



REPUBLIC OF KENYA



**Dreamline Express Limited & another v Directline Assurance Company Limited & 2 others
(Commercial Case E003 of 2024) [2025] KEHC 5095 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 5095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
COMMERCIAL CASE E003 OF 2024
AN ONGERI, J
MARCH 27, 2025**

BETWEEN

DREAMLINE EXPRESS LIMITED 1ST PLAINTIFF

TIPPER HAULIERS LIMITED 2ND PLAINTIFF

AND

DIRECTLINE ASSURANCE COMPANY LIMITED 1ST DEFENDANT

SAMUEL K MACHARIA 2ND DEFENDANT

ROYAL MEDIA SERVICES LIMITED 3RD DEFENDANT

RULING

1. The 2nd and 3rd Defendants raised a Notice of Preliminary Objection dated 14th January 2025 in the following terms:-
 - i. This court lacks jurisdiction to entertain either the suit or Notice of Motion herein.
 - ii. As regards prayer 2 i.e. an injunction prohibiting execution of suits pending before the Chief Magistrate's Court, this court has no jurisdiction to grant the same as it is not seized of those matters; this court can only be moved through an appeal against decisions made in those matters; there is no appeal against those decisions before this court.
 - iii. As regards prayer no. 3 this suit is barred by the sub judice doctrine in that the issues raised herein have been raised and are pending hearing and determination in among others, Nairobi Court of Appeal, Civil Application No. E624 of 2024; S.K.Macharia & Others v DACL & Others, Milimani HCCC Comm. No. E328 of 2024; Directline assurance Company Ltd v S. K. Macharia & Others and Milimani HCCR Misc. Appl. No. E404 of 2024; S. K. Macharia v ODPP & Others; they are live matters pending before those courts: TAKE FURTHER NOTICE that relying on the rule in George W. M. Omondi & Another v National Bank of



Kenya Ltd & 2 Others [2001] eKLR, the 1st and 2nd Defendants shall urge this court to order that the court files in respect of the said matters be availed to determine this objection: in that decision, Hon. Justice Aaron Ringera [as he then was] stated the law as follows:-

The issue of locus standi and res judicata are pure points of law that can properly be raised as preliminary objections. In determining both points, the court is perfectly entitled to look at the pleadings and other relevant matter in its records.

- iv. As regards prayer no. 4, this court has no powers to issue any declaratory orders as it can only do so when and if moved through a proper suit as between the Plaintiffs [insured] and the 1st Defendant [Insurer] under the provisions of Section 10 of the Insurance [Motor Vehicles Third Party Risks] Act which provides for declaratory suits when an Insurer declines to satisfy a judgment delivered against an Insured;
 - v. As regards prayer nos. 5, 6, 7 and 8, the doctrine of privity of contract renders it legally impossible to grant and/or enforce any orders against the 2nd and 3rd Defendants [shareholders in the 1st Defendant] in a contract entered into by the Plaintiffs [Insured] and the 1st Defendant [Insurer] – there is no privity of contract: the Plaintiffs are purporting to enforce a contract to which the 2nd and 3rd Defendants are not parties: furthermore, the Plaintiffs are not shareholders in the 1st Defendant and hence cannot purport to question the running of the 1st Defendant:
 - vi. As held in *Owners of the Motor Vessel Lillian S v Caltex Oil Kenya Ltd* [1989] KLR 1, where a court lacks jurisdiction, it must down its tools; this is a suitable case for this court to down its tools.
2. The 2nd and 3rd Defendants submitted that they have raised this preliminary objection challenging the jurisdiction of the court to entertain the Plaintiff's suit and Notice of Motion dated 18th October 2024. They seek to have both struck out with costs on several grounds.
 3. First, they argue that the court lacks jurisdiction to grant an injunction prohibiting the execution of judgments from the Chief Magistrate's Court, as those matters are not before this court. The Plaintiffs should have filed appeals against the lower court decisions within the stipulated time under Section 79G of the Civil Procedure Act, rather than seeking injunctive relief here.
 4. Second, they contend that the suit is barred by the sub judice doctrine, as the same issues are pending in other courts, including the Court of Appeal [Civil Application No. E624 of 2024] and the High Court [Commercial Case No. E328 of 2024 and Miscellaneous Application No. E404 of 2024]. They rely on the precedent set in *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001], which allows courts to examine pleadings and records to determine objections based on res judicata or sub judice. They further note that a similar injunction was already granted in *Directline Assurance Company Limited v Macharia & 11 others* [2025], making the current prayer redundant.
 5. Third, they assert that the court cannot issue declaratory orders under prayer 4, as such relief can only be sought through a proper declaratory suit under Section 10 of the Insurance [Motor Vehicles Third Party Risks] Act, which governs disputes between insurers and insured parties.
 6. Fourth, they argue that prayers 5 to 8 offend the doctrine of privity of contract, as the 2nd and 3rd Defendants [shareholders of the 1st Defendant] are not parties to the insurance contracts between the Plaintiffs and the 1st Defendant. Citing *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] and *Rose Ayuma Musawa v Mathias Onyango Tabuche* [2016], they emphasize that a contract cannot confer rights or obligations on non-parties. They also reference *National Bank*



of Kenya Ltd v Pipeplastic Samkolit [K] Ltd & another [2001] to stress that courts cannot rewrite contracts between parties.

