



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shihua Industry Aliance Company Limited v Liu (Also known as Liu Ing – Ming) & 4 others (Civil Case E65 of 2022) [2023] KEHC 18630 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18630 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E65 OF 2022  
DKN MAGARE, J  
MAY 8, 2023**

**BETWEEN**

**SHIHUA INDUSTRY ALIANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**PETER LIU (ALSO KNOWN AS LIU ING – MING) ..... 1<sup>ST</sup> DEFENDANT**

**SALMA MBAURO ..... 2<sup>ND</sup> DEFENDANT**

**KENYA PORTS AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY ..... 4<sup>TH</sup> DEFENDANT**

**MAERSK KENYA LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendant raised 5 preliminary points of law as follows: -
  - a. THAT the suit filed herein is res judicata the same having already been deliberated vide prior suits that has already been disclosed by the Plaintiff herein being Chief Magistrate's Misc Civil Application no 328 as consolidated with 329 of 2018, Environment and Land Case No 23 of 2019 (Mombasa) and court of appeal (Mombasa) Civil Application No E 050 OF 2022
  - b. THAT the averments contained in the affidavit in support of the application together with the pleadings hereto obliterate the doctrine of sub judice the said question and contention herewith being the substratum Chief Magistrate's Misc Civil Application no 328 as consolidated with 329 of 2018, Environment and Land Case No 23 of 2019 (Mombasa) and court of appeal (Mombasa) Civil Application No E 050 OF 2022



- c. THAT the suit herewith offends the doctrine of stare decisis as it attempts to force the power of the honourable Court to sit on its own Appeal which can cause a Constitutional crisis and bearing disrepute to the Honourable Courts process.
  - d. THAT the Honourable Court respectfully lacks the requisite jurisdiction to try this suit hence ought to immediately down its tools.
  - e. THAT the Plaintiff is guilty of material non-disclosure hence as held in the by the court of appeal in Bahadurali Ebrahim Shanji- Versus – Al Nooor Jamal & 2 Others Civil Appeal no 210 OF 1997. fullest possible disclosure of all material facts within his knowledge, and if he DOESNOT make the fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained'
2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions on November 15, 2023 thus reiterate their preliminary objection. They rely on the English case of *Henderson versus Henderson (1843 – 60) ALL ER 378*. I will not refer to it as there is no desert of local jurisprudence on the same.
  3. The parties are in agreement on what constitutes res judicata. The plaintiff's case is that it has never instructed filling of suit in the Republic of Kenya. Its view is that there are cases filed without their consent. The view of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is that the suits were filed by the plaintiff.
  4. In the case *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*: -
 

' A preliminary objection consists of a pure 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. Examples are an objection to the jurisdiction of the court.'
  5. Consequently, preliminary objection must proceed on the premises thus what is stated by the plaintiff in the plaint is true.
  6. On that basis, the defences is only looked to confirm its compliance with Order 2 Rule 4 (1) which states: -
 

Matters which must be specifically pleaded: -

    - (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
      - (a) Which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or
      - (c) Which raises issues of fact not arising out of the preceding pleading.
  7. In Essence the use of the defence is to confirm that the defences raised are pleaded. in the premises the court must take it that the plaint is true. In paragraphs 26, 18, 19. A 13, 35 the plaintiff pleads fraudulent impersonation on part o the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. in essence, the Plaintiff is saying they did not file the other suits. The suit was filed by the defendants in the name of the Plaintiff. Further they ae not seeking to reserve the orders. thy are seeking a benefit that due to them from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.
  8. There is no affidavit to set out the claims by either of the parties.



9. If the plaint is true, then fraud was committed by the 1<sup>st</sup> and 2<sup>nd</sup> defendant filing suit on behalf of the plaintiff herein. they indicated that they had power of attorney. the issue herein is the propriety of the power of attorney. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant conceded that they were acting on behalf of the legitimate owner of the goods. However, it appears the goods were to go to the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
10. The question I ask myself, is whether on basis of the preliminary objection, I can make a decision of res juidcata and res sub judice. Though res judicata and res subjudice are concepts of law, they must be based on the evidence record.
11. Order 2 Rule 15 of the *Civil Procedure Rules*, provides that where suits are vexatious, there be an affidavit setting forth, grounds relied on. I do not have a single piece of evidence to enable me settle the dispute between parties.
12. It is a strong thing to strike out a suit on basis of no evidence. The Applicants chose the route of preliminary objection. The question of res juidcata and res sub judice cannot be determined without evidence. There needs to annexed pleadings and or admissions. I cannot base my decision on consecutive and bare pleadings. I shall not therefore do justice to the parties, if start throwing the files to see documents filed by not owned by the parties.
13. Given that there is absolute no evidence of files being res judicata, I dismiss the Application with costs of Kshs 25,000/= to the Plaintiff.

#### **Determination**

14. The preliminary objection dated October 24, 2022 is thus unmeritorious as it is not based on pure points of law. I dismiss the preliminary objection with costs of Kshs 25,000/= to the plaintiff.

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 8<sup>TH</sup> DAY OF MAY, THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Adhiambo Wameyo for the plaintiff

Mr. Egunza 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Mugambi for the 5<sup>th</sup>

Amos Cheruiyot for 3<sup>rd</sup> Defendant

Court Assistant – Firdaus

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