



Kauty Academy v Star Gold Enterprises Limited & another (Miscellaneous Application E015 of 2023) [2023] KEHC 27316 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEHC 27316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E015 OF 2023
SN MUTUKU, J
OCTOBER 18, 2023**

BETWEEN

KAUTY ACADEMY APPLICANT

AND

STAR GOLD ENTERPRISES LIMITED 1ST RESPONDENT

CARNELIAN AUCTIONEERS 2ND RESPONDENT

RULING

1. This Ruling relates to a Preliminary 3rd April 2023 brought by the 1st Respondent in respect to the Notice of Motion dated 3rd March 2023. The 1st Respondent has raised the following grounds:
 - i. That this court lacks jurisdiction to entertain the Application as the same is sub-judice and bad in law as it violates section 6 of the *Civil Procedure Act*.
 - ii. That the Applicant is guilty of material non-disclosure and that the application is bad in law, fatally defective, unmaintainable and an abuse of the court process as all the orders sought herein are similar to those sought in the application dated 2nd January, 2023 which is pending determination before this court as per the annexed copy of the court order.
 - iii. That the Applicant is grossly abusing the court process by filing duplicate applications asking for similar orders in an attempt to obtain unjust advantage and the present application is thus commenced for improper purpose that is not sanctioned by law.
 - iv. That the application is an act of desperation and time wasting designed to bar the respondent from realizing the fruits of its judgement.
 - v. That the application dated 3rd March, 2023 is incompetent, frivolous, vexatious, misconceived, bad in law and should be dismissed with costs in limine.



Applicant's Submissions

2. This court directed that the Notice of Preliminary Objection be determined first through written submissions. The Applicant filed its submissions dated 14th July, 2023 in which 2 issues have been raised for determination:
 - i. Whether the application herein dated 3rd March, 2023 is sub-judice.
 - ii. Whether the various pending applications should be consolidated and/or heard simultaneously.
3. On the first issue, the Applicant argued that the only prayer in the Application sated 3rd March, 2023 that was similar to the application dated 2nd January, 2023 was, "That pending the hearing and determination of the intended appeal, there be stay of execution of the judgement delivered on 6th September, 2022 in Kajiado SCCC No E045 of 2022 between the parties herein, and all other consequential orders."
4. It is submitted that the prayers may be similar, but the facts are different. It was their case that the facts giving rise to the application dated 3rd March, 2023 were different in that the Respondents forcefully took possession of the Applicant's school bus registration number KCD 102 Q; that therefore section 6 of the *Civil Procedure Act* does not apply in this case; that one of the legally recognized methods of drawing attention to the status of the subject of any issue in dispute is through an application and that it is what they did through their application dated 3rd March, 2023.
5. It is submitted that the PO herein should be dismissed with costs as it is made in error ab initio.
6. On the second issue the Applicant argued that the applications dated 2nd January, 2023 and 3rd March, 2023 are arising from the same stem, which is their intention to file an appeal against the judgement of the lower court and therefore the 3 applications be consolidated and heard together. The Applicant cited *Stumberg and another v Potgeiter* which was quoted in *Republic v Paul Kihara Kariuki, Attorney General and 2 others ex-parte Law Society Of Kenya* [2020] eKLR, where the court stated as follows,

"Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered."
7. They also relied on the case of Paul Kiharra (IBID), the court also made reference to the supreme court case of India of *Prem Lala Nabata & V Chandi Prasad Sikaria*,

"...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions, or that for some other reason it is desirable to make an order consolidating the suits"



8. It is submitted that the Applicant is a public school and since repossession of their school bus, it has not been business as usual and that it is therefore fair that the interest of the children and their basic rights to education be taken into consideration to avert mis-courage of justice.

Respondent's Submissions

9. The Respondents have filed their submissions dated 10th May, 2023, in which two issues have been raised for determination:

- i. Whether the court is barred from determining this application by the doctrine of sub-judice.
- ii. Whether the court has jurisdiction to grant stay of execution pending appeal.

10. On the first issue, it is argued that the provisions of section 6 of the [Civil Procedure Act](#) defines the principle of sub-judice as follows:

“....No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigation under the same title, where such suit or proceeding is pending in the same court or nay other court having jurisdiction in Kenya to grant the relief claimed.”

11. The Respondents cited [Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 others \(interested parties\)](#) [2002] eKLR, where the Supreme Court of Kenya defined sub-judice as follows:

“The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction issuing conflicting decisions over the same subject matter.... A party that seeks to invoke the doctrine of res sub-judice must therefore establish that: there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before the courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

12. They submitted that the matter in issue in the present application is directly and substantially in issue in the application dated 2nd January, 2023 filed before this court and therefore, under the rule of sub-judice, this court does not have jurisdiction to entertain this present application and must down its tools and the orders issued on 7th March, 2023, which were irregularly issued, must be vacated. They further submitted that the Applicant has come to court with unclean hands when it failed to disclose to the High Court at Machakos that there was a similar application before this court.

13. On the second issue they submitted that for an order for stay to be considered by a court an appeal needs to be in place. That this is not the case herein and that therefore this court cannot grant this prayer since doing so will be acting in vacuo. They relied on various cases including the court of appeal’s decision in [Abubakar Mohammed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR where the judges approved the



decision in Rosalinda Wanjiku Macharia v James Kiingati Kimani (suing as the legal representative of the estate of Martin Muiruri(deceased)) [2017], in the following terms:

“In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the motion, it would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court’s discretion under Order 42 Rule 6(1) of the *Civil Procedure Rules*.” She further stated that,

“It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6(1) or 6(6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure of filing appeal, in this case a memorandum of appeal. Until the memorandum of appeal is filed, the court would be acting in vacuo by granting stay of execution pending appeal.”

Analysis and Determination

14. I have read both applications, the Responses, the PO and the submissions in respect to the PO which is under determination in this Ruling. Before I determine the PO, it is important to bring the issues before me into perspective. The PO was necessitated by the applications pending before this court. On 2nd January 2023, the Applicant, Kauty Academy, filed Notice of Motion of that date, under Certificate of Urgency, in which it sought the following orders:
 - i. That this application be certified urgent and be heard ex-parte in the first instance.
 - ii. That the Honourable Court do issue orders in the interim for stay of execution of the Judgment given on 6th September 2022 pending the hearing and determination of this application.
 - iii. That the Honourable Court do stay the execution of the Judgement given on 6th September 2022 , any decree therefrom pending the hearing and determination of the Appeal.
 - iv. That the Honourable Court do stay any attachment of the School property by the Respondents, their agents and/or by any other means pending the hearing and determination of this Appeal herein.
 - v. That costs of this application be provided for.
15. That Notice of Motion was filed on 3rd February 2023. It was placed before me on 6th February 2023 and I issued the following directions:
 - i. Urgency is not demonstrated given that judgment was delivered on 6th September 2022.
 - ii. Notice of Motion dated 2nd January 2023 be served.
 - iii. Mention on 14th March for directions.
16. Before the matter was mentioned on the date as directed and before the mention date, the Applicant filed another application, a Notice of Motion dated 3rd March 2023, on 5th March 2023. I was not sitting due to a medical issue. The matter was placed before a judge in Machakos on 7th March 2023. The record does not show attendance of any party, and therefore it is my belief that the judge issued directions without parties. The following orders were granted:
 - i. The Application is certified as urgent and also grant prayers 2 and 3 of the Application dated 3rd March 2023.



