



Kipteng v Good Hope Sacco Limited; Co-operative Bank of Kenya Limited (Garnishee) (Miscellaneous Application E057 of 2023) [2023] KEELRC 3272 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E057 OF 2023
DN NDERITU, J
DECEMBER 13, 2023**

BETWEEN

ANGELINA NAANYU KIPTENG APPLICANT

AND

GOOD HOPE SACCO LIMITED RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED GARNISHEE

RULING

I. Introduction

1. By way of a notice of motion dated 5th September, 2023 (the application) the applicant, acting in person, is seeking for the following orders –
 1. Spent
 2. That, this Honourable Court be pleased to grant leave for the Applicant to transfer ELRC case NO. E002 of 2019 at SPMCC at Kilgoris to this Honourable Court for assessment of the Bills of costs filed on the 3rd August, 2022 and 19th December, 2022 for disposal of the same.
 3. That, upon assessment and/or taxation of the said Bills of costs, this Honourable Court be pleased to issue an Order for interests to be applied at the rate of (14%) (p.a) as from the date of filing the Applications and until full payments is made.
 4. That, this Honourable Court be pleased to issue an Order for payments of interests for decretal sum of Kshs.1,675,270.49 as from 29th July,2021, as earlier Ordered by the SPMCC at Kilgoris at the commercial rate of (14%) (p.a) and until fully paid as per the Order dated 13th July, 2022.



5. That upon the assessment of the said Bills of costs, this Honourable Court be pleased to issue an Order for Consolidation of the Certificates of costs upon issuance together with Certificates of Costs issued on 15th August, 2023 in the [ELRCA](#) NO. 13 OF 2022, which are before the Court.
 6. That an Order do issue by this Honourable Court restraining the SPMCC at Kilgoris by way of prohibitory Order from entertaining, adjudicating, hearing and determining and or dealing in any manner whatsoever and howsoever with the Application dated 27th July, 2023 filed by the firm of M/s Nchoko & Company Advocates for abuse of due process of Court and violations of mandatory provisions of the Law.
 7. That, the costs of this Application be in the cause.
2. The application is expressed to be brought under Articles 159(2)(d), 165(6) & (7) of the [Constitution](#), Sections 1A, 1B, 3, 3A, & 18(1)(b) of the [Civil Procedure Act](#), *inter alia*, and all other enabling provisions of the law.
 3. The application is based on the grounds on the face of it and supported with the affidavit of Angelina Naanyu Kipteng, the applicant, sworn on 5th September, 2023 with several annexures thereto.
 4. On 25th October, 2023, the respondent, through Nchoko & Co. Advocates, filed a notice of preliminary objection (PO) raising the following issues for the determination of this court –
 1. That, the Application before the Honourable Court are incompetent, vexatious, scandalous, incurably defective in substance, law and otherwise an abuse of Court process, judicial time and resources and should be dismissed, expunged and struck out from Court Records.
 2. That, the Application herein is Res-judicata which offends Section 7 of the [Civil Procedure Act](#).
 3. That, the issues raised by the applicant are mala fide in substance as she has multiple suits relating to the same cause of action before this Honourable Court.
 4. That, the Honourable Court has no jurisdiction to her this matter as the matter is out of the court's jurisdiction and it offend Section 34 of the [Civil Procedure Act](#).
 5. That, the orders sought cannot issue since the Application has been placed before the wrong court.
 6. That, this Honourable Court ought to declare the present Preliminary Objection to be meritorious and the application dated 28th August, 2023, filed in court be struck out with costs to the Respondent.
 5. On 31st October, 2023 the applicant filed a further affidavit in response and opposition to the PO. Of course, the affidavit is an unorthodox response to the PO which should legally only engage matters of law not facts.
 6. When the matter came up in court for directions on 1st November, 2023, the applicant appeared in person, Mr. Karanja appeared for the respondent holding brief for Mr. Nchoko, and Miss Njeru appeared for the garnishee. It was directed that the PO be heard first and that the same be canvassed by way of written submissions.
 7. Counsel for the respondent filed written submissions on 16th November, 2023, while the applicant filed her submissions on 20th November, 2023 and further submissions on 27th November, 2023. As at the time of writing this ruling no submissions have been received from counsel for the garnishee



although the further submissions by the applicant make reference to submissions by counsel for the garnishee which are not on record.

