Procedure Rules* envisions existence of a suit before an injunction can issue and not otherwise. I do not agree with the applicant’s submission that the form of the current application is a procedural technicality.

13. In the circumstances afore going, I find that the preliminary objection has merits and the same is hereby allowed with costs to the respondents.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the 1st Respondent



.....for the 2nd Respondent

