



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 4 OF 2012

SHABAN ODUKI WANYAMA.....PLAINTIFF

VERSUS

CARISPO WECHULI

MUMIAS SUGAR CO. LTD.....DEFENDANTS

RULING

The 2nd defendant/respondent raised a preliminary objection on the following principal points that:-

1. This honourable court lacks the jurisdiction to entertain the said application as it became functus officio upon the delivery of the judgment on 9th May, 2019.
2. The application contravenes the mandatory provisions of section 6 of the Civil Procedure Act Cap 21 as the applicant had made a similar application at the Court of appeal at Kisumu vide civil application No. 127 of 2019 and which application is still pending at the appellate court.
3. The application has no merit and constitutes a blatant abuse of the due process of the court.

The 2nd defendant/respondent prays for the dismissal of the applicant's Notice of Motion dated 7th November, 2019 with costs. The 2nd defendant submitted that the plaintiff appealed against the judgement of this court delivered on the 9th may 2019 and filed an application in the court of Appeal in Kisumu for stay of the judgement which application is still pending there. This court has no jurisdiction to entertain this application dated 7th November, 2019 which is similar as it lacks jurisdiction.

The plaintiff submitted that this court was not funtus officio and that the application was not subjudice. That order 46 rule 6 of the Civil Procedure Rules empowers the court to stay execution either of its judgement or that of a court whose decision is being appealed from.

This court has considered the preliminary objection, submissions and the various authorities cited. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

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

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a 'Preliminary Objection'.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared

to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

The issue as to whether or not this court is *funtus officio* or the application is *res judicata* or *sub judice* is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

Section 7.

"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."

The defendant submitted, the application dated 7th November 2019 contravenes the mandatory provisions of section 6 of the Civil Procedure Act Cap 21 as the applicant had made a similar application at the Court of appeal at Kisumu vide civil application No. 127 of 2019 and which application is still pending at the appellate court. This court has perused the application and indeed in the supporting affidavit paragraph 3 the plaintiff admits that they have filed an application for stay under rules 5(2) (b) and 42 of the Court of Appeal Rules a copy of the application is annexed. The application before this court seeks a stay of the same judgement. I find this application dated 7th November 2019 is *sub judice* the application in Kisumu Civil Application No. 127 of 2019. This application is an abuse of the court process and this court is now *funtus officio*. I find the preliminary objection has merit and I uphold the same. This application is struck off with costs to the defendant/respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE