



**MMC Petroleum Limited v Fujita Corporation/Mitsubishi Corporation  
(Commercial Case E016 of 2022) [2023] KEHC 27593 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 27593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E016 OF 2022  
F WANGARI, J  
JULY 28, 2023**

**BETWEEN**

**MMC PETROLEUM LIMITED ..... APPLICANT**

**AND**

**FUJITA CORPORATION/MITSUBISHI CORPORATION ..... RESPONDENT**

**RULING**

1. This ruling relates to a Preliminary Objection orally raised by the Respondent. The applicant moved the court through Originating Summons dated 22<sup>nd</sup> March, 2022 and filed on 23<sup>rd</sup> March, 2022. The court having considered the application, responses, submissions as well as the law rendered itself on 10<sup>th</sup> February, 2023 wherein it found the Originating Summons unmerited and thus dismissed the same with each party ordered to bear own costs.
2. While the ruling was pending, the Applicant once again moved the court through a Chamber Summons application dated 7<sup>th</sup> November, 2022 and filed on an even date. The application sought for the following orders: -
  - a. That pending arbitration proceedings contemplated in the service agreement between the parties, the Honourable Court be pleased to issue an injunction compelling the Respondent to permit the Applicant access to the work site at Mwache Precast Yard to decommission the constructed mini fuel station
  - b. That the Applicant be provided the costs of this Application;
  - c. Any other orders as the Court may deem fit.
3. When the application came for hearing on 27<sup>th</sup> March, 2023, Counsel for the Respondent pointed out that the Originating Summons having been dismissed, the application dated 7<sup>th</sup> November, 2022 has got no roots and the same was fatally defective. Counsel for the Applicant expressed his reservations



as he deemed that he had been ambushed. He thus sought for time to respond and the same was duly granted.

4. In his response, Counsel took issue with the manner in which the Preliminary Objection was raised. According to the Applicant, it was correct for the Respondent to raise the Preliminary Objection orally. Citing Order 51 Rule 14 of the *Civil Procedure Rules*, the Applicant pointed out that the rules anticipated that a Preliminary Objection ought to be in writing since it is required to be filed.

### **Analysis and Determination**

5. I have considered the Preliminary Objection, the oral submissions as well as the law and in my view, the following issues are for determination;

- a. Whether the Preliminary Objection is merited;
- b. Who bears the costs?

6. 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 v. 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...”

7. 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.

8. I am satisfied that as per the case of *Mukisa Biscuit* (above) that the competence of a suit or application is a point of law which is 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.

9. In the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, J.A. had the following to say: -

“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....”

10. I agree with the Applicant that to afford the other party sufficient time to respond to an issue, good order requires that a Preliminary Objection ought to be filed. It is for this reason that the rules refer to it as a “notice” of Preliminary Objection. A party is duly made aware or simply put, notified of what the other side is intending to raise.
11. In the present case, I note that the Preliminary Objection was orally raised. The Applicant considered it as an ambush and as such, sought for time to respond. The court allowed the Applicant time to respond to the objection. Having done so, the requirement to have it filed was thus overtaken by events since the Applicant had now been notified of what the Respondent was intending to raise and was indeed afforded time to respond.
12. To this end, I am satisfied that the preliminary objection though oral was properly taken since the Applicant was afforded time to respond to the same.
13. Preliminary Objections can be raised at any time by the parties including orally provided that the other side is afforded enough time to respond. Even the court can raise it suo moto. In *Republic v Chief Registrar of the Judiciary & 2 Others Ex parte Riley Services Limited* [2015] eKLR, it was held thus: -

“... 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 Olenguruone 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...” (Emphasis added)
14. Having found that the Preliminary Objection was properly taken, I shall now proceed to determine the merits of the objection. The Respondent contends that the Originating Summons having been dismissed on 10<sup>th</sup> February, 2023, there was no longer any suit which the application dated 7<sup>th</sup> November, 2022 could stand on.
15. I note that at the time the application dated 7<sup>th</sup> November, 2022 was filed, a ruling was yet to be delivered on the originating summons dated 17<sup>th</sup> March, 2022 and the application as at that point in time was properly on record. However, as per the application dated 23<sup>rd</sup> January, 2023, no directions were issued on the application dated 7<sup>th</sup> November, 2022.
16. Upon considering the application dated 23<sup>rd</sup> January, 2023, the court certified the same as urgent and directed the Applicant to serve the same for hearing on 30<sup>th</sup> January, 2023. As per the court record, there was no appearance by either party on 30<sup>th</sup> January, 2023 and the matter was fixed for mention on 10<sup>th</sup> February, 2023.



17. This is the same date that the ruling on the Originating Summons was delivered. Having delivered its ruling, the court made an order that further directions on the application dated 7<sup>th</sup> November, 2022 be given on 27<sup>th</sup> March, 2023. This is the date the current Preliminary Objection was raised.
18. Having considered the effect of the ruling delivered on 10<sup>th</sup> February, 2023, I hold that the application dated 7<sup>th</sup> November, 2022 was overtaken by events on dismissal of the Originating Summons. The orders sought could not be issued in a non-existent suit. The situation would have been different had the orders sought been granted prior to 10<sup>th</sup> February, 2023. It is against this backdrop that I find the application dated 7<sup>th</sup> November, 2022 a non-starter and the same is hereby struck out.
19. 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. The Respondent being the successful party is entitled to costs and I so order.
20. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection orally raised on 27th March, 2023 is hereby merited and the same is hereby upheld with the attendant consequence that the application dated 7th November, 2022 is hereby struck out;
  - b. Costs to the Respondent.Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**F. WANGARI**

**JUDGE**

In the presence of;

Ms. Chege Advocate holding brief for Mr. Mwanzia for the Applicant

Ms. Aluvale Advocate for the Respondent

Abdullahi, Court Assistant

