



Business Partners International Kenya (II) Limited v Rudufu Limited & 2 others (Miscellaneous Application E027 of 2023) [2023] KEELC 22458 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E027 OF 2023**

**MD MWANGI, J
DECEMBER 20, 2023**

BETWEEN

BUSINESS PARTNERS INTERNATIONAL KENYA (II) LIMITED . APPLICANT

AND

RUDUFU LIMITED 1ST RESPONDENT

VIRIGINIA SUSAN WANGUI 2ND RESPONDENT

SIMON NGIGI KIMANI 3RD RESPONDENT

RULING

1. This ruling is in respect of the Respondent’s Preliminary Objection dated 8th September, 2023 on the ground that:
 - a. The 1st Respondent has filed a similar suit at the high court of kenya at nairobi hccomm no. 97 of 2019 - rudufu limited vs business partners international (ii) limited & anor which suit is before hon. justice. prof. dr. sifuna nixon and is coming up for mention on 2nd october 2023.
 - b. the applicant has failed to disclose to this honorable court that in hccomm no. 97 of 2019 - rudufu limited vs business partners international (ii) limited & anor the suit property outlined herein is also the subject of litigation in the said proceedings and the applicant has raised similar issues both directly and substantially.
 - c. the application filed herein and the suit at the high court of kenya at nairobi in hccomm no. 97 of 2019 - rudufu limited vs business partners international (ii) limited & anor involve the same subject matter and parties, save for the addition of the 2nd and 3rd respondent herein who are the directors of the 1st respondent’s company.
 - d. the parties in this application and in hccomm no. 97 of 2019 - rudufu limited vs business partners international (ii) limited & anor are litigating under the same title and suit property.



- e. this application is therefore frivolous, vexatious, contemptuous and an abuse of the court process since the hon. justice. prof. dr. sifuna nixon in hccomm no. 97 of 2019 - rudufu limited vs business partners international (ii) limited & anor possesses the requisite jurisdiction to grant the reliefs claimed herein.
2. the court on the 19th september, 2023 in the presence of both parties directed that the preliminary objection be canvassed by way of written submissions. both parties complied.

Respondents'/Objectors' submission

3. The Respondents submit that the issue for determination is whether the Applicant is entitled to the prayers sought in the Application. The Respondents submit that the 1st Respondent herein filed a suit against the Applicant herein in the High Court being HCCOMM No. 97 of 2019, in which the suit property herein is also the subject of litigation in the said proceedings. The Applicant has directly and substantially raised similar issues in this case.
4. The Respondents further submit that the two suits are similar, save for addition of the 2nd and 3rd Respondent in the instant suit, who are directors of the 1st Respondent. The Respondent asserts that this Court should not indulge the Applicant's abuse of the Court process of filing a multiplicity of suits between the same parties, and should therefore stop the same.
5. As such, the Court should dismiss the application as the Judge handling HCCOMM No. 97 of 2019 possesses the requisite jurisdiction to grant the reliefs claimed herein.

Applicant's Submissions

6. The Applicant identifies two issues for determination. The first issue is whether the Preliminary Objection meets the test of a Preliminary Objection. The Applicant cites the case of Mukisa Biscuit . –vs- Westend Distributors Ltd. (1969) E.A on the definition of what amounts to a Preliminary Objection.
7. It is the Applicant's submission that the Respondents' Preliminary Objection does not meet the aforesaid test as it does not raise pure points of law. The gist of the Objection is that there is a similar suit involving the same parties being HCCOMM 97 of 2019; Rudufu Ltd. –vs- Business Partners International (II) Ltd in respect of the suit property which raises similar issues as this matter. Evidently, the court would require to investigate and ascertain whether the same issues in contention in the instant application dated 8th August, 2023 are also in contention in HCCC 97 of 2019.
8. It is the Applicant's submission that a pure point of law speaks for itself and does not require the court to undertake an examination of documents in order to make a finding. The Respondents' Preliminary Objection therefore fails on this limb alone.
9. The second issue for determination is whether the matter is sub judice in nature. The Applicant cites Section 6 of the [Civil Procedure Act](#), 2010 and the case of Kinatwa Co-operative Savings & Credit Society Limited –vs- Kinatwa Prestige Ltd. (2021) eKLR on the meaning of sub judice. The Applicant argues that HCCC 97 of 2019, was filed by the 1st Respondent challenging the Applicant's rights to exercise its Statutory Power of Sale. The issue in contention in HCCC 97 of 2019 and the instant matter are neither directly nor substantially similar as the former suits seeks injunctive orders on the grounds of the illegal exercise of the Statutory Power of Sale.



