



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**MISC CIVIL APPLICATION NO. 167 OF 2018**

**THE HONOURABLE ATTORNEY GENERAL.....APPLICANT**

**-VERSUS-**

**MESHACK OCHIENG T/A MECKO ENTERPRISES.....RESPONDENT**

**RULING**

**PRELIMINARY OBJECTION:**

The Respondent filed a Preliminary Objection dated and filed on 6<sup>th</sup> March 2018 on the grounds that:

- 1. The court has no jurisdiction to entertain the Application dated 5<sup>th</sup> April 2018 on the grounds that it would be an infringement on the Respondent's judgment rights dated 19<sup>th</sup> March 2014, 17<sup>th</sup> June 2016 and 20<sup>th</sup> June 2016;***
- 2. The Application dated 5<sup>th</sup> April 2018 discloses no reasonable cause of action; and***
- 3. The Notice of Motion Application dated 5<sup>th</sup> April 2018 contravenes the mandatory provisions of trite law, common law, intent law as consent judgment dated 19<sup>th</sup> March 2014, and 20<sup>th</sup> June 2016 further of what is obvious;***
- 4. The Notice of Motion Application dated 5<sup>th</sup> April 2018 hence the same is bad law, misconceived and incompetent before this court on the ground that the Board of Governors Ngiya Girls' High School as partly initiated payment reversal of Kshs. 52,939,270.85; and***
- 5. The Application dated 5<sup>th</sup> April 2018 only serves to embarrass or delay the fair trial of Misc. Application No. E161 of 2018.***

The Preliminary Objection sought orders that the Notice of Motion dated 5<sup>th</sup> April 2018 be dismissed with orders to pay reversion of late payment for Kshs. 52,939,270.85.

**APPLICATION BY APPLICANT**

The matter proceeded by way of oral submissions by both parties on 26<sup>th</sup> March 2019. By an Application dated 5<sup>th</sup> April 2018 and filed on 6<sup>th</sup> April 2018, the Applicant sought orders that this Court declares; the Respondent a vexatious litigant under the Vexatious Proceedings Act and for an order restraining the Respondent from instituting future proceedings without the leave of the court.

The Application is based on the grounds that:

- 1. The dispute herein was heard and determined by an Arbitration Tribunal which published a final award on 30<sup>th</sup> September 2013;***
- 2. The Applicants were dissatisfied with an award of interest in the final award and therefore successfully challenged it and was consequently set aside by a Ruling delivered by Lady Justice Kamau on 26<sup>th</sup> February 2014;***
- 3. The Arbitration award was adopted on 17<sup>th</sup> March 2014 in so far as it were consistent with the Ruling of 17<sup>th</sup> March 2014;***

**4. The Respondent has since filed numerous applications in the High Court and Court of Appeal pursuing interest even though this superior court has repeatedly determined that interest is not payable to the Respondent; and**

**5. The Respondent's actions are an abuse of judicial process since he is filing multiple cases touching on the same subject matter over issues that have been heard and determined by courts of competent jurisdiction.**

The Applicant's Application is supported by the Affidavit of Emmanuel Kiarie who states that;

That the dispute was heard and determined by an Arbitration Tribunal which published its final award on 30<sup>th</sup> September 2013. The Applicant dissatisfied, filed an application in **MISC APPLICATION 445 of 2013** challenging the award and a Ruling setting aside the interest on the principal sum was delivered by **Lady Justice Kamau on 26<sup>th</sup> February 2014**. On 17<sup>th</sup> March 2014, when the matter came for adoption of the Arbitration Award, the parties by consent, agreed that the award would be adopted in so far as it were consistent with the Ruling of 26<sup>th</sup> February 2014.

