



**Tiwari v Skyes (Civil Case E414 of 2022) [2023] KEHC 20006 (KLR)
(Commercial and Tax) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E414 OF 2022
FG MUGAMBI, J
JULY 7, 2023**

BETWEEN

ADRIAN SIMON TIWARI PLAINTIFF

AND

WILLIAM MARTELL SKYES DEFENDANT

RULING

Brief Facts

1. The plaintiff instituted this suit via a plaint dated October 19, 2022 seeking judgment against the defendant for;
 - a. The sum of USD 271,273.00 made up as follows;
 - i. USD 159,000 as agreed under the loan agreement and
 - ii. The second loan amount of USD 112,273
 - b. In the alternative to prayer (a)(i) above, an order of specific performance do issue compelling the defendant to transfer 30% of the share capital in Naibor Camps Limited to the plaintiff and to execute the necessary documents for change of directors in Naibor Camps Limited to the plaintiff and/or the plaintiffs nominee
 - c. Interest on (a) above at court rates from the date of filing suit until payment in full
 - d. Costs of the suit.



2. In response to the plaint, the defendant filed a statement of defence dated November 25, 2022. The defendant further raised a preliminary objection dated February 20, 2023, on the grounds that;

The portion of the plaintiffs claim for the alleged second loan amount of USD 112,273/- was totally incompetent, as the said loan amount had been wholly disbursed by Elivalat Finchech Limited (in terms of the swift advice at pages 6-9 of the plaintiffs list and bundle of documents) who is not a party to the suit and no valid and/or written resolution had been sought, obtained and filed in as far as the instant suit is concerned.

The plaintiff's aforesaid portion of claim for the alleged second loan amount of USD 112,273/- is for dismissal with costs for want of a valid and/or written company resolution by Elivalat Fintech Ltd

3. Parties canvassed the preliminary objection by way of written submissions dated 22nd March and 28th March 2023, which I have considered. The plaintiff's main contention was that the preliminary objection ought to be dismissed as it did not raise a pure point of law.
4. The basis for the submission was that since the issue of the second loan was disputed, the court would need to interrogate the evidence presented before it and ascertain the facts before arriving at a conclusion. Counsel submitted that the issue of whether the plaintiff was entitled to payment of a sum of USD 112,273 as pleaded cannot be a subject of a preliminary objection as it was a matter of fact and for this reason the preliminary objection had not met the required threshold.
5. Counsel for the respondents on the other hand submitted that the preliminary objection went to the root of the locus of the plaintiff in the suit. According to the defendant, Elivalat Fintech Ltd ought to have been the claimant with respect to the second loan amount and since the plaintiff did not have authorization to file the suit on behalf of the company, he then lacked locus standi to pursue the claim for the second loan amount.

Analysis

6. I have carefully considered the pleadings, rival submissions and authorities presented by the parties to advance their respective positions. The bone of contention lies in first of all determining whether the preliminary objection meets the threshold before determining whether it is sustainable in substance. What constitutes a preliminary objection was laid out in the celebrated case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 where their Lordships observed thus:

“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...It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. (emphasis added)

7. The Supreme Court of Kenya further buttressed this position in Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others [2015] eKLR where it was held that;

“The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record...A preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. (emphasis added)



8. These two decisions provide perfect guidance on the threshold that an intended preliminary objection should meet. The question that this Court must answer is whether the claimant over the second loan is a contested issue or not. It will follow that if there is a contest over this, it is then an issue that falls for determination before the court and would therefore be an issue of facts as opposed to an issue of law.
9. The basis of the claim by the plaintiff is a loan agreement that was allegedly entered into between the plaintiff and the defendant. The plaintiff describes himself at paragraph 1 of the plaint as a male adult of sound mind and makes no reference to the company alleged by the defendant. Regarding the second loan amount, the plaintiff pleads at paragraph 8 of the plaint that the plaintiff advanced to the defendant and the Masai trust, a further sum totaling USD 112,273 on various dates.
10. The defendant through his statement of defence denies the description of the plaintiff and instead pleads that the agreement was entered into between the defendant and the plaintiff, through the plaintiff's company, Elivalat Finchech Limited. The alleged second loan is also denied at paragraph 5 of the statement of defence.
11. Based on this background, I am of the considered view that the issues raised by the defendant are not based on ascertained facts. The issue of the parties to the said loan agreement appear to be an issue that will require parties to lead evidence for the court to ascertain during trial. A finding of fact will then have to be made on the question upon interrogation of the evidence, which is premature at this stage.

Determination and orders

12. For the reasons that I have stated, it is my finding that the said preliminary objection does not meet the required threshold as it rests on points of facts and for this reason it is not sustainable. It is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7th DAY OF JULY 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