10. The Applicant submits that the orders it is seeking in its application is for Police Assistance in obtaining vacant possession. The doctrine of sub judice cannot therefore apply. Further, that the substance of the two suits are substantively different.
11. The Preliminary Objection therefore lacks merit and ought to be dismissed with costs to the Applicant.

Issues for Determination

12. I have considered the Notice of Preliminary Objection by the Respondents and the rival submissions, I am of the considered view that the Preliminary Objection raises two broad limbs. The issues for determination are:
 - a) Whether the issue of sub judice may be raised by way of a preliminary objection.
 - b) Whether the court has jurisdiction to determine the suit.

Analysis And Determination

A. Whether The Issue Of Sub Judice May Be Raised By Way Of A Preliminary Objection

13. The starting point is to define what a preliminary objection is. On what constitutes a Preliminary Objection; the Supreme Court in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 others SCK Petition No. 12013[2014] eKLR, restated the definition in the case Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A where the Court of Appeal said 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 need to be ascertained or if what is sought is the exercise of judicial discretion.”

14. In the case of Equity Bank Limited vs. Bryan Yongo & Another [2014] eKLR the court held that:

“ Any true Preliminary Objection should not be entangled with factual issues.”

15. The Respondents contends that the instant suit is related to another matter being, HCC COMM NO. 97 of 2019 - Rudufu Limited –vs- Business Partners International (II) Limited & Another in which the Applicant has raised similar issues both directly and substantially.

16. Section 6 of the *Civil Procedure Act* provides that: -

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

17. I find that in order to determine whether the rule of sub judice has been offended, the court has to delve into material facts of the case pending in the High Court, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar. This necessarily puts the matter outside the ambit of a Preliminary Objection. I rely on the case of In Re Kibet Arap Kimarun (Deceased) (2021) eKLR, Succession Cause No. 206 of 2015.



18. I agree with the decision in Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

19. I am further persuaded by the court’s holding in the case of Margaret Wachu Karuri –vs- John Waweru Ribiro (2021) eKLR, where the Court was faced with a similar question whether sub-judice can be raised as a preliminary point. It held as follows:

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.”

20. That is the position in this case. The issue of sub-judice cannot be determined by way of the Preliminary Objection for reasons explained above.

Whether The Court Has Jurisdiction To Determine The Suit

21. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools.

22. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

- [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.



23. It is therefore my finding that an Objection on jurisdiction is one on pure points of law that may be determined as a preliminary objection. In the Mukisa case, the issue of jurisdiction was highlighted as one that qualifies to be considered as a preliminary objection.
24. In any event, the court on its own motion must, before entertaining a matter before it satisfy itself that it possesses the requisite jurisdiction. I will therefore proceed to determine if this Court has jurisdiction to hear and determine this matter.
25. It is common ground that the jurisdiction of this court is set out under Article 162(2) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*, 2011 and that the same relates to the use occupation and title to land.
26. Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, it has been noted that the said provisions are less clear on what “land-related” means. The determination on what land related means has been left for courts to interpret.
27. In the case of Suzanne Achieng Butler & 4 Others -vs- Redhill Heights Investments Limited & Another [2016] eKLR, the court stated that:

“In all honesty, it would not be possible for such direction to come from *the Constitution* or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.
25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.
26. In my view, the following factors are significant in determining the nature of the contract:
 - a. The language of the contract;
 - b. The nature of the business of the vendor;
 - c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
 - d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the



quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff” (emphasis mine).

28. From the above case and using the Predominant Purpose Test, it will be paramount for me to determine the gravamen of the dispute between the parties herein and determine whether the same is rooted in contests about ownership, deficiency in title, occupation or use of the land or something else.
29. The Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR while determining the issue of jurisdiction for the Environment and Land Court upheld the ‘predominant purpose test’ and stated that:

“ As for land use, the Black’s Law Dictionary, 9th Edn; gives the basic definition of the word ‘use’ as being: -

‘the application or employment of something; esp. a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.

Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

... the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

30. From the miscellaneous application dated 8th August, 2023, the Applicant prays for orders that the OCS Industrial Area Police Station be directed to assist and ensure that the Applicant takes personal peaceful possession of the property known as LR No. 209/3635 (I.R. No. 94443/1). It is evident that the Applicant seeks exercise its right of Foreclosure after the 1st Respondent allegedly defaulted in loan repayment.
31. Guided by the Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (Supra) and the decision by the Learned Judge Ngugi J (as he then was) in Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another (Supra), my finding is that this court lacks the jurisdiction to hear and determine this matter. It ought to be handled by the High Court.
32. Accordingly, the Applicant’s application dated 8th August, 2023 is hereby struck-out with costs to the Respondents.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY DECEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:



Mr. Ongoto for the Respondent

Ms. Mburu for the Applicant

YVETTE, COURT ASSISTANT.

