



**Amollo, Adede & Anyanzwa Advocates v Chelimo t/a Blue Seal Communication & 2 others; Kenya Commercial Bank Limited & 4 others (Interested Parties) (Miscellaneous Application E093 of 2022) [2023] KEHC 2154 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E093 OF 2022  
TA ODERA, J  
MARCH 9, 2023**

**BETWEEN**

**AMOLLO, ADEDE & ANYANZWA ADVOCATES ..... APPLICANT**

**AND**

**PAUL BARNABA CHELIMO T/A BLUE SEAL COMMUNICATION .... 1<sup>ST</sup>  
RESPONDENT**

**BLUE SEAL COMMUNICATIONS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**OKICON GENERAL WORKS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... INTERESTED PARTY**

**SBM (K) LIMITED ..... INTERESTED PARTY**

**STANBIC BANK (K) LIMITED ..... INTERESTED PARTY**

**PRIME BANK (K) LIMITED ..... INTERESTED PARTY**

**KINGDOM BANK (K) LIMITED ..... INTERESTED PARTY**

**RULING**

1. Amollo Adede and Anyanzwa advocates herein after referred to as the applicant filed the chamber summons dated April 14, 2022 seeking;
  - a. That an order be and is hereby issued directing the 1<sup>st</sup> interested party, Kenya Commercial Bank Limited to debit a sum of Kshs 12,590,000/= on the 1<sup>st</sup> and 2<sup>nd</sup> respondent's account No 1121968880 and credit the said amount on the account No 0492366453001 being held by the applicant herein Amollo, Adede & Anyanzwa advocates by the 2<sup>nd</sup> interested party, SBM (K)



Limited forthwith pursuant to the High Court Order issued by Lady J. Kamau in HCCC No 8 of 2018 on April 5, 2022.

- b. That an order be and is hereby issued directing the 1<sup>st</sup> interested party Kenya Commercial Bank Limited to debit a sum of Kshs 110,000/= on the 1<sup>st</sup> and 2<sup>nd</sup> respondent A/C 1121968880 and credit said amount to A/C 0492366453001 being held by the applicant herein Amollo, Adede & Anyanzwa Advocates by the 2<sup>nd</sup> interested party SBM (K) Limited forthwith being payment for a dishonest cheque payment for April 3, 2022 issued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
2. On May 31, 2022 the firm of Omondi Abande and company Advocates for the respondents filed a notice of preliminary objection dated May 26, 2022 on the grounds that ;
    - a. The applicant seeks to illegally and unlawfully execute the judgment ,decree and order in Kisumu commercial case No 2018 Paul Barnaba Chelimo T/a Blue Seal Communication and Blue Seal Communications limited v NCBA (K) Limited against express and explicit provisions of Section 34 of the *civil procedure Act*.
    - b. The application is incompetent, frivolous, misconceived and founded on a misinterpretation of the law and in any event the orders sought cannot issue as they are tantamount to creating legal morass.
    - c. The application lacks merit and is otherwise an abuse of the process of the court.
    - d. The respondents shall apply that this application be struck out with costs to respondents.
  3. Directions were taken that the preliminary objection proceeds by way of written submissions.
  4. The applicant, the respondents, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties filed submissions herein.
  5. The applicant submitted that what amounts to a preliminary objection was laid down in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited*[1969] EA. 696 in which Sir Charles NewboldP observed as follows:-

“ 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 off the suit .... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop” .

6. The respondents submitted that that section 34 of the *civil procedure Act* provides that “

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. “
7. It was submitted that the applicant cannot purport to file a miscellaneous application seeking to execute the orders in the a separate suit being Kisumu HCCC No 8 of 2018 and that any issues arising from that suit should he dealt with in that suit. To buttress this point respondents cited case of *DML v*



ML [2016] eKLR where the case of Eutyclus M wangi Karanja & others v KTDA and another [2014] eKLR was cited with approval that ;

“ From the above, it is evident that questions touching on execution of decrees are within this court’s jurisdiction. The law prohibits filing of a separate suit for execution purposes “

10. Also that decree is defined as “ means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

(a)	any adjudication from which an appeal lies as an appeal from an order; or
(b)	any order of dismissal for default:

11. Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;
12. Further that this court has no jurisdiction to entertain the application dated January 24, 2021 and should down its tools as jurisdiction is every thing as was held in the case of owners of the Lilian S” v Caltexoil (Kenya) Limited(1989). The 2<sup>nd</sup> and 3<sup>rd</sup> interested parties in their submissions also supported the submissions.
13. The applicant submitted that the gist of the application is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents disobeyed court orders dated April 28, 2022 and hence they were cited for contempt in prayer 10 ordering them to pay decretal sum of Kshs 12,700,000/= and that the said orders can only be appealed from or reviewed. Also that the preliminary objection herein is not about the jurisdiction of this court as per submissions of the respondents dated November 20, 2022. Applicant agreed with the submissions that questions arising between the parties should be addressed in one suit.
14. Further that no decree has been issued herein to warrant section 34 of the civil procedure Act to be invoked. Also that a court order is not a decree and that the application seeks to cite respondents for disobedience of court orders. Further that he who comes to equity must come with clean hands and that this court has inherent power to enforce its orders under Article 159 of the constitution as was held in the case of Kenya national Human Rights Commission v Attorney general and another. It was submitted that no compelling reason has been given as to why the court orders were not complied with.
15. Applicant further submitted that the application herein is a child of Kisumu Miscellaneous High Court Commercial Suit No 8 of 2018 which was consolidated with the instant application and the consolidation does not in any way injure the parties herein. They cited the case of Selecta Kenya Gmbh & Co v KG Chase bank Kenya Limited & 2 others [2018] where it was held that the court has powers to consolidate suits even on its own motion where issues and witnesses are the same .
16. I have considered the preliminary objection, the submissions, the cited cases and section 34 of the Civil Procedure Act. The law on preliminary objections in Kenya was settled by the case of Mukisa Biscuits Manufacturing Co. Ltd v End Distributors Limited [1969] EA. 696 (Supra). Applicant argued that there is no preliminary point of jurisdiction raised as there is no order or decree herein. Respondent



- submitted that section 34 of the [civil procedure Act](#) clearly states that all issues arising from a decree between the same parties should be dealt with in the court executing the decree and not a separate suit.
17. I have seen section 34 of the [civil procedure Act](#) and I agree with the parties that the same prohibits questions arising between the same parties from the decree or order being addressed in a separate suit as rightly submitted by the applicant, respondents and the interested parties herein. I have seen the application herein and I note that the application seeks execution of the orders issued in HCCC No 8 of 2021 Kisumu. The preliminary objection herein is thus rightly before this court on the matter of section 34 of the [civil procedure Act](#) which is a matter of law.
  18. It is clear from the application dated April 14, 2022 and the annexed order that this application emanates from the said HCCC No 8 of 2021 Kisumu and the parties and subject matter therein and in this application are the same. The applicant argued that the said suit and this application were consolidated but I have not seen a record of the same and no application for consolidation has been made herein.
  19. The applicant cited cases relating to contempt of court but what is before court now is the issue of Jurisdiction which must be determined first because Jurisdiction is everything and without it the court cannot move a step forward as was held in the celebrated Lilian S case (Supra).
  20. It was also contended that this court on its own motion can order consolidation of the application and the HCCC No 8 of 2021 Kisumu but I do not see the justification of the same as preliminary objection has already been raised on it and it is the duty of this court to determine the same. In any event in the cited cases, the suits were pending hearing and determination and not execution of the decree as in the instant suit.
  21. The application dated April 14, 2022 offends the express provisions of section 34 of the [civil procedure Act](#) which prohibits filing of a separate suit to determine an issue of execution of a decree as was held in the cited [DML v ML](#) case (supra). I thus uphold the preliminary objection and I proceed to strike out the application dated April 14, 2022 with costs to respondents, the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties.
  22. 30 days Right of Appeal.

**T.A. ODERA - JUDGE**

**9.3.2023**

**Delivered virtually Via Teams Platform in the presence of;**

**Mr Owino holding brief for Mr Abondo for the Applicant,**

**No appearance for Respondents,**

**No appearance 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties,**

**Court assistant: Oyando**

**T.A. ODERA - JUDGE**

**9.3.2023**

**Owino: We seek that the ruling be forwarded to our email addresses.**

**Order: Copy of the ruling be forwarded to the email addresses of all the parties herein.**

**T.A. ODERA - JUDGE**

**9.3.2023**

