



REPUBLIC OF KENYA



**Gencel v Goga (Civil Suit E015 of 2022) [2023] KEHC 18429 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18429 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT E015 OF 2022**

**MS SHARIFF, J**

**MAY 31, 2023**

**BETWEEN**

**JASMINE GENCEL ..... PLAINTIFF**

**AND**

**JOSEPH GOGA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit by way of plaint dated 9<sup>th</sup> November, 2022 seeking the following reliefs;
  - a. A declaration that there exists a valid debt that is outstanding and due to the plaintiff by the defendant of Kshs 25, 683,820.34.
  - b. An order for permanent injunction restraining the defendant or his beneficiaries from selling, transferring, alienating, developing or otherwise dealing with the property known as KISUMU/KANYAKWAR B/2448.
  - c. An order of specific performance to compel the defendant to dispose the interest in property KISUMU/KANYAKWAR B/2448 and in the likely event that the defendant declines, the court does issue an order requiring the deputy registrar of the court to execute any transfer documents necessary for the transfer of the property.
  - d. An order compelling the defendant to produce an original title to KISUMU/KANYAKWAR B/2448 to the Deputy Registrar of the court.
  - e. Special damages.
  - f. Costs and interest of the suit.
2. Upon service, the defendant initially failed to enter appearance and the suit therefore proceeded to hearing where 2 witnesses testified and case closed.



3. Subsequently, the defendant entered appearance, filed a statement of defence and a notice of preliminary objection dated 24<sup>th</sup> April, 2023 in the following terms;
  - a. The court lacks jurisdiction to hear and determine the suit for reasons that the cause of action wholly rose in Sweden outside the jurisdiction of this court and both the plaintiff and defendant are residents of Sweden.
  - b. The plaintiff lacks the requisite locus standi to institute this suit as presented and should therefore be struck out with costs.
  - c. The suit is frivolous, vexatious and an abuse of the court process.
4. I directed the parties to file their written submissions on the preliminary objection.
5. The defendant submits that the suit emanates from a loan taken by the defendant from a Swedish bank, guaranteed by the plaintiff and secured by the plaintiff's house in Sweden. That the transaction therefore was executed and concluded in Sweden outside the jurisdiction of the court. The defendant cites the case of *Mukisa Biscuits Manufacturing Co. v West End Distributors Ltd* (1969) EA 696.
6. It is submitted on behalf of the Plaintiff that this court has jurisdiction to hear and determine the suit because reliefs sought in the suit relate to property situate within the local limits of the court.
7. On the plaintiff's lack of locus to institute the suit, it is submitted that the defendant has not substantiated the same wherefore that ground of objection ought to be rejected. The plaintiff submits that the preliminary objection is not merited as it does not raise points of law.

#### **Analysis and determination.**

8. What constitutes a preliminary objection was settled by the celebrated decision in *Mukisa Biscuits Manufacturing Ltd –v- West End Distributors* (1969) EA 696 where their Lordships observed thus:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.
9. In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
10. The nature of the preliminary objection herein goes to the jurisdiction of this court. It is trite law as held in *Owners of the Motor Vessel “Lillian S”*(1989) KLR 1 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 other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

11. Looking at the pleadings filed so far in this matter, it is evident that the parties herein were and are still resident in Sweden. The contract entered into for the guarantee of the Defendant’s loan facility with Nordea by the Plaintiff was also executed in Sweden. The collateral is the Plaintiff’s property situated in Sweden. The agreements are written in Swedish.
12. The Plaintiff seeks omnibus prayers of commercial nature and of enforcement of her land rights in respect of parcel No Kisumu/Kanyakwar B/2448. The loan guarantee agreement does not indicate the applicable law in case of disputes. This calls for a determination of the territorial and subject matter jurisdiction of this court.
13. While considering the issue of the place to institute suit, the defunct East Africa Court of appeal in *Karachi Gas Co. Limited V Issaq* [1965] E.A. 42 at 53, held;  
  
“The two main issues which arise in this appeal are first, whether the Supreme Court had jurisdiction and, secondly, whether the contract was frustrated. As regards the first of these issues the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. .... In the case of a contract the courts of Kenya will assume jurisdiction, inter alia, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya. While it is not perfectly clear where this contract was made, I shall assume that it was made in Pakistan. If, therefore, the Kenya courts are to have jurisdiction in this case, either the proper law of the contract must be Kenya law or a breach of the contract must have been committed in Kenya.  
  
The various factors in this case, as is so often the position, point in different ways for the purpose of determining what the proper law of the contract is. The test to be applied is, in my view, the system of law by reference to which the contract was made, or that with which the transaction has its closest and most real connection.”
14. Whereas the Plaintiff has exhibited agreements that indicate that the advanced money was expended in acquiring and developing Parcel No Kisumu/Kanyakwar B/2448, she did not register a charge over that property in her favour save for an another agreement of the parties that indicated that she was entitled to 50% of the said property. The Plaintiff ought to have approached the Environment and Land Court for her 50% interest in parcel No Kisumu/Kanyakwar B/2448 as that is the court vested with the jurisdiction to adjudicate over land matters by dint of section 13(2) of the *Environment and Land Court Act* and article 162(2) (b) of the *Constitution* of Kenya 2010.
15. The Plaintiff’s claim for repayment of the guaranteed loan is a matter that is within the purview of the Swedish Courts where all the transactions were undertaken and where both parties are domiciled.
16. Taking all the circumstances of the matter into perspective, I find that the Preliminary objection is merited because of the reasons aforesated.
17. Regarding the timing of the preliminary objection, I note that the objection was raised after hearing of the matter had been concluded. The matter at time was awaiting filing of submissions evidence having been taken.



18. On this very issue of the timing of the preliminary objection, it was observed in *Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited* [2015] eKLR that:-

“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of Beatrice Cherotich Koskei and Another –v- Olunguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007, the court observed as follows:

“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I therefore hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”

19. In *Kenya National Highways Authority v George Kirimana Abuaba* [2021] eKLR, Mbugua J held;

It follows that the argument advanced by the respondent that the appellant’s Preliminary Objection was raised 11 months after the filing of the suit is irrelevant. It is preferable for the preliminary objection to have been raised at an early stage of proceedings, but still, it could be raised at any time while the suit was still active. Thus, the preliminary Objection was properly raised before the trial court.

20. In the circumstances, I find that notwithstanding the fact that the objection was raised towards the very end of the trial, the defendant is still entitled to have his preliminary objection determined.

21. On the balance I find that the preliminary objection is merited and I hereby proceed to strike out the suit and I expunge the proceedings so far taken. I shall make no order as to costs.

**DELIVERED, DATED AND SIGNED AT KISUMU THIS 31<sup>ST</sup> DAY OF MAY 2023.**

**MWANAISHA. S. SHARIFF**

**JUDGE**

