



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wenyong & another v Barasa (Civil Suit E047 of 2022)
[2023] KEHC 19161 (KLR) (Commercial and Tax) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19161 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E047 OF 2022
JWW MONG'ARE, J
JUNE 26, 2023**

BETWEEN

**PAN WENYONG 1ST PLAINTIFF
CHEN LEI 2ND PLAINTIFF**

AND

CYNTHIA ATIENO BARASA DEFENDANT

RULING

1. On 25/7/2022 the defendant in this matter filed a Notice of preliminary objection to the plaintiff's case herein on two grounds; Firstly, that these proceedings were Sub-judice and secondly; that they were Res-judicata
2. The defendant argues that the insolvency petition number E021 of 2022 in Re Yashian Investments Limited, the issues therein are the same issues being raised by the parties in the present proceedings and that means that this court should not entertain a matter in active litigation before another court on the same issues and between the same parties. It is the Defendant's position that this suit negates the provisions of section 431 as read with section 432 of the Insolvency Act and Section 6 of the Civil Procedure Act which provides that no court shall proceed where a matter is in a different court.....
3. The defendant averred that the defendant and plaintiff were the only two directors in the Yashian Investments Limited and the proceedings relate to one and the same issue being canvassed in the present suit.
4. On res-judicata, the defendant argued that the court has already considered and made a determination on the issues between the parties in HCCOMM - OS-E1306 of 2020 which suit was filed seeking similar orders and the same was dismissed by the trial court on 14/2/2022 with costs assessed at 20,000



for the Defendant. That this suit was brought as an antic to move the court again the Plaintiff having lost in the first case where they failed to have the Defendant removed as a director of the company.

5. The defendant invited the court to find that this case was wrongly filed and should be dismissed as the issues before the court were either fully litigated upon and decided or they were pending before the insolvency court.
6. The preliminary objection is opposed. The plaintiff submitted that there was no proper notice of preliminary objection before the court since the defendant had not filed any defence from whence she would then give the notice to raise the issues on the preliminary objection at the earliest instance as envisioned by law. Further, the Plaintiff argued the grounds upon which the defendant was seeking to rely on are not pure matters of law but would require a determination of facts before the court could arrive at a decision. Similarly, a preliminary objection cannot be raised where the court has to exercise its discretion to make a finding. To succeed in a preliminary objection, the plaintiff argued that a party must only rely on the law and nothing else.
7. The plaintiffs' response on the arguments by the defendant was that the court was being invited ascertain facts. The facts to be ascertained were whether the liquidation order has been issued by the court under section 432 of the Insolvency Act in respect of Yashian Investments Limited? If there exists a judgment over the same issues delivered by Justice Majanja in HCCOMM No. E1306 of 2020 to invoke the principle of res-judicata? The Plaintiff argues that all these issues are issues of fact that can only be determined once the court is seized of the evidence and not pure points of law.
8. Further, the plaintiff submitted as it relates to the Insolvency Proceedings and the current matter, the parties are different and the orders being sought are different and as such the same cannot be deemed to be sub-judice. On res-judicata, the plaintiff argued that the case upon which the defendant argues to have been determined was dismissed on a technicality and was never heard and the issues therein substantively settled by the court.

Analysis and Determination: -

9. A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“...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 the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

10. I have considered the pleadings placed before me, the written submissions by the parties and the oral arguments thereto. I note that the defendant did not file any pleadings in this matter. instead, once served with the plaintiff's plaint, the defendant moved to raise this preliminary objection. In the absence of a defence by the defendant, then it means the court is being invited to decide the preliminary



objection in vacuo. Further, the grounds that the defendant has advanced to persuade the court that the suit herein should be dismissed cannot be determined without evaluating evidential material to confirm if indeed the suit is sub-judice or res-judicata or both. In the premises therefore, I am persuaded that the preliminary objection as filed is incompetent before the court and is lacking in merit. The same is therefore hereby dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE 2023

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Keaton for the Applicant.

N/A for the Respondent.