II. Submissions from both sides

8. Counsel for the respondent has submitted that the application herein offends Sections 15 and 34 of the *Civil Procedure Act*. It is submitted that this court has no jurisdiction to deal with the application and that this entire matter has been filed in total abuse of the court process. It is submitted that this court lacks both territorial and substantive jurisdiction to handle the matter. Counsel has cited the old case of *Owners of Motor Vessel "Lilian S" V Caltex Oil Kenya LTD* (1989) KLR and cited the popular sentiments by Nyarangi JA that "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence".
9. Further, it is submitted that the application is res judicata under the provisions of Section 7 of the *Civil Procedure Act*. Counsel has cited *Kennedy Mokua Ongiri V John Nyasende Mosioma & Another* (2022) eKLR in support of that argument.
10. For the foregoing reasons, the court is urged to dismiss the application.
11. The applicant has submitted that this court has powers and jurisdiction in calling for and transferring Kilgoris Magistrate's Court ELRC No. E002 of 2022, wherein she is the claimant/decreed-holder, to this court for taxation of costs in regard to proceedings in that court wherein she has a judgment in her favour. It is emphasized that this application is not a different cause but an application for transfer of the cause to this court for taxation purportedly under the provisions of law upon which the application is predicated. Further Section 18 of the *Civil Procedure Act* is invoked.
12. It is submitted that this matter is not res judicata under Section 7 of the *Civil Procedure Act*.
13. Further, it is submitted that the PO does not meet the threshold that a PO shall be based on matters of law only that do not call for evidential proof.
14. On the basis of the foregoing, it is submitted by the applicant that the PO should fail and be dismissed with costs.
15. It is unfortunate that the submissions by the applicant, in my view due to lack of technical legal knowledge, deal with the lengthy and regrettably wasteful history of litigation between the parties herein revolving around and about the same issue, instead of addressing the issues raised in the PO.

III. Issues for determination

16. Flowing from the foregoing summary, the following issues commend themselves to this court for determination –
 - a) Is the PO as raised herein proper in law?
 - b) If (a) above is in the affirmative, is the application herein properly before the court or is it res judicata and or an abuse of the court process?
 - c) Depending on the outcome in (a) and (b) above, what orders should issue? And,
 - d) Who should meet the costs of the PO and the application?



VI. Analysis & determination

17. In the old case of *Mukhisa Biscuits Manufacturing Co. LTD V West End Distributors LTD* (1969) EA 696, arguably a leading authority on what constitutes a PO, it was expressed by Sir Charles Newbold P. as follows - “A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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”.
18. My understanding of the above quote, which has been cited again and again over the years, is that the foundation and the arguments for or against the PO should be purely based on law. A PO should be based on pure law which should not require the court to seek or interrogate evidence in deciding the same. This is the reason why the affidavit filed by the applicant in response to the PO add no value and make no sense.
19. If and where a court’s view is obscured by disputed facts that need evidence for substantiation, then the PO is displaced and inappropriate. It is upon this predication that the court shall weigh and scale the PO herein.
20. On issue (a) Section 7 of the [Civil Procedure Act](#) provides as follows –
 7. Res judicata

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.
21. The question that comes to mind is this – what is the subject matter of the application? The prayers sought have been reproduced in the introductory part of this ruling. In my understanding, the applicant is seeking that the cause in the lower court be transferred to this court for taxation of bills of costs pending therein on proceedings that took place in that lower court. Has this issue been litigated upon and determined? Of course, the answer to this question is one that requires an inquiry and adduction of evidence to determine whether that aspect of the PO meets and conforms with the above law. There is no obvious and uncontested evidence or information that has been readily availed to satisfy that angle of the PO.
22. Therefore, if the PO was only based on the issue of the application being res judicata the same should fail. However, the respondent has also relied on Section 34 of the [Civil Procedure Act](#) which provides as follows –
 34. Questions to be determined by court executing decree
 - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
 - (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.



- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

23. Further, Sections 30 and 31 of the *Civil Procedure Act* provide as follows –

30. Court by which decree may be executed

A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

31. Transfer of decree

- (1) The court which passed a decree may, on the application of the decree holder, send it for execution to another court—
 - (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of that other court; or
 - (b) if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court; or
 - (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which has passed it; or
 - (d) if the court which has passed the decree considers for any other reason, which it has recorded in writing, that the decree should be executed by such other court.
- (2) The court which passed a decree may of its own motion send it for execution to any court of inferior but competent jurisdiction.

