



Asego Holdings Limited v Mayfaire Bank Limited & another; Okundi (Interested Party) (Civil Case E005 of 2022) [2023] KEHC 3099 (KLR) (Commercial and Tax) (14 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E005 OF 2022**

A MABEYA, J

APRIL 14, 2023

BETWEEN

ASEGO HOLDINGS LIMITED PLAINTIFF

AND

MAYFAIRE BANK LIMITED 1ST DEFENDANT

LEGACY AUCTIONEERS 2ND DEFENDANT

AND

EDWARD KENNETH OTIENO OKUNDI INTERESTED PARTY

RULING

1. By a plaint dated 13/1/2022, the plaintiff instituted a suit against the defendant seeking to have the defendants permanently restrained from selling or disposing off House number 26 erected on L.R number 330/475 Thompson Estate Lavington (“the suit property”) belonging to the plaintiff.
2. Simultaneous with the plaint, the plaintiff filed a Motion on Notice dated 13/1/2022. The same was brought under sections 3A, Section 63(e) of the *Civil Procedure Act* cap v21 laws of Kenya. Order 40 rule 1 order 51 rule 1 of the *Civil Procedure rules* 2010, Under section 5(i) of the *High court practice (vacation) rules*, section 10 of the *Judicature Act* (cap) 8 of the Laws of Kenya, section 90, 96, 103 and 104 of the *Land Act* No 6 of 2012.
3. The application sought injunctive orders to restrain the 1st and 2nd defendants from selling the suit property pending the hearing and determination of the suit.
4. The motion was based on the grounds on the face of it and was supported by the affidavit sworn by Philip Okoth Okundi. The applicant stated that the plaintiff charged the suit property 1st defendant



for a sum of Kshs. 25,000,000/- in form of overdraft facilities in favour of the interested party. That the overdraft was limited to three months starting from 17/6/2020 to 15/9/2020.

5. That the 1st defendant failed to notify the plaintiff of any breach by the interested party arising out of the said facility and upon perusal of the bank statements, the plaintiff established that as at 1/10/2020, the interested party was within the limit of the overdraft facility. That the 2nd defendant advertised for the sale of the suit property without informing the plaintiff of the breaches by the interested party. That there was no 90 days statutory notice and the 40 days notice to sell the suit property.
6. The application was opposed. The respondent filed a replying affidavit sworn by Lynette Kamande on 17/1/2022. The defendant contended that the plaintiff had executed various Letters of Offer between 2018 and 2020. The first Letter of Offer dated 5/6/2018 was for a sum of Kshs.15,000,000/- which was secured by a legal charge over the suit property. That by a second Letter of Offer dated 5/6/2018, the bank extended an overdraft facility of Kshs. 25,000,000/- and the same was secured by the suit property and a corporate guarantee dated 19/6/2020 of Kshs 25,000,000/- by the plaintiff.
7. That the plaintiff accepted the terms of the guarantee and accepted to be legally bound by them. As a result of the default by the borrower, the bank issued statutory notices to both the borrower and the plaintiff and directed the 2nd respondent to issue a 45day notification of sale.
8. It was the deponent's averment that the borrower and the plaintiff were indebted to the bank in the sum of Kshs. 34,042,677/- as at 31/12/2021. That the borrower was a director of the plaintiff and the plaintiff had been served with the statutory notices as evidenced by the copies of courtesy notice and certificates of posting.
9. Additionally, the defendants raised a preliminary objection dated 14/1/2022 to have the application struck out and the suit stayed for reasons that the same was sub-judice as the plaintiff had filed Milimani CMCC No. E440 of 2021 Asego holdings Limited v Mayfair Bank Limited and Legacy Auctioneers under the same capacity seeking the same orders. That in the premises, the suit contravened the section 6 of the Civil Procedure Act and order 4 rule 1(1)(f) of the Civil Procedure Rules 2010.
10. The application was canvassed by written submissions which I have considered.
11. The applicant submitted that the Magistrates Court lacked the pecuniary jurisdiction to hear and determine the suit since the plaintiff owed the 1st defendant the sum of approximately Kshs. 35,000,000/-. That the plaintiff had since withdrawn the said Milimani CMCC E440 of 2021 Asego Holdings Limited vs Mayfair Bank Limited & another and that the said suit had been stayed pending the outcome of this application.
12. On their part, the defendants submitted that in the application dated 13/1/2022, the plaintiff had failed to inform the court that there was a pending suit in Milimani Chief Magistrates Court Case E440 of 2021 Asego holdings Limited v Mayfair Bank Limited and Legacy Auctioneers.
13. I have considered the preliminary objection and the submissions by both parties. The main issue is whether the preliminary objection is sustainable.
14. Preliminary Objection was defined in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd* (1969) EA 696 to consist 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.
15. In the same case Sir Charles Newbold, P. stated: -

“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 fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

16. In the present case, the preliminary objection was grounded on the fact that the application was sub-judice Milimani CMCC No, E440 of 2021 Asego holdings Limited v Mayfair Bank Limited and Legacy Auctioneers.

17. Section 6 of the *Civil Procedure Act* provides as follows on the issue of sub judice: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

18. Addressing the same issue in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR) the Supreme Court of Kenya stated as follows: -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

19. From the foregoing, the doctrine of subjudice entails the same parties involved in the same subject matter in various suits in different courts of competent jurisdiction.

20. In the present case, it is not disputed that the plaintiff had filed a suit in Milimani CMCC No. E440 of 2021 Asego holdings Limited v Mayfair Bank Limited and Legacy Auctioneers over the same subject matter. However, the plaintiff observed that the Magistrates Court lacked the pecuniary jurisdiction to entertain the suit.

21. I note that subjudice is a matter of law which has the effect of disposing the suit. It was further contended that the said suit had in any event been withdrawn.

22. In this regard, I find no basis for the objection and hereby dismiss the same with costs to the plaintiff.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

A. MABEYA, FCIArb

JUDGE

