



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kiminda & another v Pindoriya t/a Harshiv Autospares & Hardware Suppliers  
& 2 others; Otieno & 5 others (Interested Parties) (Environment & Land Case  
E030 of 2023) [2023] KEELC 21861 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21861 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E030 OF 2023  
CA OCHIENG, J  
NOVEMBER 23, 2023**

**BETWEEN**

**PETER MUCHIRI KIMINDA ..... 1<sup>ST</sup> PLAINTIFF**

**PETER MUNGAI KARANJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHIVAM PINDORIYA T/A HARSHIV AUTOSPARES & HARDWARE  
SUPPLIERS ..... 1<sup>ST</sup> DEFENDANT**

**MARACAY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**SHREEJI GROUP LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**EMMANUEL JUMA OTIENO ..... INTERESTED PARTY**

**EDWARD KIMORI ..... INTERESTED PARTY**

**PETER MUNGAI ..... INTERESTED PARTY**

**SAMUEL GIKONYO ..... INTERESTED PARTY**

**HEZEKIA KARIUKI MWANGI ..... INTERESTED PARTY**

**JACKSON KASAMU KAVISU ..... INTERESTED PARTY**

**RULING**

1. What is before the court for determination is the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' Notice of Preliminary Objection dated the 8<sup>th</sup> June, 2023, which is premised on the following grounds:-



1. That this Honourable Court lacks the jurisdiction to hear and determine the suit as it is an affront to the mandatory provisions of the well-known legal principle of sub judice under Section 6 of *Civil Procedure Act* owing to the pendency before the Chief Magistrates Court of Kenya at Mavoko in Mcelc No. E035 of 2023; Maracay Limited v Comfort Homes Ltd, Hezekiah Mwangi Kariuki and Jackson Kasamu Kavisu and Mcelc No.E036 of 2023; Shreeji Group Limited v Comfort Homes Limited, Hezekiah Mwangi Kariuki and Jackson Kasamu Kavisu filed by the Defendants herein against the Plaintiffs and the Interested Parties wherein ownership of the Land Reference L.R No. 20449 and L.R No. 20450 is directly and substantially in issue.
  2. That the suit and Notice of Motion is frivolous, vexatious and an abuse of the Court process and should be dismissed with costs in limine.
2. The Plaintiffs' filed their Grounds of Opposition dated the 5<sup>th</sup> October, 2023 and stated that this Honourable Court has unfettered jurisdiction to hear and determine this matter as provided under Article 162(2) of *the Constitution* of Kenya, 2010. They argued that this matter has been a subject to a dispute at the Machakos Magistrates Courts wherein the 1<sup>st</sup> Defendant herein is the Plaintiff in both Mcelc No. E035 of 2023; Maracay Limited v Comfort Homes Ltd, Hezekiah Mwangi Kariuki and Jackson Kasamu Kavisu and Mcelc No. E036 of 2023; Shreeji Group Limited v Comfort Homes Limited, Hezekiah Mwangi Kariuki and Jackson Kasamu Kavisu while the 3<sup>rd</sup> and 5<sup>th</sup> Interested Parties are the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein. They contended that the Magistrates Court on 4<sup>th</sup> July and 14<sup>th</sup> July, 2023 respectively, directed that parties file valuation reports to determine the pecuniary value of the suit properties, wherein the Defendants' filed two separate valuation reports for both parcels in which LR No. 20449 was valued at Kshs. 25,680,000 while LR No. 20450 was valued at Kshs. 42,245,440. They insist that the Notice of Preliminary Objection has since been overtaken by events as the Court sitting in the Chief Magistrates' Court at Mavoko renounced itself on 12<sup>th</sup> September, 2023 citing lack of jurisdiction owing to the pecuniary value of the suit properties which significantly exceeded its jurisdiction. They reiterated that the Court is yet to decide on the issue of jurisdiction, however the valuation done by the Defendants' exceed the court's jurisdiction which is capped at Kshs. 20,000,000. They reaffirmed that the trial court subsequently gave directions to the parties herein to initiate the process of transfer of the matters to the High Court and there is an application filed by the Defendants' for consolidation of the cases, pending in court. They explained that this suit encompasses all the parties including the Interested Parties who have direct interest in the suit properties and it is in the interest of justice that the instant Notice of Preliminary Objection should be overruled to allow the court to hear the parties on merit.
3. The Notice of Preliminary Objection was canvassed by way of written submissions.