24. The above law sets out the circumstances and reasons upon which a decree may be sent from the trial court to another court for execution and or enforcement. This is purely a matter of law based on the above provisions. To that extent the PO is well founded based on Mukhisa Biscuits (Supra).

25. Further, Section 27 of the *Civil Procedure Act* provides as follows –

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.



26. For the foregoing reasons, the court finds and holds that the PO is properly founded in law and meets the threshold. This holding answers to issue (a) in the affirmative.
27. In regard to issue (b), which is closely intertwined with (a) above, the respondent has not demonstrated and or convinced the court that the specific issue brought to this court for determination – transfer of the decree of the lower court to this court for taxation – has been heard and determined on merit in any other forum of competent jurisdiction. To that extent it is the finding of this court that the issues raised in the application are not res judicata as that is an issue that calls for interrogation by way of presentation of evidence, oral, affidavit, and or documentary so as to satisfy the provisions of Section 7 of the [Civil Procedure Act](#). Although no evidence has been availed that the issue has been heard and determined in any other court of competent jurisdiction.
28. Be that as it may, however, the PO by the respondent, as analyzed elsewhere above in this ruling, is not only based on the application being res judicata. The respondent has also based the PO on Section 34 of the [Civil Procedure Act](#).
29. Section 30 of the [Civil Procedure Act](#) outlines the circumstances and reasons under which a decree may be transferred from one court to another for execution. The applicant herein has not demonstrated in the application that any of those conditions and or circumstances set by the law have been met or exist. It is not demonstrated that there is any other sufficient cause that should inform this court to call for the file from the lower court for taxation and or assessment of costs or execution of the decree in this court. The entire application flies on the face of the above provisions of the law.
30. In any event, Section 34 is very clear and categorical that execution is part and parcel of a process towards conclusion of a cause that should be superintended and enforced by the court that issued the decree. This means that unless for good and sound legal reasons based on Section 30 above, execution proceedings shall be issued, superintended, supervised, and enforced by the court that passed the judgment and issued the decree.
31. No law or binding and or persuasive authorities have been cited by the applicant that gives this court powers, authority, and or jurisdiction to call for the matter from the lower court to this court for purposes of taxation or assessment of costs and execution. The subject matter was heard and determined in the lower court. Why should the matter be transferred to this court at this stage? Is it not the law that the lower court that heard and determined the matter should assess or tax the costs thereof? Why should this court interfere with the assessment/taxation of costs at this point and on what legal basis? These questions and many others find no answer in the pleadings filed herein alongside the written submissions by the applicant.
32. Clearly and evidently, the application by the applicant herein is in abuse of the court process and the same shall be struck out.
33. Last but not the least, the Employment and [Labour Relations Act](#) as read alongside the [Employment and Labour Relations Court \(Procedure\) Rules](#) are very clear on how a litigant ought to approach this court. A matter may be filed in this court as an original claim seeking for the reliefs under Section 12 of the [Act](#); appeals are filed under Section 17; a constitutional petition on violation of rights and liberties based on employer-employee relationships may be filed based on the Constitution and the rules applicable; and judicial review proceedings may be filed under Order 53 of the [Civil Procedure Rules](#) based on employer-employee relationships.
34. The application by the applicant does not fit in any of the categories mentioned above and as noted the reliefs sought do not fit in any of those provided for in any law.



35. For all the foregoing reasons, the PO raised by the respondent shall succeed on the ground that the application by the applicant is filed in total abuse and disregard of the process of court. The application by the applicant dated 28th August, 2023 is hereby struck out in its entirety with no order as to costs.
36. The court, without prejudice, has noted that the applicant has filed several motions, applications, and other proceedings in several courts arising, revolving, and or concerning the same cause of action or subject matter arising from an employer-employee relationship between herself and the respondent. It would do to her a lot of good if the applicant sought proper legal counsel so as to get the clear path of action that she needs to follow. While a litigant is free to file any proceedings in any court for adjudication, litigation is expensive both in terms of finance and time. It is very wasteful to engage a court in writing a ruling or a judgment in a matter that is evidently in abuse of the court process. The court has in the past, in passing, suggested to the applicant that it is in her own interest that she engages the services of competent legal counsel in order for her to realize the fruits of her litigation without wastage. I wish and hope that the applicant shall take this advice seriously.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 13TH DAY OF DECEMBER 2023.

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DAVID NDERITU

JUDGE

