



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPEAL NO. 30 OF 2019

AHMED NOORANI.....1ST APPELLANT

SCHON AHMED NOORANI.....2ND APPELLANT

- VERSUS -

RAJENDRA RATILAL SANGHANI.....RESPONDENT

(Being an appeal from the Ruling of Hon P. Muholi (SRM)

delivered on 19th July 2019 Milimani CMCC No 10453 of 2018).

JUDGMENT

1. The appellants **AHMED NOORANI** and **SCHON AHMED NOORANI** sued the respondent **RAJENDRA RATILAL SANGHANI** in the Milimani Chief Magistrate's Court seeking judgment for a debt of USD 35,976. In that court the respondent denied the claim, by his defence, and further pleaded that the appellant had previously filed another suit over the same subject matter before High Court Nairobi Commercial & Tax Division being case No. 398 of 2018.

2. This appeal is brought against the Ruling of the learned magistrate in regard to the preliminary objection raised by the respondent. The preliminary objection was in the following terms:

i. The suit is improperly before this Honourable Court and is incurably defective as the same is brought in contravention of Section 6 of the Civil Procedure Act as the plaintiffs and the Defendant herein are parties in **NAIROBI COMMERCIAL CASE NO. 398 OF 2018: AHMED NOORANI & SCHOON AHMED NOORANI VERSUS RAJENDRA RATILAL SANGHANI** at the Milimani Law Courts which suit is over the same subject matter as the suit herein and which suit has yet to be heard on a similar application by the plaintiffs.

ii. The verifying affidavit herein is therefore false as there is another similar matter pending between the parties herein at time of institution of the suit.

iii. The application dated 19th March 2019 and the suit herein is an abuse of court process.

3. The learned trial magistrate by the Ruling delivered 19th July 2019 found that Section 6 of the Civil Procedure Act (hereinafter the Act) had been established by the respondent and accordingly the preliminary objection was upheld and the appellants suit was struck out with costs. The learned magistrate stated thus in making that finding:

“I have looked at the plaint filed herein and both make reference to various loan facilities advanced to the defendant by the plaintiff's and they both make reference to a deed of acknowledgment of debt and agreement to pay debt dated 18/9/17. The two suits both make reference to the deed of acknowledgment incorporating a prior written agreement dated 13/9/17. In essence both the suit make reference to similar transaction, they are all premised on a similar deed of acknowledgment and consequently they fall within the provision of Section 6 of the Civil Procedure Act and therefore the two suits are similar. It would appear that the suit in this court is a segment of the suit in the High Court. Both suits cannot proceed at the same time and this suit having been filed later is struck out with costs to the Defendant.”

4. The appellants have raised ten grounds of appeal. Those grounds essentially fault the learned Magistrate's finding on the ground that the magistrate erred in considering facts rather than pure points of law in upholding the respondent's preliminary objection. Those are the grounds the appellants have further advanced through their written submissions.

5. The appeal is opposed by the respondent through written submissions. The respondent submitted that the preliminary objection was competent and properly raised and that that objection was not raised on controverted facts but was in tune with the case **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696**. That the objection was on pure point of law. The respondent submitted that the suit before the Chief Magistrate's Court offends Section 6 of the Act and in support of that submission the respondent relied on the case **THIBA MIN. HYDRO LTD VS JOSHAT KARU NDWIGA (2013) eKLR**. Respondent submitted that the Chief Magistrate's suit and HCC No 398 of 2018 are both premised on the same Deed of acknowledgment and that therefore the learned magistrate was right by his decision in striking at the suit.

ANALYSIS

6. The parameters of consideration of a preliminary objection are now well trodden. The learned magistrate by his Ruling appropriately cited the celebrated case of **Mukisa Biscuit** (supra) where the court in respect to a preliminary objection stated:

“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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. I wish to ponder on that holding of Mukisa Biscuit case for a while and say: that parameter of preliminary objection has been upheld by courts of all levels. Justice D.O. Ohungo after citing that case, **Mukisa Biscuit** (supra), proceeded to break down, in the case **DAVID KAROBIA KIIRU VS CHARLES NDERITU GITOI & ANOTHER (2018) eKLR**, what a court should satisfy itself when considering a preliminary objection. This is what the learned judge stated:

“11. The learned magistrate had before her a preliminary objection to the effect that the court did not have territorial jurisdiction. A valid preliminary objection must be on a pure point of law. In Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

12. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

8. The learned magistrate in consideration of the respondent's preliminary objection should have considered whether the respondent raised a pure point of law with the assumption that the appellant's facts, in their pleadings were correct.