## Submissions

### Defendants' Submissions

4. The Defendants insisted that this suit is *sub judice* and having parallel matters in court may cause conflicting orders to be issued. Further, that the Defendants might be required to defend the same suit twice. They further submitted that this suit is an abuse of the Court process as the Plaintiffs' intentionally failed to disclose the existence of the lower court suits, a fact they were well aware of. Further, they attempt to embarrass this court by seeking interim injunctive orders knowing fully well the existence of valid injunctive orders issued by the lower court over the very same subject matter. They insisted that the suit properties are valued at Kshs. 15,000,000 each, therefore well within the jurisdiction of the lower courts and in any case the lower court could as well tackle the issue of



jurisdiction instead of having parallel proceedings. They reiterated that since the suit offends the *sub judice* rule, it should be struck off with costs to them. To buttress their averments, they relied on the following decisions: *Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd* (1989) KLR 1; *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* [2020] eKLR; *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (interested parties) and Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* [2018] eKLR.

5. The Plaintiffs in their submissions insist that this suit is not sub judice. They explain that the two matters were wrongly filed in Mavoko Chief Magistrate's Court by the 1<sup>st</sup> Defendant to deliberately meet the jurisdiction of the court and allow him a platform to compromise the suit in their favour as the pleadings in the lower court are a carbon copy, hence basically forum shopping. They contended that the Defendants intentionally under-valued the suit properties to meet the pecuniary jurisdiction of the lower court. They argued that the instant Notice of Preliminary Objection is incompetent and seeks to interfere with the expedient determination of the proceedings herein through mischief. Further, that this court is clothed with unlimited original jurisdiction and is the proper forum to dispose all the suits. To support their arguments, they relied on the following decisions: *Margaret Wachu Karuri v John Waweru Ribiro* (2021) eKLR; *Cyrus Mucebiu Irungu v Martha Wanjiru Irungu & another* [2022] eKLR and ELC Pet. No. E017 of 2021 Ngwatanio Phase Four Association v National Land Commission & 10 Others./

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Preliminary Objection, Grounds of Opposition and rivalling submissions, the only issue for determination is whether the said Notice of Preliminary Objection is merited and if this Court has jurisdiction to determine this suit.
7. The 1<sup>st</sup> - 3<sup>rd</sup> Defendant's Notice of Preliminary Objection is premised on the ground that this suit is sub judice and this court does not have jurisdiction to handle the matter. I note the Defendants though duly served, failed to file their Statements of Defence to controvert the Plaintiffs' averments but instead filed the instant Notice of Preliminary Objection.
8. On Preliminary Objection, in *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

"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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."
9. While in the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the Court held that:-

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained." Emphasis Mine
10. From perusal of the Plaint, I note the Plaintiffs have raised issues of trespass to the suit land, fraud and also claimed beneficial ownership of the said suit land. It is trite that where the Defendants have failed to file a Defence expressly rebutting the Plaintiffs' averments, the claim therein remains unopposed. From



the facts before court, while associating myself with the decisions I have cited, I opine that the issues raised in the Plaint including trespass, fraud and beneficial ownership needed to have been expressly rebutted and ascertained during a full hearing.

11. In my view, the Defendants should have filed their Statements of Defence first to controvert the Plaintiff's allegations before lodging the instant Notice of Preliminary Objection. Further, on the issue of jurisdiction, I wish to rely on Section 13 of the *Environment and Land Court Act* as well as Article 162 (b) of *the Constitution*, 2010 and find that this Court has a wide mandate to hear as well as determine matters relating to the environment including land and is clothed with jurisdiction to handle this matter.
12. In the circumstance, I find the Notice of Preliminary Objection dated the 8<sup>th</sup> June, 2023 premature and will disallow it.
13. I direct the Defendants to file and serve their Statements of Defence within twenty one (21) days from the date hereof.
14. Costs will be in the cause.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