The Respondent filed an application **MISC APPLICATION 414 of 2014** before the Judicial Review Division seeking an amendment/ review of the Decree issued on 19<sup>th</sup> March 2014 allowing for payment of interest. In a Ruling delivered by **Justice Odunga on 23<sup>rd</sup> March 2017, the Court dismissed the Application**. The Respondent thereafter filed a Notice of Motion dated 24<sup>th</sup> March 2017 at the Commercial and Admiralty Division seeking for the same amendment/ review of the Decree. In a Ruling delivered by **Lady Justice Olga Sewe on 30<sup>th</sup> June 2017**, the Court dismissed the Application.

The Respondent thereafter proceeded to file another Application dated 9<sup>th</sup> November 2017 seeking for paragraph 61 of the High Court Ruling dated 26<sup>th</sup> February 2016 be dismissed or struck out. **Lady Justice Olga Sewe dismissed the Application in a Ruling delivered on 22<sup>nd</sup> December 2017** on the grounds that the issues therein were *res judicata*.

In a further Application dated 10<sup>th</sup> January 2018, the Respondent sought reprieve at the Judicial Review Division for the same orders but **Justice Odunga dismissed the Application via a Ruling delivered on 15<sup>th</sup> March 2018**.

On 19<sup>th</sup> March 2018, the Respondent proceeded to the Court of Appeal where he filed several documents under **Civil Appeal No. 54 of 2015**. However, the documents did not conform to the form of pleadings as prescribed by Court of Appeal Rules or any other legislation. Consequently, the Applicant was unable to respond to the Respondent's case before the Court of Appeal.

That the matter in question has been heard and determined to finality and that the Respondent has filed a series of cases in different divisions of the High Court seeking for the same prayer which has severally been held to be *res judicata*. Consequently, the Respondent's actions are an abuse of the court process and sufficient for this court to declare the Respondent a vexatious litigant.

#### **RESPONDENT'S CASE**

The Respondent filed his submissions dated 11<sup>th</sup> March 2018 in support of the Preliminary Objection.

It is the Respondent's submission that this court lacks jurisdiction to hear the application dated 5<sup>th</sup> April 2018 as the whole issue of interest was settled by consent which was adopted as a decree on 19<sup>th</sup> March 2014. It is the Respondent's submissions that the effect of the said decree was to give force to the entire award without any exception or modification and that the consent remains in force as it has not been set aside.

The Respondent also drew the court's attention to the consent that parties entered on 17<sup>th</sup> June 2016 and adopted as an order by the Court of Appeal on 20<sup>th</sup> June 2016. It was the Respondent's submissions that the said Court of Appeal Order directed the Applicant to pay reversion rights of Kshs. 52,939,270.85 to the Respondent and allowed the Respondent freedom to pursue the award and decree.

It was thus the Respondent's submissions that this court lacks jurisdiction to hear the Application dated 5<sup>th</sup> April 2018 because the consents were adopted as orders and consequently, this court is bound by such orders and hence lacks jurisdiction to hear the Application dated 5<sup>th</sup> April 2018.

#### **APPLICANT'S CASE**

The Applicant filed their Submissions dated 18<sup>th</sup> March 2019 in response to the Preliminary Objection dated 6<sup>th</sup> March on 20<sup>th</sup> March 2019.

It was the Applicant's submissions that the Preliminary Objection dated 6<sup>th</sup> March 2019 does not raise or otherwise address a pure point of law as it does not make any reference to any specific statutory provision as was held in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696**.

The Applicant further submitted that this court has jurisdiction to hear the Application dated 5<sup>th</sup> April 2018 because **Section 2 of the Vexatious Proceedings Act** gives this court such jurisdiction and it reads;

***"If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious proceedings, whether civil or criminal, and***

*whether in the High Court or in any subordinate court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, make an order declaring such person to be a vexatious litigant”*

It was further the Applicant’s submissions that the High Court of Kenya has **unlimited original jurisdiction under Article 165 of the Constitution** and is therefore competent to hear and determine the Application dated 5<sup>th</sup> April 2018.

It was therefore the Applicant’s case that the Preliminary Objection did not satisfy the threshold in **IEBC vs Jane Cheperenger & 2 Others [2015] eKLR** as it is only meant to be a delay tactic and as such, it was the Applicant’s prayer that the said Preliminary Objection be dismissed and the Application dated 5<sup>th</sup> April 2018 be allowed.

The case of **IEBC vs Jane Cheperenger & 2 Others [2015] eKLR** held:

*“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. Secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”*

## **DETERMINATION**

The issue to be determined by this court is the Preliminary Objection on whether this court has jurisdiction to hear the Application dated 5<sup>th</sup> April 2018.

The Respondent/Applicant did not raise a pure question of law specifically ousting the jurisdiction of this Court to hear and determine the instant application. By virtue of **Article 165 COK 2010** which provides High Court with unlimited original jurisdiction to hear and determine matters in Court except where there is express statutory limitation in terms of subject matter and specific jurisdiction to Tribunals, Specialized Courts and other Superior Courts. The relevant provision **Section 2 of Vexatious Proceedings Act** directly donates jurisdiction to the High Court. The Preliminary Objection was/is dismissed.

With regard to the instant application parties made oral submissions highlighting their respective written submissions;

The above chronology of events reveal that the Respondent in application of 5<sup>th</sup> April 2018 has canvassed the same issue on payment of interest of the claim as awarded in arbitral award of 30<sup>th</sup> September 2013. Subsequent proceedings confirm that Lady Justice Kamau set aside the award of compound interest on 26<sup>th</sup> February 2013. This is a valid regular and legal order of the Court that was/is not set aside, varied reviewed or successfully appealed against. The Respondent has since filed numerous applications as outlined above before various Courts of the High Court;

**Misc Civil Application File 445 of 2013-** Civil Division High Court;

**Misc Application Civil Application 414 of 2014-**Judicial Review High Court;

**Misc Application 167 of 2018-** Commercial Division of High Court;

**Misc Application 161 of 2018 –** Commercial Division of High Court.

All the Applications filed in the various Divisions of High Court have orders by Courts of equal and competent jurisdiction, none of these Courts can sit on appeal of another Court with equal jurisdiction. Therefore, prolonged hearing and rehearing of the same issue is a futile exercise, the Respondent ought to appeal these decisions and/or enforce final order of Court of Appeal.

I note from the content of the instant Court file, that the Respondent/Applicant filed appeal in Court of Appeal but there is no evidence of hearing of appeal and determination of the matter in Court of Appeal. There is a consent which ought to have been enforced as an order of the Court of Appeal. It cannot be the subject of hearing in the High Court but enforced as it is an order of Court order from Court Appeal. There cannot be any legal proceedings to amend, vary or review orders of Court of Appeal in the High Court. The High Court is bound by Court of Appeal orders.

I note that the Applicant was paid the principal sum of Ksh 30,571,250.10 and costs of Ksh 1,301,883.70 a fact which he admitted to in Court. The only issue the Respondent is pursuing is interest which the various Courts in High Court have ruled upon. The issue is *res judicata* unless appealed against in Court of Appeal.

The concept of *res judicata* is provided for under **Section 7 of the Civil Procedure Act** that provides;

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

In **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** the court held:

*“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;*

- a) The suit or issue was directly and substantially in issue in the former suit.*
- b) That former suit was between the same parties or parties under whom they or any of them claim.*
- c) Those parties were litigating under the same title.*
- d) The issue was heard and finally determined in the former suit.*
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

Despite the above legal considerations, the Respondent filed various suits in different Courts and numerous applications in pursuit of the same question of interest.

In the instant Court file the Respondent filed following documents;

**2/5/2018- End of Litigation to Full Execution of Appeals**

**11/6/2018-List of Authorities**

**30/5/2018-Submissions with Authorities**

**6/11/2018-Submissions on Judicial Restraint**

**31/10/2018-Judicial letter**

**15/11/2018-Affidavit High Lighting Submissions**

**12/11/2018-Supplementary Affidavit**

**14/1/2019-Notice of Motion of 14/1/2019**

**7/2/2019-Supplementary Affidavit**

**16/1/2019-High lights to be relied on in Miscellaneous Applications**

**5/3/2019-Affidavit of Evidence for Court File 161 of 2018**

**2/2/2019-Respondent’s Grounds of Opposition of 20/2/2019**

**6/3/2019-Respondent’s Preliminary Objection**

**11/3/2019- Respondent’s case dated 11/3/2019**

**20/3/2019- Respondent’s Submissions**

**12/3/2019-Respondent’s Further Affidavit**

**25/3/2019-Respondent/Applicant’s Affidavit**

All these pleadings have been filed by the Respondent Applicant without leave of the Court and could not possibly elicit a response from the Applicant. The substantive application and reply possibly further and Supplementary Affidavit(s) ought to suffice. So that when pleadings close the matter is heard on merit and determined. In the instant case it is not possible to decipher the content of all these documents and their import to the substantive application. Naturally and legally these numerous filings and service vex the Applicant. The Applicant has to contend with receiving and reading through massive documents, reply and serve the Respondent and move from Court to Court on the same/identical issue without reasonable grounds. This is because various Courts as shown above have determined the issue of interest. No Court can legally overturn another Court’s decision except in formal application of review or legal grounds to set aside judgment as the Courts are of equal and competent jurisdiction. The Respondent ought to appeal the decisions in Court Appeal. In the absence of which it would be contrary to Law to ventilate the same issue in successive cases in the High Court. For these reasons, this Court finds the Applicant’s application has merit.

A vexatious litigant has been defined in the case of *Camerado Insurance Agency v Superior Court of Sacramento County CV525328*

***(STOLZ) (1993)*** as a person who does any of the following:

***a) In the immediately preceding seven year period has commenced, prosecuted or maintained in propria persona at least five litigations other than in a small claims court that have been;***

- Finally determined adversely to the person or***
- Unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing***

***b) After a litigation has been finally determined against the person, he/she repeatedly re-litigates or attempts to re-litigate in propria persona either:***

***i) The validity of the determination against the same defendant as to whom the litigation was finally determined or***

***ii) The cause of caution, claim or controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant***

***c) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery or engages in other tactics that are frivolous***

This is court observed that the Respondent is representing himself without guidance of an advocate and he is out to seek relief from various avenues that the law provides. **Article 48 COK 2010** grants every citizen the right to access to justice, **Article 50 COK 2010** grants every person the right to a fair hearing and **Article 159 COK 2010** which provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

***(a) justice shall be done to all, irrespective of status;***

***(b) justice shall not be delayed;***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

However, although the Respondent is entitled like every person to these rights under **COK 2010, Section 7 CPR 2010**, curtails multiplication of suits and pleadings on the same/identical issue. Therefore, the Respondent is estopped from filing any pleading or suit in any Court in the High Court on the issue of interest emanating from the **Arbitral Award** of 30<sup>th</sup> September 2013 without leave of the Court.

To aid the Respondent there is pending for determination same matter in **HCCC 161 2018**. In terms of **Section 1A of CPA** that provides for **just, expeditious, proportionate and affordable resolution of this matter**, this court shall have this file placed before the Trial Court in **HCCC161 of 2018** and all pleadings going forward shall be filed with leave of the Trial Court **HCCC161 of 2018**. **No other suit in any other Court shall be filed by the Respondent on the current issue in any Court within High Court without leave of the Trial Court in HCCC161 of 2018**

#### **DISPOSITION**

**1. Preliminary Objection dated 6<sup>th</sup> March 2018 be dismissed with costs**

**2. Application dated 5<sup>th</sup> April 2018 granted as prayed;**

**3. Misc. Civil Application No. 167 of 2018, be consolidated with and heard with Misc. Civil Application No. E161 of 2018.**

**DATED, SIGNED & DELIVERED IN OPEN COURT ON THIS 20<sup>TH</sup> MAY, 2019.**

**M. W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**MR. KIHARA FOR THE APPLICANT**

**MESHACK OCHIENG RESPONDENT/IN PERSON**

