



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

HCCC NO. E111 OF 2018

ASL CREDIT LIMITED.....CLAIMANT

-VERSUS-

ABDI BASID SHEIKH ALI.....1ST RESPONDENT

HAFSA K. S. ALI.....2ND RESPONDENT

RULING

PRELIMINARY OBJECTION

The Defendants filed a **Notice of Preliminary Objection** dated 16th January 2019 on 17th January 2019 which they withdrew on 18th January 2019. They in place filed another **Notice of Preliminary Objection** dated 18th January 2019 on 21st January 2019.

Their Preliminary Objection is based on the following grounds:-

- 1. The Application falls short on the doctrine of “Res-subjudice” under section 6 of the Civil Procedure Act as there is a suit on the same subject matter pending determination under CMCC NO. 4854 of 2018;**
- 2. The suit dishonors the principle of “veil of incorporation” as the debtor and the guarantors are two separate and distinct persons in law;**
- 3. The Plaintiff has not yet exhausted the recovery mechanisms i.e. realizing the security of the loan;**
- 4. The suit is fatally defective for failure to include the Principal Debtor.**

DETERMINATION

Order 2 Rule 9 of the Civil Procedure Rules provides;

A party may by his pleading raise any point of law.

A preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. In the case of; **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; the Court defined

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

Therefore at this stage the Court will consider legal issue(s) that go to the root of the whether there is a competent suit before Court and/or whether the Court has/lacks jurisdiction to hear and determine such matter.

1. On the issue of Res- Subjudice

Section 6 of the Civil Procedure Act provides as hereunder:

“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 Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

The rationale for this principle was restated in Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General in which the Court held 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.”

In Barclays Bank Of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012]eKLR the court held that:

“...if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties...”

In Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR; the Court opined that:

“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

However in Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR

“...In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation...”

DETERMINATION

From the above cited cases, it is clear what the doctrine of *sub-judice* entails; same parties involved in same/similar subject-matter in various suits in different Courts. In the instant case from the Plaintiff filed on 9th October 2013 and copy of Plaintiff in **Civil Suit 4854 of 2018**; attached Defendants to Replying Affidavit filed on 16th January 2019 to the Plaintiff's application of 17th October 2018 indicate the following;

The suit that is pending determination under **CMCC No. 4854 of 2018** has a different subject matter and different parties. The parties in **CMCC No. 4854 of 2018** are **A.O Basid Ltd and A.S.L Credit Ltd** and the subject matter was the recalculating of the true interest accruing on the principal sum of the charge agreement and the release of the plaintiff's log books to motor vehicles as security. The parties to this suit are **ASL Credit Limited and Abdi Basid Sheikh Ali & Another**. The subject matter is recovering from the guarantors the principal sum and interest thereon as the principal debtor defaulted in his payments. Therefore, the doctrine of *sub judice* fails in this case as the parties and subject matter in both suits are different.

However, the outcome of the case in **CMCC No. 4854 of 2018** may affect the decision in this suit in the event that the Plaintiff's case is upheld. This is because the Plaintiff in the Plaintiff in **CMCC No. 4854 of 2018** alleges that if the interest was to be recalculated he would have paid more than the principal sum and the interest thereon as **A.S.L Credit Ltd** exaggerated their amounts. This may impact on this suit as **A.S.L Credit Ltd** may have no reason to sue or claim from the guarantors. If the Plaintiff herein is heard and determined first before the matter in **Civil Suit 4854 of 2018** then to safeguard rights of each party, there shall be reconciliation of accounts by each party; from the time the hire purchase Agreements took effect; how much has been paid and received; what is due and owing and what is disputed. These reconciled accounts shall be exchanged and filed in Court and shall be the basis of issues for determination during the trial

DISPOSITION

1. The Preliminary Objection be dismissed with costs to the Respondent;

2. The other issues raised in the Preliminary Objection are not pure points of law but law and fact only determined during hearing and determination of the matter in Court;

3. The rest of the issue shall be raised and addressed during the hearing of application if need be or suit.

DATED SIGNED & DELIVERED IN OPEN COURT ON 11TH MARCH 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MS MWANGI FOR PLAINTIFF

MR NDUNGU FOR DEFENDANTS

COURT ASISSTANT JASMINE