



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL APPEAL NO. 22 OF 2018**

**CHINA ROAD & BRIDGE CORPORATION.....APPELLANT**

**VERSUS**

**KELVIN NYUKI MACHIMBO.....RESPONDENT**

**RULING**

**Introduction**

1. On 5<sup>th</sup> September, 2018, the appellant filed a Notice of Motion application seeking majorly to stay execution of Judgment and Decree in Mavoko CMCC 628 of 2017 and lift the warrants given on 28<sup>th</sup> August, 2018. On 17<sup>th</sup> September, 2018, the respondent filed a replying affidavit and a notice of preliminary objection.

**Notice of Preliminary objection**

2. On 17<sup>th</sup> September, 2018, P.K Omwenga and Associates, counsel for the Respondent filed a notice of a preliminary objection the crux of which is:-

***a) that the appellant has filed a multiplicity of similar applications seeking similar orders which have already been determined by a court of competent jurisdiction and as such the instant application is an abuse of the Court's due process, as it is res judicata;***

***b) that the applicant has consistently failed, refused and neglected to comply with explicit court order and is therefore estopped from seeking the discretion of this Honorable court;***

***c) that the purported appeal upon which the said application is expressed to be premised upon is irregular, incompetent and non-existent***

3. Mr. Ngugi for the Respondent supported the objection arguing that the Appellants have filed a total of four applications seeking similar orders and it is between similar parties. These are application dated 2.3.2018 filed in Mavoko Law Courts (annexture KNM1 in the replying affidavit), application dated 29.3.2018 filed in Mavoko Law Courts (annexture KNM2 in the replying affidavit), application dated 30.8.2018(annexture KNM4C in the replying affidavit), application dated 5.9.2018 which is the latest. He further argued that the persons who have sworn the affidavits in support of the appellant's application have not shown the authority of the company sanctioning them to swear the affidavits. Further that there is no proper appeal against the order of the trial court dismissing the application for stay thus this application is incompetent and incurably defective thus the objections should be upheld.

4. Counsel for the appellant opposed the preliminary objection on grounds that there is no proof that the trial court has made a determination on the several applications. The first application is for stay pending appeal, the second application is for extension of time to deposit the decretal sums, the third application was to determine the issue of legality of the warrants taken out despite there being a stay of execution pending appeal, and the instant application seeks a determination of how warrants of execution could be issued yet stay orders pending appeal are still in force. Further that there are two appeals in this file, one against the judgment and one against the order. Thus the preliminary objection should be dismissed as it is meant to block the appellant from benefiting from the court process.

**Definition of a preliminary objection**

5. I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

6. It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.

7. Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs. Westend Distributors Ltd*(1969) E.A 696 AT PAGE 700 said:-

*"...so far as I am aware, 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."*

8. In the words of **Sir Charles Newbold P** at page 701, B:-

*"...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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)*

9. Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others (2001) KLR 579* where it was held that:-

*"The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts..."*

10. Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows in *Oraro vs. Mbaja [2005] 1 KLR 141:-*

*"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.... 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion...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. ...."(Emphasis added)*

11. Thus, a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is **no** proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

12. According to Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co, A **question of law**, also known as a **point of law**, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a **question of fact**, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

13. A **question of fact**, also known as a **point of fact**, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles.

**The issue for my determination is whether the grounds raised in this objection are pure points of law**

14. The first ground as I understood it is "that the subject application was filed in flagrant disobedience of the express and mandatory provision of the Civil Procedure Act, particularly Section 7 Cap 21 Laws of Kenya." Put differently, is this application res judicata? This is a point of law which does not warrant evidence.

**a. Whether this suit is res judicata**

15. Mr. Ngugi submitted that the Appellants have filed a total of four applications seeking similar orders and it is between similar parties. The record shows that these are application dated 2.3.2018 filed in Mavoko Law Courts (annexture KNM1 in the replying affidavit), application dated 29.3.2018 filed in Mavoko Law Courts (annexture KNM2 in the replying affidavit), application dated 30.8.2018(annexture KNM4C in the replying affidavit), and the application dated 5.9.2018 which is the latest. From my record, it is not clear that the matters have

been concluded

16. Further, to establish that the matters have been concluded, the parties would need to demonstrate the same.

17. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

18. As **Somervell L.J.** stated In *Greenhalgh v Mallard (1) (1947) 2 All ER 257* *res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*

19. It is quite clear that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuit between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.

20. In **Caeserstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) paras 20-21**, it was observed that the requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgments involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of this case.'

21. From the evidence before me, it is not clear whether or not the applications that the respondent has raised objection to have been concluded and or resolved. I am not persuaded that the plea of *res judicata* raised in this case can succeed.

***b. The applicant has consistently failed, refused and neglected to comply with explicit court order and is therefore estopped from seeking the discretion of this Honorable court.***

22. The court was asked to strike the petition on grounds that the applicant has consistently failed, refused and neglected to comply with explicit court order and is therefore estopped from seeking the discretion of this Honorable court. I find that this is a question of fact that ought to be established in the substantive application and therefore a preliminary objection cannot dispense with this issue.

***c. the purported appeal upon which the said application is expressed to be premised upon is irregular, incompetent and non-existent.***

23. The appellant submitted that they filed two appeals, therefore this is a fact that is in dispute and therefore, I find that this is a question of fact that ought to be established in the substantive application and therefore the preliminary objection fails on this ground.

24. In my view, considering that there are disputed facts that form the basis of the preliminary objection, it is improper for the said objection to be allowed.

#### **Determination**

25. Applying the principles laid down in the law and the above authorities, the conclusion becomes irresistible that the preliminary objection raised in this case lacks merit. Consequently, the same is ordered dismissed with costs to the Appellant.

Orders accordingly.

**Signed, Delivered and Dated at Machakos this 6<sup>th</sup> day of December, 2018**

**D.K. KEMEI**

**JUDGE**