7. In conclusion, the 2nd and 3rd Defendants have urged the court to dismiss the suit for lack of jurisdiction, citing the principle in Owners of the Motor Vessel Lillian S v Caltex Oil Kenya Ltd [1989] that a court must down its tools where it lacks jurisdiction. They also seek costs for the objection and the application.
8. The Plaintiffs opposed the 2nd and 3rd Defendants' Preliminary Objection [PO] dated 14th January 2025 and submitted that it fails to meet the legal threshold for such objections. The Plaintiffs contend that the PO is not based on pure points of law, as required under the established principles set out in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd and affirmed in Kenyan jurisprudence, including Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others and Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others.
9. Further, the plaintiffs submitted that the Defendants' first ground challenges the court's jurisdiction but fails to specify the legal basis for this claim. Grounds 2 to 5, which touch on jurisdiction, res judicata, and related issues, improperly invite the court to examine facts rather than pure law, contrary to the nature of a preliminary objection.
10. The Plaintiff have relied on Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another, where the court cautioned against improperly raising factual disputes as preliminary objections. Issues like sub judice and res judicata inherently require factual analysis, making them unsuitable for determination at this stage.
11. Consequently, the Plaintiffs have urged the court to dismiss the PO for failing to satisfy the Mukisa Biscuit standard. On costs, the Plaintiffs have invoked Section 27[1] of the Civil Procedure Act, asserting that costs should follow the event, favoring the successful party unless misconduct or other exceptions apply.
12. In summary, the Plaintiffs submitted that the PO is unmerited, as it conflates factual and legal disputes, and seeks its dismissal with costs awarded to the Plaintiff.
13. The issues for determination in this NOPO are as follows;
 - i. Whether the Preliminary Objection meets the threshold set in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 for a valid preliminary objection.
 - ii. Whether this court lacks jurisdiction to entertain the suit and the Notice of Motion, particularly concerning:
 - [a] The injunction prohibiting execution of judgments from the Chief Magistrate's Court [prayer 2];
 - [b] The declaratory orders sought [prayer 4];SUBPARA [c]
The alleged violation of the doctrine of privity of contract in prayers 5–8.
 - iii. Whether the suit is barred by the sub judice doctrine under Section 6 of the Civil Procedure Act, given the pending matters in the Court of Appeal and the High Court.
 - iv. Whether this suit is barred by the doctrine of res judicata.



- v. Whether the Plaintiffs have locus standi to seek orders against the 2nd and 3rd Defendants [shareholders] in relation to the 1st Defendant's contractual obligations.
14. On the issue as to whether the Preliminary Objection meets the threshold set in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 for a valid preliminary objection, a preliminary objection must be grounded on pure points of law without delving into factual disputes .
 15. The Defendants' objection largely hinges on jurisdictional and procedural issues, which are legal in nature. However, some arguments, particularly those touching on sub judice and res judicata, require examination of pleadings and court records, as permitted in *George W. M. Omondi & Another v National Bank of Kenya Ltd & 2 Others* [2001] eKLR. To that extent, the objection meets the threshold insofar as it raises legal challenges.
 16. On the issue as to whether this court lacks jurisdiction to entertain the suit and the Notice of Motion, I find that Jurisdiction is fundamental and where a court lacks it, it must down its tools [Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1].
 17. The plaintiff is seeking an injunction on Execution of Magistrate's Court Judgments. The Plaintiffs seek to restrain execution of judgments from the Chief Magistrate's Court.
 18. However, this court cannot issue injunctive relief against execution of judgments from a subordinate court unless an appeal is properly filed under Section 79G of the Civil Procedure Act [Republic v Karisa Chengo & 2 Others [2017] eKLR]. Since no appeals have been lodged, this prayer is incompetent.
 19. The plaintiffs are also seeking declaratory relief against an insurer under Section 10 of the Insurance [Motor Vehicles Third Party Risks] Act, which provides a statutory mechanism for disputes between insured parties and insurers. The Plaintiffs have not invoked this provision, rendering the prayer unmaintainable [Directline Assurance Co. Ltd v S.K. Macharia & Others [2025]].
 20. I find that the 2nd and 3rd Defendants, as shareholders, are not parties to the insurance contracts. The doctrine of privity prohibits enforcement of contractual terms against non-parties [Agricultural Finance Corporation v Lengetia Ltd & Another [1985] KLR 765]. The Plaintiffs, being neither shareholders nor creditors of the 1st Defendant, lack standing to challenge its internal management [see *Rose Ayuma Musawa v Mathias Onyango Tabuche* [2016] eKLR].
 21. On the issue as to whether this suit is sub judice, Section 6 of the Civil Procedure Act bars parallel litigation on the same issues in multiple courts. The Defendants cited pending matters in the Court of Appeal [Civil Application No. E624 of 2024] and the High Court [Commercial Case No. E328 of 2024]. The Plaintiffs have not demonstrated that the issues here are distinct. The sub judice rule thus applies [see *Kenya Wildlife Service v James Thuo Njuguna* [2013] eKLR].
 22. On the issue of Res Judicata, the Defendants submitted that similar issues have been litigated in other suits. While res judicata requires identity of parties, subject matter, and relief [John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Another [2021] eKLR], the objection here is better framed under sub judice, given the pending cases.
 23. On the issue of locus standi, the Plaintiffs cannot enforce contractual obligations against the 2nd and 3rd Defendants, who are not privy to the insurance agreements [National Bank of Kenya Ltd v Pipeplastic Samkolit [K] Ltd [2001] eKLR]. Their attempt to interfere with the 1st Defendant's management is legally untenable.



24. Consequently, the suit and Notice of Motion dated 18th October 2024 are struck out with costs to the Defendants.
25. The Preliminary Objection dated 14th January 2025 is upheld.
26. The Plaintiffs' suit and Notice of Motion are struck out for lack of jurisdiction.
27. Costs are awarded to the Defendants.

Orders to Issue Accordingly

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2025 VIRTUALLY VIA MT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

