



Business Partners International Kenya (II) Limited v Otundo & another (Civil Suit E034 of 2022) [2025] KEHC 507 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E034 OF 2022
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

BUSINESS PARTNERS INTERNATIONAL KENYA (II) LIMITED ... PLAINTIFF

AND

BENARD ONKUDI OTUNDO 1ST DEFENDANT

LILIAN BONARERI ABUGA OTUNDO 2ND DEFENDANT

RULING

1. This court has been moved by the Respondents by way of a Notice of Preliminary Objection dated 26th February 2024 on the following grounds:-
 1. The Plaintiff's suit is fatally defective and bad in law as it offends the provisions of Section 6 of the *Civil Procedure Act*.
 2. That there is a suit pending court determination in Machakos HCCC No. 5 of 2020 between the partes
 3. That the Honourable Court lacks jurisdiction to hear and determine this matter since the same raises matters pertinent to those already in issue in Machakos HCCC No. 5 of 2020.
4. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process.
 1. The Plaintiff has opposed the said Notice of Preliminary Objection. Both parties have filed their written submissions which I have considered carefully.
 2. In opposing the present suit, the Defendant filed a Notice of Preliminary Objection and argues that the Plaintiff's suit does not meet the threshold set out in the Locus Classica case of *Mukisa*



Biscuits Manufacturing Company vs West End Distributors Ltd(1969) E.A. 696 where the court stated 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 argued on the assumption that all 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

4. It therefore follows where a party seeks to terminate a suit like in the present case, the basis of the objection should be such that the court need not look for evidence to ascertain a fact so pleaded. In the present application, the Applicant argues that “there is a suit pending court determination in Machakos HCCC No. 5 of 2020 between the parties”.

In my view for the court to ascertain that the present suit and the suit filed in Machakos HCCC No. 5 of 2020 are the same, the court will have to call evidence to determine the same. This therefore means that the Preliminary Objection raised by the Defendant is not on a pure point of law as the court has to satisfy itself that indeed the claim is the same and the causes of action are also the same.

- a. Section 6 of the *civil procedure Act* provides as follows:-

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“6. Stay of suit;

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

Explanation. —The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

5. It is from the above provisions of the law that a court will not proceed to determine a suit where a similar suit has been filed before a court of competent jurisdiction. Be that as it may, it is my view that the court can only determine if a suit before it is similar to another suit before a different court once it is seized of the pleadings and material in the other case. It is therefore my finding that this can only be achieved through a proper motion where the Applicant makes available the relevant evidence to confirm such facts. This therefore means that such a determination shall be one of fact and not of law and cannot be therefore determined on a Preliminary Objection.
6. In sum it is my finding that the Notice of Preliminary Objection filed before this court is without merit and the same is forthwith dismissed. Costs shall abide the outcome of the main suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

J.W.W. MONG'ARE

JUDGE



In The Presence Of

Ms. Jane Okoth for the Plaintiff/Respondent.

Ms. Mudeizi for the Defendant/ Applicants.

Amos- Court Assistant

