



**Nafula v Baron Capital Limited (Civil Suit 43 of 2022)
[2024] KEHC 16931 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16931 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 43 OF 2022
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

FORCHEL FARIDAH NAFULA PLAINTIFF

AND

BARON CAPITAL LIMITED DEFENDANT

RULING

1. The Plaintiff via the Plaint dated 29/6/2022 sued the Defendant praying to have a permanent injunction issued restraining the Defendant from selling, auctioning or in any manner disposing of Motor Vehicle Registration no. KDB 616Z. The Defendant had advanced a loan of Kshs. 2,500,000 to the Plaintiff.
2. The Plaintiff stated that she executed the agreement by signing the dotted lines shown by the Defendants agents. The copy of the agreement was not given to her. Thereafter, the Defendant started demanding for monthly payments without disclosing how much was payable. She demanded to have a copy of the agreement but her request was declined.
3. The Defendant threatened to attach her Motor Vehicle registration no. KDB 616Z. This led the Plaintiff to file CMCC No. 1331 of 2021 Forchel Faridah Nafula v Baron Capital Limited. In response to that suit, the Defendant attached a copy of the loan agreement, where the Plaintiff noted that the signature alleged to be hers was forged, and that the interest rate was stated as 30% but not indicated if it was per annum or per month. The Plaintiff subjected the document to a document examiner and it was confirmed that the Plaintiff's signature was a forgery.
4. The Plaintiff further stated that in the alleged loan contract, there was an arbitration clause in the event there was a dispute between the client and the company. The Defendant invoked the provisions of the [Arbitration Act](#) to the effect that the matter in the lower court should be referred to an arbitrator.



5. The Plaintiff moved to this court under section 7 of the *Arbitration Act* for interim measure of protection pending the dispute between the parties being referred to arbitration for determination.
6. The Defendant filed a Notice of Preliminary Objection dated 27/7/2022 stating that this suit was sub judice and offends section 6 of the *Civil Procedure Act*. It was further stated that the suit raises similar issues that are being adjudicated in CMCC No. 1331 of 2021 between the parties. The jurisdiction of this court was also questioned. It was prayed that this suit be dismissed with costs
7. Directions were taken that the P.O be canvassed by way of written submissions. Only the Plaintiff complied with the directions.

Analysis and Determination

8. I have duly considered the preliminary objection, submissions together with the authorities relied upon by the Plaintiff as well as the law and in my view, the following issues are for determination;
 - a. Whether the notice of preliminary objection is merited;
 - b. Who bears the costs?
9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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.”

At page 701, Sir Charles Newbold, P added: -

“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...”

10. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
11. I am satisfied that as per the case of *Mukisa Biscuit* (above) sub judice and issue of jurisdiction are a points of law which are enough to dispose of a suit as it goes to the root of the dispute before court. It goes to the jurisdiction of the court to pronounce itself on what is before it.



12. It is a fact that the Plaintiff had filed a similar suit in the Magistrate's court. She filed this suit after she noticed the arbitration clause in the copy of the loan agreement. Section 7 of the [Arbitration Act](#) provides as follows;

Interim measures by court

- (1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
 - (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.
13. The Plaintiff relied on a copy of a loan agreement with she alleges to have been forged, the same having been confirmed by a document examiner. On one hand, the Plaintiff is disputing the authenticity of the loan agreement and on the hand, she is relying on the same agreement in seeking to have this court issue orders based on a clause in the disputed agreement. A party cannot speak on both sides of the mouth. This is what has been described as blowing hot and cold and as described by the Scotland's lawyers, approbating and reprobating.
14. In *Evans v Bartlam* [1937] 2 ALL ER 649 and *Banque De Moscou v Kindersley* [1950] 2 ALL ER 549 cited with approval in *Republic v Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria* [2010] eKLR, this conduct was disapproved. In *Banque De Moscou* (above), the court held as follows: -

“...This is an attitude of which I cannot approve, nor do think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold...”

15. Similarly, this court does not approve the Plaintiff's conduct in seeking to rely on what she deems to be a forgery to advance a position that accords to her whims. The court declines the invite. The doctrine of sub-judice is provided for under section 6 of the [Civil Procedure Act](#). It provides as follows: -

“No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”

16. In the case of *David Ndii & Others v The Attorney General & Others* [2021] eKLR, a five-judge bench commenting on this principle observed as follows: -

“...The rationale behind this provision (Section 6 of the [Civil Procedure Act](#)) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will...”



16. In the circumstances, I find that this suit is sub judice as the parties and issues for determination are similar to the suit filed in the Magistrate's court. I therefore find merit in the preliminary objection dated 27th July, 2022 and the same is hereby upheld.
17. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. Having reached the above conclusion, naturally, the Plaintiff ought to be condemned to pay costs but this being a discretion, I direct that each party shall bear own costs.
18. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated 27/7/2022 is merited and is hereby upheld.
 - b. Consequent to (a) above, the plaint dated 29/6/2022 and filed on 5/7/2022 is hereby struck out.
 - c. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of;

Mr. Mkomba Advocate h/b Mr Mutugi Advocate for by the Plaintiff

Ms. Ego Advocate h/b for Mr. Mwaniki Advocate for the Defendant

Mr. Barille, Court Assistant

