



Maingi v Sen-Tech Limited; KHS East Africa Limited (Objector) (Cause 1710 of 2013) [2024] KEELRC 1081 (KLR) (13 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1081 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1710 OF 2013
JK GAKERI, J
MAY 13, 2024**

BETWEEN

JERUSHA NYAMBURA MAINGI CLAIMANT

AND

SEN-TECH LIMITED RESPONDENT

AND

KHS EAST AFRICA LIMITED OBJECTOR

RULING

1. Before the court for determination is the Claimant’s Notice of Preliminary Objection dated 6th March, 2024 urging that;
 1. The Advocates for the Applicant herein Litoro & Omwebu Advocates are not properly on record and offends Order 9(a) of the Civil Procedure Rules, 2010 (wrongly indicated as *Civil Procedure Act*).
 2. The Application herein is res judicata the issues therein having been directly and substantially determined in similar applications.
 3. The Application herein is frivolous, vexatious and abuse of the court process.
2. The Objector did not file a response to the Preliminary Objection.

Claimant’s submissions

3. On compliance with the provisions of Order 9 (a) of the Civil Procedure Rules, 2010, counsel urged that the firm of Daly Inamdar Advocates filed the application dated 5th August, 2019 which was dismissed on 12th May, 2022 and sought a stay and review of the ruling which was dismissed on 2nd



November, 2023 and the Objector has now instructed another law firm to file a similar application and has not complied with Order 9 (a) of the Civil Procedure Rules, 2010.

4. That the application dated 5th March, 2024 filed by Litoro & Omwebu Advocates seeks orders similar to those sought in the earlier application by Daly and Inamdar Advocates and the matters had been settled.
5. Concerning res judicata, counsel submits that the instant application is brought in bad faith as the issues being litigated were heard and determined by a competent court as ordained by law.
6. Reliance was made on the sentiments of Wingram V-C in Henderson V Henderson (1843) 67 ER 313 cited in Milka Njeri Thuo & another v Pauline Gikera & another [2018] eKLR to urge that the Objector's application dated 5th March, 2024 is res judicata as the issues raised were determined.

Objector's submissions

7. On compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010, counsel submits that the rule does not apply to persons who are not parties to the suit within the meaning of Order 1 Rule 1 of the Rules and Objectors are persons opposed to the parties to the suit as they are neither a Decree-Holder or a Judgement-Debtor and there is no judgement or decree against the Objector.
8. Reliance was made on Paul Mwaua Mwangi v Francis Muamba Kimeru & another [2019] eKLR and Nzeli Maweu v Christine Katoto Masila [2021] eKLR among others to urge that Order 9 Rule 9 is intended to protect advocates from mischievous clients and thus did not apply to Objectors.
9. As regards res judicata, counsel relied on the sentiments of the court in Sella Rose Anyango v Attorney General & 2 others [2021] eKLR as well as those of Ojwang J. (as he then was) in an unnamed case for the definition of a Preliminary Objection.
10. According to counsel, the Objector's proceedings herein will require a factual analysis of whether the proclamation is the same, the goods proclaimed are the same and whether they belong to the Objector.
11. Reliance was also made on the Court of Appeal decision in Independent Electoral & Boundaries Commission v Maina Kiai & others [2017] eKLR on the essentials of res judicata.
12. According to counsel, there are two proclamations of attachment dated 24th May, 2022 and 27th July, 2019 and the properties are different thus the threshold of res judicata had not been met.

Determination

13. The issues for determination are whether;
 - i. The Claimant's Notice of Preliminary Objection dated 6th March, 2024 is a competent Preliminary Objection.
 - ii. The Objector's Notice of Motion dated 5th March, 2024 is res judicata.
14. On the 1st issue, counsel for the parties have adopted opposing positions with the Objector's counsel urging that the Preliminary Objection is incompetent as it raises factual issues as opposed to pure points of law. Counsel for the Decree-holder argues otherwise.
15. It is common ground that the definition of a Preliminary Objection is a judicial pronouncement and the locus classicus exposition of what constitutes a Preliminary Objection are the sentiments of Justices



of the Court of Appeal in the often cited case of in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 where Law J.A stated as follows;

“... 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.”

16. In the words of Sir Charles Newbold V.P;

“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 . . .”

17. The Decree-Holder’s counsel submits that the failure by the Objector’s counsel to comply with Order 9 Rule 9 of the Civil Procedure Rules, 2010, and the fact that the Notice of Motion dated 5th March, 2024 is res judicata constitute a competent Preliminary Objection concerning non-compliance with Order 9 Rule 9. Counsel for Decree-Holder urges that the Change from Daly Inamdar Advocates to Litoro & Omwebu was neither consensual nor with leave of the court.

