



REPUBLIC OF KENYA



KENYA LAW

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**Renji v Xplico Insurance Company Limited (Civil Miscellaneous Application
E084 of 2023) [2023] KEHC 20083 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E084 OF 2023

AN ONGERI, J

JULY 6, 2023

BETWEEN

RUTH MINZA RENJI APPLICANT

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The respondents raised a preliminary objection dated April 24, 2023 to the application dated February 20, 2023 on the ground that the said application contravenes Order 22 Rule 17 of the [Civil Procedure Act](#), 2012 which may result in multiple execution of the same decree against the respondent.
2. The respondent filed a relying affidavit sworn by Paul Mucai Gitau on April 26, 2023 in which he deposed that the application dated February 20, 2023 is founded on execution of a decree which may be a decree in statutory demand in insolvency case no 28 of 2023.
3. The parties filed written submission in the preliminary objection as follows: the respondent submitted that the decree being executed emanates from a declaratory suit No E12164 of 2021 which related to primary suit in Milimani CMCC No 1406 of 2019. That it is common ground that the High Court Case No HCCOMM/E895/2021 that the firm of Musili Mbiti & Associate Advocates, garnished and received in excess of Kshs. 6,000,000 from the accounts of the respondent at I&M Bank Accounts of the respondent. that the statutory demand in the insolvency Notice No E028 of 2023 dated March 7, 2023 issued by the advocates as a petitioner without disclosing details of the decrees that statutory demand in the insolvency notice No E028 of 2023 relates to. The statutory demand issued by the advocates of the applicant was objected to by the respondent as to non-disclosure of the details.
4. That the current application to execute the decree in the declaratory suit by attachment of the respondent's immovable property LR Nos 7025/111/MN and 7024/111/MN both in Kilifi county



is inconsistent Order 22 rule 17. That the provisions of order 22 rule 17 of the *Civil Procedure Rules* gives the court jurisdiction to determine issues of contentions as raised by the respondent. That the transfer of the suit to the magistrates court in Kilifi county would not serve the ends of justice where the decree being sought to be simultaneously executed, where one of the petitioners in the insolvency statutory notice and the holder of the primary decree that is sought to be transferred is indebted to the respondent herein.

5. The applicant submitted that the preliminary objection before this court invites the court to investigate and look at the facts before it in order to make a determination and further introduces new questions of facts clothed in the mask of submissions. That the question of whether or not there are multiple executions of the same decree is not a point of law.
6. That a quick glance at the Insolvency Notice it is clear that this matter is not part of Insolvency Notice No E028 of 2023. The applicant is not part of the creditors in the said notice as evident from all the names of the creditors listed in the notice.
7. The sole issue for determination is whether the application dated February 20, 2023 contravenes Order 22 Rule 7 of the *Civil Procedure Rules*.
8. The said orders states as follows;

Oral and written applications [Order 22, rule 7]

- (1) Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the court.
- (2) Save as otherwise provided by subrule (1) or by any other enactment or rule, every application for the execution of a decree shall be in writing, signed by the applicant or his advocate or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars—
 - (a) the number of the suit;
 - (b) the names of the parties;
 - (c) the date of the decree;
 - (d) whether any appeal has been preferred from the decree;
 - (e) whether any, and, if any, what payment or other adjustment of the matter in controversy has been made between the parties subsequent to the decree;
 - (f) whether any, and if any, what previous applications have been made for the execution of the decree, the dates of such applications, and their results;
 - (g) the amount with interest, if any, due upon the decree, or other relief granted thereby, together with particulars of any cross- decree, whether passed before or after the date of the decree sought to be executed;
 - (h) the amount of the costs, if any, awarded;
 - (i) the name of the person against whom execution of the decree is sought; and
 - (j) the mode in which the assistance of the court is required, whether—



- (i) by the delivery of any property specifically decreed;
- (ii) by the attachment and sale of any immovable property, or by the sale without attachment or by proclamation and sale immovable property;
- (iii) by the arrest and detention in prison of any person;
- (iv) by the appointment of a receiver;
- (v) otherwise, as the nature of the relief granted may require.

9. The applicant in the application dated February 20, 2023 is seeking transfer of this case to Kilifi where execution proceedings have commenced in respect of a parcel of land owned by the respondent.

10. I find that the application dated February 20, 2023 requires to be canvassed by evidence and therefore the same cannot be disposed of by way of raising a preliminary objection.

11. According to case of *Biscuit Manufacturing Co Ltd Vs West End Distributors Limited* (1969) EA 696 a preliminary objection cannot be raised in a case that requires to be canvassed by evidence .It was held in that case as follows;

“ 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 exercise of judicial discretion.”

The court further stated that;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

12. In the case of *UU Net Kenya Ltd vs Telkom Kenya Ltd* (2004) 1 EA 348 it was held;

“In his ruling in Garden square ltd versus Kogo & another Justice Ringera said that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing the suit or application entirely.”

13. The case of *Oraro vs Mbaja* (2005) 1 KLR 141 it was held

“ A preliminary objection correctly understood is a point of law we must not be blurred with factual details liable to be contested and in any event to be proved through the process of evidence.”

14. I find that the preliminary objection dated April 24, 2023 is not merited and the same is dismissed with costs to the applicant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF JULY, 2023.

.....

A. N. ONGERI

JUDGE



In the presence of:

..... for the Applicant

..... for the Respondent

