



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D.S. MAJANJA J.**

**CIVIL APPEAL NO. 59 OF 2018**

**BETWEEN**

**KISII COUNTY ASSEMBLY CLERK.....APPELLANT**

**AND**

**PERIKEN AUTO AGENCY LIMITED.....1<sup>ST</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY.....2<sup>ND</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY DIRECTOR**

**FINANCE & PROCUREMENT.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon.N. Lutta, SPM dated 25<sup>th</sup> July 2018 at the Magistrates Court at Kisii in Civil Case No. 128 of 2017)*

**JUDGMENT**

1. This is an appeal against an order dismissing the appellant's preliminary objection. The appellant, who was the 2<sup>nd</sup> defendant before the subordinate court, filed a notice of preliminary objection dated 29<sup>th</sup> May 2018. Although the notice is rather wordy, the grounds therein may be condensed into two points. First, whether the appellant could be sued as such. Second, whether the cause of action was contrary to the provisions of the **Public Procurement and Assets Disposal Act, 2006**.

2. For purposes of this judgment and for ease of reference, I shall refer to the parties in their capacities before the trial court unless the context otherwise admits. Before the trial court, the 1<sup>st</sup> respondent was the plaintiff. It sued the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were the 2<sup>nd</sup>, 1<sup>st</sup> and 3<sup>rd</sup> defendants respectively.

3. The plaintiff's case against the defendants was for judgment for Kshs. 14,024,782.80, general damages for breach of contract, costs and interest. Its case was that it was awarded Tender No. KCA/022/2013-14 for the Proposed Construction of Extension to the County Assembly by the Defendant. Following the tender, it entered into an agreement on 30<sup>th</sup> May 2014 to construct extension of the County Assembly building and to remedy defects and on 21<sup>st</sup> May 2014, the 3<sup>rd</sup> defendant signed a Local Service Order. The plaintiff stated that on the basis of the contract, it delivered goods for construction amounting to Kshs. 14,024,782.80 for which the defendants have refused to pay.

4. In the a joint defence, the defendants raised alternative defences. First it denied that it advertised nor invited tenders for the construction if the proposed extension to the County Assembly Building. Second, it stated that the agreement entered into on 30<sup>th</sup> May 2014 did not satisfy the legal requirements as it was executed by unauthorised officers incapable of entering a contract on behalf of the 1<sup>st</sup> defendant. It also contended that the Local Service Order issued to the plaintiff dated 21<sup>st</sup> May 2014 was erroneously and/or fraudulently acquired. The defendants claimed that the plaintiff's claim was scandalous, frivolous, vexatious and made to embarrass the defendants.

5. After hearing the preliminary objection, the trial magistrate, citing the case of **Mukisa Biscuits Manufacturing Co., Ltd v West End Distributors Ltd [1969] EA 696** dismissed the preliminary objection on the ground that, "*The contract document in contention is bulky and it would appear that there are facts which are not clear as set out by the 2<sup>nd</sup> defendant and have to be ascertained. In my considered view, it would not be appropriate to resort to the remedy sought by the 2<sup>nd</sup> defendant until all the facts are clear.*"

6. At the hearing of this appeal, only counsel for the appellant appeared to prosecute the appeal. The 1<sup>st</sup> respondent's advocates were served

with process but failed to attend court while counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> advocates did not attend court despite the hearing date being taken in his presence.

7. Counsel for the appellant, submitted that the contract subject matter of the suit was entered into between the plaintiff and the County Assembly Service Board which is a body corporate with capacity to sue in its own name as established under **section 12** the **County Government Act, 2012**. He pointed to the contents of the contract and urged that the contract was specific and that only the parties to it were bound by it hence the appellant was improperly sued. He further urged that the contract was illegal as it was signed earlier than 14 days from the date of the notification of the award contrary to **section 68(2)** of the **Public Procurement and Disposal Act, 2005**.

8. The first issue I must address is under what circumstances a preliminary objection can be entertained. The leading authority on this issue is the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] EA 696** where Newbold P., held as follows:

*A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 issues, and this improper practice should stop.*

Law, JA observed as follows:

*A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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.*

9. A preliminary objection ought to be based on the assumption that what is stated in the pleadings is true and correct. It may also be based on agreed facts or a pure point of law. It cannot be entertained where there is a dispute on the facts or where those facts have to be ascertained outside the scope of the pleadings as Ojwang' J., held in **Oraro v Mbaja [2005] 1KLR 141** that

*Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive foundation from factual information which stands to be tested by normal rules of evidence. If the Applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a Preliminary Objection...*

10. As I understand, the nature and thrust of the appellant's preliminary objection was based on the contract allegedly entered into between the parties. The emphasis put on the contract is demonstrated by the written submissions filed before the trial court. As regards the issue of lack of standing or capacity to be sued, the appellant submitted as follows:

*[8] It is apparent and evidence from the Contract Document, dated the 20<sup>th</sup> day of May 2014, which forms the basis and/or crux of the instant matter, that (sic) same was allegedly entered into between the Plaintiff and the Kisii County Assembly Service Board, which is a body corporate created and/or established under the provisions of the County Government Act, (2012). [Emphasis mine]*

On the issue of non-disclosure of a cause of action and or lack of privity, it submitted:

*[14] It is common ground that the Parties to the Contract herein have been described and/or distinctly isolated in the pre-amble of the Contract Document. Consequently, in the event of a suit, it behooves the Claimant, in this case, the Plaintiff to implead and/or mount a case against the Parties to the subject Contract. [Emphasis mine]*

11. Apart from the excerpts of the written submissions that I have set out above, counsel for the appellant, in his oral submissions referred the court to the contract and notification of the award as documents supporting the preliminary objection. In short, the appellant's preliminary objection was based on the nature and tenor of the alleged contract whose purport, nature and contents were not set out in the plaint. Since a preliminary objection is based entirely on the pleadings, the court could not look at the contract annexed to the plaintiffs' list of documents as it does not form part of the pleadings.

12. The other issue raised by the appellant is that the contract relied on was tainted by illegality. This is clearly an issue that calls for an evaluation of the contract, the circumstances it was made and the entirety of the transaction. In other words, determination of illegality is, in the circumstances of this case, a question of fact.

13. While I find the appellants arguments in support of the preliminary objection attractive and indeed persuasive, I am constrained to find and hold that the issue raised by the appellant did not fall within the ambit of a preliminary objection. The trial magistrate was correct in rejecting it as it required him to go through contract documents outside the pleadings.

14. I dismiss the appeal. Since the respondent did not attend court to agitate their positions on the matter, I make no order as to costs.

**DATED and DELIVERED at KISII this 26<sup>th</sup> day of FEBRUARY 2019.**

**D.S. MAJANJA**

**JUDGE**

Ms Oguttu instructed by Oguttu, Onchwangi, Ochwal and Company Advocates for the appellant.

R O. Nyamweya and Company Advocates for the 1<sup>st</sup> respondent.

Onserio Ondimu Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.