18. The law on change of advocates after judgment is well settled.

19. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides;

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such a change or intention to act in person shall not be effected without an order of the court –

- a. upon an application with notice to all parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

20. Other than contending that the provisions of Order 9 Rule 9 of the Civil Procedure Rules were not complied with, the counsel did not demonstrate that in fact the Rule applied the Objector in the instant suit and as correctly submitted by the Decree-Holder’s counsel, an Objector is not privy to the suit and only comes to court to object to the action being undertaken by the Decree-Holder or its servants or agents and nothing else.

21. The foregoing notwithstanding, judicial authority is clear that the application for stay of execution and objection proceedings are a continuation of proceedings and are regarded as part of the same matter and the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 would normally apply and the Objector’s counsel was obligated to comply with the Rules.

22. The foregoing is fortified by the sentiments of the Court of Appeal in Tobias Wafubwa v Ben Butali [2017] eKLR as follows;

“Once a judgment is entered, save for matters such as application for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court but a commencement of new proceedings in another court.



Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a notice of change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.”

23. The foregoing sentiments are implicit that objection proceedings do not amount to commencement of new proceedings and it would appear to follow that compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010 was not an imperative.
24. Since the Objector’s counsel filed copies of Notice of Appointment and Change of Advocates on 22nd and 23rd February, 2021 respectively, the law was complied with.
25. In the premise, the Decree-Holder’s argument is unsustainable.
26. Concerning res judicata, while the Decree-Holder’s counsel contends that the Objector’s Notice of Motion dated 5th March, 2024 relates to matters already heard and determined by the trial court. The Objector’s counsel urges that the issues raised by the Decree-Holder’s counsel relates to factual issues that require evidence before the court and hence not a pure point of law as the court is required to delve into evidence and make findings of fact on the goods proclaimed.
27. It is common ground that Objector filed the instant Notice of Motion after its application for stay of execution and review of the Ruling delivered on 12th May, 2022 was dismissed vide a Ruling delivered on 2nd November, 2023.
28. The Notice of Motion seeks 5 orders including costs, namely;
 1. Be certified urgent.
 2. Stay of execution of the decree issued on 7th February, 2022 and all consequential orders and proceedings arising there from including the Auctioneer Application for break-in Orders and Police Assistance dated 23rd January, 2024
 3. The Application be heard inter partes as a matter of urgency.
 4. The Honourable Court be pleased to allow the Objection proceedings and set aside the Proclamation and/or attachment by M/S Charles Mutinda Mutua t/a Charlton Auctioneers by its Proclamation Notice dated 24th May, 2022 in execution of the decree herein against the Objectors.
 5. The costs of this Application be awarded to the Objector.
29. The Objector argues that the goods proclaimed in the Proclamation Notice dated 24th May, 2022 belong to it and it is neither a party to the proceedings nor a judgement debtor in the matter and it is neither a debtor, an affiliate, subsidiary, nor holding company of the Judgement-Debtor herein, Sen-Tech Ltd which has no legal or beneficial interest in any of the Objector’s proclaimed goods or assets.
30. In the Supporting Affidavit by Denise Schneider Walimohamed, the affiant deposes that the proclaimed properties were purchased in 2013, 2014, 2015 and 2016 but could not trace some of the receipts.
31. This far, it is discernible that the Objector is by the instant objection and Notice of Motion attempting to furnish the court with the evidence it did not avail vide its earlier application.
32. That the Warrants of Attachment and sale expired on 20th December, 2023 and are not executable and purported execution of the Decree would be irregular and the Objector stands to suffer irreparable loss.



