



**Ajongo v Ajinja & another (Civil Appeal E036 of 2024)
[2024] KEHC 15669 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E036 OF 2024**

DK KEMEL, J

DECEMBER 9, 2024

BETWEEN

PETER OCHIENG AJONGO APPELLANT

AND

KEVIN OTIENO AJINJA 1ST RESPONDENT

ERICK OTIENO OWINO 2ND RESPONDENT

RULING

1. The ruling relates to a preliminary objection dated 11/9/2024 filed by the Respondents. The same principally raises the issue that the Appellant's application dated 24/8/2024 is res sub judice and res judicata in view of the fact that a similar application had been lodged by the Appellant before the Small Claims Court and was substantially determined.
2. The preliminary objection aforesaid was canvassed by way of written submissions. However, it is only the Respondents who complied.
3. Learned counsel for the Respondent submitted that the Applicant's application dated 24/8/2024 offends the provisions of Section 6 and 7 of the *Civil Procedure Act* since the orders sought therein are similar to those sought and granted in the primary court. It was further submitted that the matter before this court is directly and substantially similar in issue with the one which has been decided by the Small Claims Court. It was contended that the dignity of this court is at risk of making contrary decision or findings if this matter proceeds. Learned counsel sought for the dismissal of the application with costs.
4. I have given due consideration to the preliminary objection raised by the Respondents as well as the submissions presented. It is not in dispute that the Appellant is aggrieved by the decision of the Adjudicator vide the ruling dated 23/8/2024 and that he has already filed a Memorandum of Appeal to that effect. It is also not in dispute that the Appellant upon filing the said Memorandum of Appeal



did accompany the same with the application dated 24/8/2024. The issue for determination is whether the preliminary objection has merit.

5. A preliminary objection was stated in the case of Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Co. Ltd (1969) EA 696 as one which raises a pure point of law and that the same is argued on the basis or assumption that all the facts as pleaded by the other side are correct and that it cannot be raised of any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In the said case, the court held:

“So far as I am aware, 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 is noted that the Respondents contention is hinged on their supposition that the Applicant’s application dated 24/8/2024 is similar to a previous application lodged before the Adjudicator leading to the impugned ruling dated 23/8/2024 and therefore the rule of sub judice and Res judicata must kick in to deny the Appellant any other opportunity to approach this court for conservatory reliefs pending the appeal.

6. It is trite that a party on appeal is entitled to approach the Appellate court for any interim reliefs even though the same had been sought in the lower court. The rationale behind this principle is the need to ensure that certain circumstances are contained and or taken into consideration if the same affect the substratum of an appeal. In the present circumstance, the Appellant is aggrieved by the ruling of the Adjudicator and has approached this court on appeal which is his right to ventilate under the dictates of *the Constitution*. The Appellant in the same breath has lodged an application seeking interim reliefs pending the determination of the appeal. There is absolutely nothing wrong with that and that the Respondents cannot deny the Appellant his right to challenge the lower court’s ruling. As to whether the Appellant was to adhere to certain condition imposed by the trial court, I find the same should be canvassed in the pending application dated 24/8/2024. I find the Respondent’s appear to have jumped the gun. They should save their guns for the hearing of the said application.
7. In the result, it is my finding that the Respondents preliminary objection dated 11/9/2024 lacks merit. The same is dismissed with costs to the Appellant. Parties are now directed to set down the Appellants application dated 24/8/2024 for hearing on priority basis.

RULING DATED AND DELIVERED AT SIAYA THIS 9TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Arionfor Applicant

Ondegofor Respondents

Ogendo.....Court Assistant

