



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. E387 OF 2020

REBECCA KERUBO TIANTA.....1ST APPLICANT

PETER NJOGU.....2ND APPLICANT

VERSUS

PARKLANE CONSTRUCTION

COMPANY LIMITED.....RESPONDENT

RULING

At the onset, the respondent herein filed a suit before the Chief Magistrate's Court at Milimani namely, CMCC NO. 8963 of 2019 and sought reliefs in the sum of Kshs.276,584/= against the 1st and 2nd applicants, together with costs of the suit and interest thereon.

It is apparent from the record that, the respondent sought and obtained entry of a default judgment against the applicants sometime on or about the 4th of March, 2020 for failure to enter appearance.

The above prompted the applicants to file the application dated 25th September, 2020 ("the Motion") in the instant matter where they sought for *inter alia*, an order setting aside the default judgment and consequent decree, and leave to defend the main suit.

To oppose the Motion, the respondent put in the replying affidavit sworn by Bhudia Suresh Naran on 7th October, 2020. The respondent equally raised a notice of preliminary objection bearing like date and put forward the following grounds:

- i. The application is brought under no known provision or procedure of law.***
- ii. The application flagrantly violates the express provisions of Section 6 of the Civil Procedure Act.***
- iii. Accordingly, the Notice of Motion dated 25th September, 2020 ought to be struck out with costs.***

When the parties appeared before this court on 22nd October, 2020 they were directed to dispose of the preliminary objection first and to put in written submissions.

I have considered the notice of preliminary objection, the rival submissions and authorities cited in that respect.

To begin with, I make reference to the celebrated case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** also cited in the respondent's submissions, where the court defined the term 'preliminary objection' in the following manner:

"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 the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

The above definition was further advanced by the Supreme Court in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** when it rendered itself thus:

"It is quite clear that 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 are incompatible with that point of law."

The first limb of the preliminary objection touches on whether the Motion offends the provisions of Section 6 of the Civil Procedure Act, Cap. 21 Laws of Kenya.

On its part, the respondent submits that prior to bringing the Motion, the applicants filed an identical application before the subordinate court on 24th September, 2020 and that the said application is pending *inter partes* hearing.

I have not seen any particular response to the above argument on the part of the applicants.

Suffice it to say that, upon perusal of the record and more particularly the material annexed to the replying affidavit of Bhudia Suresh Naran, I note the existence of the application dated 24th September, 2020 filed before the subordinate court. Upon further perusal of the said application, I established that it sought orders identical to those being sought in the present Motion.

Constituted to the annexed material is also a copy of a court order issued by the subordinate court on 24th September, 2020 declining to certify the aforementioned application urgent but directing the parties to take hearing dates for the same at the registry.

There is nothing on the record to indicate that the application dated 24th September, 2020 has been heard and determined by the subordinate court, or withdrawn for that matter.

Be that as it may, the principle still stands, under **Section 6** of the **Civil Procedure Act**, that:

“No court shall proceed with the trial of any suit or proceeding 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, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In view of the foregoing, I am of the view that the applicants cannot seek to litigate similar issues through separate courts, and I am satisfied that the Motion is *sub judice* and therefore a violation of the provisions of Section 6 (supra).

The second limb of the preliminary objection concerns whether the Motion has been brought under no known legal provision.

The respondent argues on the one hand that in the absence of a suit or an appeal for that matter, the applicants have no basis to approach this court by way of a Notice of Motion in a Miscellaneous Application. The respondent relied on the rendition in the authority of **Peter Mwema Kahoro v Benson Maina Githethuki [2005] eKLR** thus:

“...the Applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:-

“19. Every suit shall be instituted in such manner as may be prescribed by rules.”

And Order IV Rule 1 of the Civil Procedure Rules reads:

“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed.”

The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under the Advocates Act.

On the other hand, the applicants are of the view that the Motion has correctly been brought under the provisions of Order 51, Rule 1, Order 10, Rule 11 of the Civil Procedure Rules (“the Rules”); and Section 3A of the Civil Procedure Act (“the Act”).

Order 10, Rule 11 of the Rules concerns the setting aside of judgments, while Order 51, Rule 1 stipulates that unless otherwise stipulated, applications shall be brought by way of Motions. Section 3A of the Act on its part provides for the inherent power of the courts.

In view of the foregoing, I respectfully disagree with the argument of the respondent that the applicants approached this court under no known provisions of law.

Suffice it to say that, having arrived at my earlier finding that the Motion is *sub judice*, I am satisfied that there is merit in the preliminary objection.

I will allow ground (ii) of the preliminary objection dated 7th October, 2020 and I consequently make an order that the Notice of Motion dated 25th September, 2020 be and is hereby struck out with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 15th day of April, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

No appearance for the 1st and 2nd Applicants

Mr. Njoroge for the Respondent