9. As stated before the appellant's claim in the Chief Magistrate's case is for judgment for USD 35,976, being a debt the appellants alleged they were owed by the respondent. By their plaint in that case the appellants pleaded that the respondent acknowledged the debt in a Deed of acknowledgment dated 18th September 2017 and another dated 1st May 2015.

10. The respondent by his defence pleaded that the appellants had filed a previous suit in the High Court being HCC 398 of 2018 which the respondent pleaded:

“which suit is over the same subject matter as the suit herein and therefore this suit (the chief magistrate's suit) contravenes the provisions of Section 6 of the Civil Procedure Act.”

11. The appellants replied to that defence and pleaded: “the plaintiff (here the appellants) avers that HCCE033 of 2018 is in respect of a loan granted to the defendant for different currency.”

12. The case cited above in the appellants' reply to defence was filed in the High Court by the respondent and its correct title is Insolvency Cause Misc Application number E033 of 2018. The respondent pleaded in his defence that he filed that Insolvency cause to ward off the pressure the appellants were putting on him to settle their debt. The respondent further pleaded that he had settled his debt with the appellants to the tune of Ksh 1 million as directed by the judge who was handling the insolvency matter.

13. In my view the learned magistrate by his Ruling fell into two errors.

14. The first is that there was contestation between the parties on whether the debt by the Chief Magistrates Court was the same as before the High Court. The High Court matter was for judgment to be entered against the respondent for Ksh 166,270,55. The claim before the Chief Magistrate was for judgment against the respondent for USD 35,976. In reaching a decision, as the trial magistrate did, on a preliminary objection, that the suit before the Chief Magistrate offended Section 6 of the Act, the learned Magistrate erred. He committed the error forbidden in Mukisa Biscuit case (supra) by not assuming that the facts as pleaded by the appellants were correct. In other words, the learned magistrate exercised his judicial discretion in finding the suits were the same contrary to the finding in Mukisa Biscuit (supra) case. It is

clear that the learned magistrate by his decision exercised his discretion because he proceeded to find that the Deed referred to in the Chief Magistrate's case was the same Deed the appellants' relied on in the High Court case. This was contrary to the pleading of the appellants.

15. The respondent also erred to have moved the court by way of preliminary objection to have the suit struck out on disputed facts rather than filing an application supported by affidavit which would have given the appellants an opportunity to file their affidavit in reply and it is only then, and I repeat, it is only then that the learned magistrate could have exercised his discretion in determining the similarity or otherwise of the two suits.

16. The learned magistrate also fell in error in striking the suit because Section 6 of the Act does not empower the court to strike out a suit. A careful look of that section will show that it forbids the court from proceeding; and I emphasize, from proceeding with the trial of an issue in a previous suit. This is what section 6 of the Act provides:

“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. (Emphasis mine)”

17. The clear implications of that section is that a trial should not proceed. If the respondent wished to have the suit struck out he ought to have moved the court under the appropriate Rules of the Civil Procedure.

18. In the case **David Scott Ongosi v Kenya Commercial Bank Ltd (2006) eKLR** the court made it clear that the court ought to stay a suit when moved under Section 6 of the Act. This is the holding of that case:

“It has been observed time and again that the power of striking out pleadings is a draconian one which should only be exercised in plain and obvious cases. This in my view is not such a case. Besides, under the provisions of Section 6 of the Civil Procedure Act, I have a discretion to stay this suit pending the hearing and determination of HCCC No.558 of 2004. That is the order that commends itself to me. On the determination of that suit the plaintiff will elect the cause of action to take in this suit. This result does not in any way bar any party from moving the court to have the suit struck out or otherwise dismissed on any other basis. Accordingly, this suit is stayed pending the hearing and determination of HCCC No.558 of 2004. I make no order as to costs.”

19. I find and hold that the appeal, in view of the above discussion, is merited and does succeed. The costs must, as set out in Section 27 of the Act, follow the event. The appeal therefore will be granted with costs.

CONCLUSION

20. In the end the judgment of this court is as follows:

- a. The appeal is hereby allowed and accordingly the Ruling and orders of Hon. P. Muholi (SRM) in Milimani CMCC No. 10453 of 2018 of 19th July 2019 is hereby set aside.
- b. The Milimani CMCC No. 10453 of 2018 is hereby reinstated.
- c. The Milimani CMCC No. 10453 of 2018 shall be heard by any other magistrate other than Hon. P. Muholi (SRM)
- d. The appellant is awarded the costs of this appeal and the costs of the preliminary objection dated 29th April 2019.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Appellants:

For the Respondent:

ORDER

This decision is hereby virtually delivered this 1st day of July, 2020.

MARY KASANGO

JUDGE