- ii. The matter be heard inter partes on 22nd March 2023.
17. On 22nd March 2023, Mr. Odhiambo appeared for the Applicant and Ms Kisiangani for the Respondents. Parties were granted more time to allow for filing of Replying Affidavit and Supplementary Affidavit. Parties were also directed to file submissions. They were directed to return to court on 17th April 2023. On that date parties appeared before me. I was informed that in addition to filing a Response, the Respondents had also raised a PO which challenged the jurisdiction of this court. I directed parties to file submissions on the PO in order to allow me to determine the PO first. This led to this Ruling.
18. What constitutes a PO has been discussed in *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696, among other authorities in the following terms:
- “----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 a contract giving rise to the suit to refer the dispute to arbitration”.
19. The matter of jurisdiction of the court to determine the matter before it, in my considered view, is a point of law which has been pleaded, or which has arisen by clear implication out of the pleadings. It is clear to me that if argued, this PO may dispose of the matter before this court.
20. As stated above, in this Ruling, the issue of sub judice rule is provided under Section 6 of the *Civil Procedure Act*. So what the Respondents ought to show to this court is that the matter in issue in the Application dated 3rd March 2023 is also directly and substantially in issue in the application dated 2nd January 2023; that the matter concerns the same parties or their representatives litigating under the same title; that the matter is pending before this court or another court with having similar jurisdiction to grant the relief sought.
21. The reasoning behind the sub-judice rule is to avoid multiplicity of suits between the same parties and over the same subject matter. This is the view taken by the courts in various cases including Kampala High Court Civil Suit No. 450 Of 1993 - *Nyanza Garage vs. Attorney General*, where the Court stated that:
- “In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”
22. I have read both applications that necessitated the PO. Both seek to stay the execution of the judgement and decree of the SCCC. No. E045 of 2022 pending the hearing of the two applications and secondly pending the hearing and determination of the intended appeal. These prayers come out clearly in prayers 2 and 3 in the Notice of Motion dated 2nd January 2023 and in prayers 3 and 4 of the Notice of Motion dated 3rd March 2023.
23. The other prayers seeking stay of attachment of school property or restraining orders from selling or disposing of the school property or specifically the school bus KCD 102Q is the process of execution.



- Once stay is granted, the outcome would be that no property of the Applicant would be attached, sold or in any other manner dealt with in execution of the said judgment.
24. In my considered view, stay of the execution of the judgment of the Small Claims Court in SCCC No. E045 of 2022 is the subject matter in both applications before this court. But the PO has been raised because of the latter application dated 3rd March 2023 which according to the Respondent is bad in law because of the application of the sub-judice rule.
 25. I have noted that the Respondents in the submissions also addressed the issue on whether the court has jurisdiction to grant stay of execution pending appeal. It is my considered view that the outcome of the determination of the first issue will automatically resolve this issue in respect of the Notice of Motion dated 3rd March 2023. Besides this issue has also been raised in the application dated 2nd January 2023 which application is yet to be determined.
 26. My considered view, after careful consideration of the submissions of parties and the authorities cited, is that the Notice of Motion dated 3rd March 2023 is affected by the sub-judice rule. Its subject matter is the same as in the Notice of Motion dated 2nd January 2023. It is unfortunate that the Applicant did not disclose to the judge in Machakos that there was an earlier application on the same issues. Failure to do so, in my view, must have been aimed at making the court in Machakos proceed as if the only pending application was the one before it, the one date 3rd March 2023.
 27. I am unable to understand why the Applicant filed another application on the seeking the same orders as the earlier on given that the date this court has directed parties to appear before it had not lapsed. I wonder why the Applicant, if it felt that they could not wait for the date allocated by the court, did not seek audience with the court on the earlier application instead of filing another one. I am finding it difficult to not take the view that the Applicant was forum shopping. To my mind, the action of the Applicant, in filing the Notice of Motion dated 3rd March 2023, amounts to abuse of this court's process.
 28. Consequently, I find for the Respondent and allow the PO to stand. The outcome of this is clear that this court lacks jurisdiction to hear and determine the Notice of Motion dated 3rd March 2023. It is hereby dismissed together with all consequential orders granted under that application with costs to the Respondent.
 29. Parties are directed to revert to the Notice of Motion dated 2nd January 2023 for directions on its disposal on merit. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH OCTOBER 2023.

S. N. MUTUKU

JUDGE