33. By its Notice of Objection dated 1st August, 2019 and filed an even date, the Objector through the law firm of Daly & Inamdar argued that;
- a. The assets proclaimed are wholly owned legally and beneficially by the Objector.
 - b. The Objector was not a party to the main suit.
 - c. The Objector has no legal relationship with the Claimant and was not the employer.
 - d. The Objector is an independent and separate legal entity and has no relationship with the Respondent.
34. In the court's view, these arguments are not fundamentally different from the grounds set out on the face of the Notice of Motion dated 5th March, 2024 and the Notice of Objection of even date.
35. In its Ruling dated 12th May, 2022, the trial court relied on the decisions in *Precast Portal Structures v Kenya Pencil Company Ltd & 2 others* [1993] eKLR and *Stephen Kiprotich Koech v Edwin K. Barchilei, Joel Sitienei (Objector)* 2019 eKLR to underscore the burden of proof imposed on the Objector to prove that it is entitled to or has a legal or equitable interest on the whole or part of the attached property.
36. The trial court found that the Objector filed the application before the court without supportive documentation as neither the Agreement of Sale nor form CR 12 was annexed to the Supporting Affidavit to the application and did not bother to file submissions as intimated.
37. On the other hand, the Decree-Holder provided a copy of a letter by the Objector to its clients dated 24th June, 2013 which stated in part;
- “ . . . We are pleased to inform you that the management team, sales team and an extensive service team at SEN-TECH has joined KHS East Africa Ltd and they will remain at your service.”
38. The court further observed as follows;
- “From the above pronouncement which remains uncontroverted, it is unclear whether the Objector and the Defendant have merged into a new company, whether it is a joint venture or a member of the same group of companies. Either way, the onus of illuminating the nature of the resultant entity lay with the Objector for the court to determine whether the Objector inherited the original Respondent's liabilities or not; just as it did regarding its assets. Moreover, the Turquand rule comes into play. In consideration of the circumstances of this case, the Decree-Holder does not need to have an in-depth knowledge of the inner workings of the Objector/Judgement-Debtor so as to realize the fruits of her judgment.”
39. The court found the Objection dated 1st August, 2019 and the corresponding Chamber Summons dated 5th August, 2019 unmerited and dismissed them with costs.
40. It is clear that the Objector's application was lost for want of evidence.
41. The foregoing decision precipitated the Application for interim stay of execution of the Decree and Warrants of Sale pending the hearing and determination of the Objector's application for review dated 27th May, 2022 which the court dismissed with costs on 2nd November, 2023.



42. At paragraph 8 of its Ruling, the court stated inter alia;

“The application herein is substantially similar to the one dated 5th August, 2019 where the same party sought stay of execution pending hearing and determination of the Objector’s application dated 2nd August, 2019.”

43. The court revisited the Objector’s manner of handling of the earlier application where it did not avail supportive evidence or file submissions and did not do so in the application for review notwithstanding a request for 3 days which the court acquiesced. The court found the application unmerited and dismissed it with costs.

44. The foregoing decision precipitated the instant Notice of Objection to Attachment dated 5th March, 2024 and the Notice of Motion of even date adverted to elsewhere in this Ruling.

45. It requires no belabouring that the Notice of Objection to Attachment and Notice of Motion are a replication of the earlier one and the issues are substantially the same and in the court’s view all were heard and determined by the trial court by its Rulings delivered on 12th May, 2022 and 2nd November, 2023, namely; the Objector is a legal entity distinct and separate from the Judgment-Debtor and that it owed or had legal and/or equitable interest in the proclaimed assets, save for the allegation that the Warrants of Attachment had lapsed, which is factual issue.

46. In terms of the scope of res judicata, the sentiments of Wingram V-C in Henderson V Henderson (Supra) are instructive;

“... Where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

47. See also George W. M. Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR.

48. The justification of res judicata was alluded to in John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport & Infrastructure & 3 others [2015] eKLR as follows;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of courts limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts... Without res judicata, the very essence of the rule of law would be in danger or unravelling uncontrollability.”

49. The doctrine of res judicata is provided for by Section 7 of the [Civil Procedure Act](#).



50. In Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (Supra), restated the essentials of res judicata as follows;
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under same title.
 - d. The issue was heard and 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.
51. Juxtaposing these principles on the facts of the instant objection and application, it is clear that the Objector's Notice of Objection to Attachment dated 5th March, 2024 and the Notice of Motion of even date are res judicata as the suit and issues in the current application are similar to the issues in the earlier suit, if not identical.
52. Second, the same parties were parties to the earlier suit litigating under the same title.
53. Third, the issues arising from the suit were heard and determined by a court of competent jurisdiction.
54. From the record, it is discernible that the Objector is by the Notice of Objection and Notice of Motion dated 5th March, 2024 is attempting to have second bite at the same cherry which is not allowed in litigation as litigation must come to an end.
55. The rendition by the Court of Appeal in Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR is instructive;
- “ . . . Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error . . . ”
56. Flowing from the foregoing, it is clear that the Objector's Notice of Objection dated 5th March, 2024 and Notice of Motion of even date are unsustainable on account of being res judicata.
57. The upshot therefore is that the Notice of Preliminary Objection dated 6th March, 2024 is upheld.
58. Consequently, the Notice of Objection to Attachment and the Notice of Motion both dated 5th March, 2024 are hereby struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court



to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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