



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 8 OF 2019**

**STEPHEN KIPKOECH KEITANY.....PLAINTIFF**

**-VERSUS-**

**SBM BANK KENYA LIMITED.....DEFENDANT**

**-AND-**

**CHEBII JEOFREY KIPCHUMBA.....INTERESTED PARTY**

**RULING**

[1] The Plaintiff herein, **Stephen Kipkoech Keitany**, moved the Court vide his Notice of Motion dated **5 March 2019**, under **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** for orders that there be stay of proceedings of **Eldoret CMCC No. 654 of 2014** and stay of further execution of the decree in **Eldoret CMCC No. 654 of 2014** pending the hearing and determination of this suit; and that the costs of the application be provided for.

[2] The brief background to the application is that, in the year 2012 the Plaintiff approached the Defendant for a facility and was lent a sum of **Kshs. 665,000/=** to enable him purchase **Motor Vehicle Registration No. KBM 727Q**, Toyota Fielder, whose purchase price was **Kshs. 850,000/=**. As security for the loan, the Plaintiff handed over the Log Book for the said motor vehicle to the Defendant and embarked on the repayment of the loan. He however encountered financial challenges and was thus constrained to sell the motor vehicle to **Mr. Chebii Jeofrey Kipchumba**, the Interested Party herein, for **Kshs. 650,000/=**. Since the Plaintiff could not immediately hand over the Log Book of the said motor vehicle to the Interested Party, the latter filed **Eldoret CMCC No. 654 of 2014** against the Plaintiff for specific performance with a view of compelling him to hand over the Log Book and a duly executed transfer form in respect of the motor vehicle.

[3] The Defendant was enjoined to the suit along the way, but it thereafter filed an application seeking that its name be struck out from the that suit. An order to that effect was subsequently made by consent of the parties. The case then proceeded to hearing and was ultimately determined in favour of the Interested Party. The Plaintiff's contention is that, by that time, he had fully repaid the loan he owed the Defendant; and that despite demand and several visits, the Defendant has refused to release the Log Book for the motor vehicle; thereby placing the Plaintiff in an awkward position vis-à-vis the decree in **Eldoret CMCC No. 654 of 2014**, wherein a Notice to Show Cause has been issued against him. He further asserted that he is unable to comply because the said Log Book is presently in the custody of the Defendant.

[4] The Plaintiff acknowledged that he has been informed by the Defendant that there is a further sum of **Kshs. 127,800/=** that remains unpaid in respect of his account, being charges incurred in connection with **Eldoret CMCC No. 654 of 2014**; and that the Bank has demanded payment thereof before the Log Book can be released. He however denied liability and has, in his Plaintiff herein, sought declaratory orders in that regard. And so, it is the Plaintiff's prayer that, pending the hearing and determination of his suit, the Court be pleased to stay the lower court proceedings, and in particular the execution process.

[5] The Defendant opposed the application contending that it ought to have been filed in the lower court matter; and that, for that reason, the application is an abuse of the process of the Court. It was further the contention of the Defendant that Advocates' fees are the responsibility of the borrower and form part of recovery costs; and therefore that the Plaintiff has no valid cause of action in this matter. In addition to the Grounds of Opposition dated **24 May 2019**, the Defendant filed a Notice of Preliminary Objection, contending that:

[a] The Plaintiff's application and suit are bad in law and are an abuse of the Court process;

[b] The Plaintiff has no capacity to give instructions to his counsel, swear an affidavit or institute legal proceedings owing to his mental condition as adverted to in the suit and in the affidavit in support of the application;

[c] The suit and all proceedings taken against the Defendant are therefore a nullity *ab initio* for want of capacity;

[d] The Plaintiff's application and suit are therefore incurably defective, bad in law and ought to be struck out.

[6] The Interested Party, on his part, had no objection to the Plaintiff's application, which was urged by way of written submissions, pursuant to the directions of the Court issued herein on **27 March 2019**. In response to the Preliminary Objection, Counsel for the Plaintiff relied on **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696 to support his submission that the allegations of lack of capacity on the part of the Plaintiff are serious allegations of a factual nature; which ought to have been made on oath, supported by medical evidence. He urged the Court to dismiss the same; and that, in any case, the issue is not a proper one for consideration as a preliminary point. Counsel further submitted that the Defendant did not demonstrate how or on what basis the application and the suit are bad in law; and added that since the orders sought will not affect the Defendant, it has no basis for opposing the application. Counsel accordingly urged the Court to dismiss the Preliminary Objection; allow the application and grant the orders sought by the Plaintiff.

[7] The Respondent's Counsel, on her part, took the view that since the Plaintiff has conceded to being mentally ill, a finding should be made that he was incapable of giving instructions to his Advocate for the filing of this suit or swearing the affidavit filed in support of the instant application. **Ms. Kosgei** relied on **Order 32 Rule 15** of the **Civil Procedure Rules** and the case of **M M M vs. A M K** [2016] eKLR in support of her submissions and urged for the dismissal of the application and for the striking out of the main suit.

[8] The Notice of Preliminary Objection shows, on the face of it, that it was laid under **Order 32 Rule 15** of the **Civil Procedure Rules**. Accordingly, the single issue that arises from the four points relied on by Counsel of the Respondent is that of capacity of the Plaintiff. The question to pose then is whether this is an issue fit for consideration by way of a preliminary objection; bearing in mind the principle in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A 696**, that:

**“...a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”**

[9] Likewise, in **Oraro vs. Mbaja [2005] 1 KLR 141** the principle was restated thus by **Hon. Ojwang, J.** (as he then was):

**"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a 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 a preliminary objection, 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...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

[10] Since it is manifest from the above provision that an inquiry would have to be held to determine whether or not the Plaintiff ought to be adjudged unfit mentally, it goes without saying the Defendant's Preliminary Objection is misconceived; and I so find. Having so found, there appears to be no valid opposition to the application for stay; noting that it was conceded to by the Interested Party who is the Plaintiff and Decree Holder in the suit sought to be stayed. In the premises, I would allow the application dated **5 March 2019** and grant orders as hereunder:

[a] That an order be and is hereby issued staying the proceedings and further execution in **Eldoret CMCC No. 654 of 2014** pending the hearing and determination of this suit;

[b] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4<sup>TH</sup> DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE