Republic v Tafakul Insurance of Africa LMT (Kenya); County Government of Garissa & 2 others (Judgment debtor) (Miscellaneous Application E001 of 2022) [2023] KEHC 17830 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17830 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

MISCELLANEOUS APPLICATION E001 OF 2022

JN ONYIEGO, J

MAY 19, 2023

BETWEEN

REPUBLIC ..... EXPARTE APPLICANT

AND

TAFAKUL INSURANCE OF AFRICA LMT (KENYA) ..... DECREE HOLDER

AND

COUNTY GOVERNMENT OF GARISSA ..... JUDGMENT DEBTOR

COUNTY SECRETARY GARISSA COUNTY ..... JUDGMENT DEBTOR

CHIEF OFFICER FINANCE AND ECONOMIC PLANNING GARISSA COUNTY ..... JUDGMENT DEBTOR

RULING

1. Through a default judgment entered on 28th October, 2019 in favour of the decree holder herein against the respondents jointly and severally in civil case number 8 of 2019, the respondents were ordered to pay the decree holder a sum of kshs 221,365,643. Aggrieved by the said judgment, the respondents moved this court vide an application dated 10th December 2019, pursuant to order 10 rule 10 and order 12 rule 7 of the *civil procedure rules* seeking to set aside the said judgment and all consequential orders and costs. The application was premised on grounds that service of summons to enter appearance and notice for entry of judgment was not served upon them. That formal proof was not done and that the draft proposed defence had raised triable issues.

2. After canvassing the application, the court delivered its ruling on 12th February 2020 allowing the application on condition that; the respondents to deposit within 45 days a sum of kshs53,351,945 in a joint interest earning account in the names of parties' respective counsel; defence and or counter claim to be served upon the decree holder then the respondent/ plaintiff within 14 days; costs to the

respondents(decree holder/plaintiff) of Kshs:100,000 be paid within 45 days; in default of any of the above, the application will stand dismissed and the auctioneer to file his bill of costs to be taxed by the deputy registrar.

3. Aggrieved by the said ruling, the respondents filed an application dated 26th February 2020 seeking stay of execution pending appeal. In its ruling delivered on 28th April 2020, the court dismissed the application arguing that the matter having been finalized, the court was functus officio hence could not stay execution process yet there were no pending proceedings. In the court's view, to stay the proceedings would have amounted to sitting on its own appeal. Meanwhile, the respondents moved to the court of appeal Vide Civil Application No. 170 of 2020 where the court of appeal in its ruling of 20th November 2020 held that the respondents had not properly moved the court for extension of time to appeal.

4. However, determined to execute the decree, the applicant filed miscellaneous application number 5 of 2021 seeking an order of mandamus to compel the secretary to Garissa Service Board to facilitate payment to the decree holder the decretal sum of kshs 221,365,643. After canvassing the application Aroni J dismissed the application on16th December 2021 on grounds that the application was prematurely filed as the requisite certificate under the *government proceedings Act* had not been extracted and served.

5. Consequently, the applicant filed a fresh notice of motion dated 15th February 2022 under miscellaneous application No. E001 OF 2022 seeking the court to grant it a mandamus order to compel the secretary to Garissa Service Board to pay the outstanding decretal sum plus interest and costs. The application is premised upon grounds stated on the face of it. It is the applicant's case that the respondents having not filed an appeal against this court's judgment, it would be unfair to deny the applicant the fruits of its own judgment.

6. In response, the applicant filed a replying affidavit sworn on 10th March 2022 by Ismail Aden Dabar the 1st respondent's attorney thus stating that the application is an abuse of the court process as a similar application had been dismissed on16th December 2021; that there is an active appeal pending before the court of appeal hence a likelihood that it may be rendered nugatory; that the applicants will not suffer any harm if they waited for the appeal to be determined on merit, and that the applicants ought to have appealed against the dismissal of the similar application in misc. application No.5 of 2021.

7. Contemporaneously filed with the said replying affidavit is a notice of preliminary objection raising similar issues as contained in the affidavit in support.

8. Subsequently, the applicant filed another application dated 16th March 2022 seeking an order to strike out the respondent's replying affidavit and preliminary objection. The grounds advanced are similar to those highlighted in the application dated 15th February 2022.

9. When the matter came up for directions, parties agreed to file submissions. On their part, the applicant through the firm of Kanyariri and company advocates filed two sets of submissions with one addressing the application dated 16th March 2022 and the other the preliminary objection. The two sets of submissions filed on 13th and 15th March 2022 respectively simply adopted the content contained in the affidavit in support of the substantive application of 15th February 2022.

10. The respondents filed their submissions on 10th May 2022 through the firm of Githinji Mwangi. Principally, counsel submitted in support of the preliminary objection reiterating the grounds therein. Counsel opined that the application amounts to abuse of the court process as a similar application had been heard and determined by a court of competent jurisdiction hence the application should be dismissed. To support that position, the court was referred to the case of *Patrick Macharia Nderitu*

vs the Director of Public Prosecutions &2 others; Dovey pharma limited (interested party) (2020 eKLR where the court held that filing two similar suits based on similar facts amount to abuse of the court process.

11. I have considered the application herein and the objection thereof. I have also considered rival submissions by both counsel. Before me is an application seeking mandamus orders to compel the respondent pay the applicant the outstanding amount arising from a default judgment. Along-side, there is a preliminary objection challenging the same. Issues that arise for determination are; whether the prayer for mandamus order can issue and; whether the same should be strike out for being incompetent, bad in-law and amounts to abuse of the court process.

12. There is no dispute that there is a judgment in favour of the applicant. There is no dispute either that the respondent has not honoured the decree. It is also not in dispute that there is no stay order. Before I attempt to determine the application, I need to dispose of the preliminary objection first which if determined in favour of the respondent, it will dispose of the matter with finality hence no need to determine the application for mandamus orders.

13. It is trite that a preliminary objection must be raised as appoint of law which if favorably determined will dispose of the matter with finality. Newbold, J.A. had this to say on what constitutes a preliminary objection in the most celebrated case of*Mukisa Biscuit Co Ltd v West End Distributors Ltd* [1969] E.A. 696;

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law (emphasis ours) 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".

He went on to state that;

> "The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues".

14. As stated herein above, an application similar to the application herein was heard and determined under miscellaneous application number 5 of 2021. The same was dismissed for non-compliance with Section 21(1) of the *government proceedings Act* for failure to extract a certificate. Although it is not clear from the record whether such certificate has been issued, the applicant herein had two options in my view; firstly, they could have appealed or simply sought for review but not file a fresh suit.

15. The application dismissed under file No. 5 of 2021 was determined on appoint of law which in my view again decided the matter on merit. In that regard, Section 7 of the *civil procedure Act* will creep in as this court cannot hear a matter that has already been determined on merit by a court of competent jurisdiction. Section 7 does provide as follows;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can 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."

16. In the case of *Njangu vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), Kuloba J as he then was held that:

> 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."

17. Whether the matter ought to have been struck out or dismissed is a matter for the applicant to decide so that the court can easily exercise its discretion under Section 21(3) of the *government Proceedings Act* where it may direct insertion of the missing certificate.

18. Whereas I agree with the applicant that the claim which is still outstanding must be honoured unless set aside or stayed, the court must not sit on its own decision in an appellate capacity. For that reason, I agree with the respondent that the application herein is incompetent and amounts to an abuse of the court process.

19. Having upheld the preliminary objection herein, I do not find any reason why I should delve on the application dated 15th February 2022 on merit. As to the application dated 16th March 2022 seeking to strike out the preliminary objection and replying affidavit to the application dated 15th February 2022, the same is a non-starter as it was not even necessary. Having upheld the preliminary objection, the application automatically falls by the wayside.

20. In view of the above holding, the applications dated 15th February 2022 and 16th March 2022 are hereby struck out for being incompetent. Accordingly, the preliminary objection is upheld. Regarding costs, same shall follow the event hence awarded to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 19TH DAY OF MAY 2023

J.N. ONYIEGO

JUDGE