



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISCELLANEOUS APPLICATION NO. 353 OF 2014**

**JANET WANGARI MUHORO..... 1<sup>ST</sup> APPLICANT**

**DR. JOHN FRANCIS KIBUGI .....2<sup>ND</sup> APPLICANT**

**ANDERSON KIMATHI MBURUGU.....3<sup>RD</sup> APPLICANT**

**JAMES JOMO GATUNDU.....4<sup>TH</sup> APPLICANT**

**ROISE WAIRIMU MUIGAI.....5<sup>TH</sup> APPLICANT**

**OLAKUNLE TOLUWALOPWO OWASIKA.....6<sup>TH</sup>  
APPLICANT**

**Versus**

**SUSAN NYAMBURA WACHIRA..... RESPONDENT**

**RULING**

**Jurisdiction**

[1] The Respondent filed Notice of Preliminary Objection dated 22<sup>nd</sup> September 2014. She took out two objections to the suit. The first objection is that this court does not have jurisdiction; Environment and Land Court (hereafter ‘‘ELC’’) does. Under this objection, three arguments have been put forth, to wit; a) that the court is being called upon to try matters of ownership of Apartments erected on L.R. NO 209/8879/9 & L.R. 209/8879/10; b) Order 37 rule 3 of the Civil Procedure Rules relates to Summons by the Vendor or Purchaser of land and it can only be presided over by ELC; and c) there is also a civil suit, **ELC No. 605 of 2012, Skyview Properties Ltd & another vs. Kennedy Amos Njoroge & 3 others** relating to the same Suit Properties in the instant suit; which is still pending in Environment and Land Court. In the said suit, there are interim orders in favour of the Plaintiff, and it is only fair that the instant matter should be heard by the Environment and Land Court. The two matters may be consolidated for the expeditious disposal of justice. The second objection is that no written authority was filed as required by Order 1 rule 13 of the Civil Procedure Rules authorizing the Applicant to file this suit on behalf of the

2<sup>nd</sup> to 6<sup>th</sup> Applicants.

[2] I have considered all the arguments put forth by parties and they are part of record. The test on whether an objection is a preliminary objection was set out in the case of Mukisa Biscuits. The objection must be one which is not blurred with factual issues, and is capable of disposing of the suit completely. Therefore, any objection which requires copious explanations to ascertain, fails the test of preliminary objection. The objections being raised here are inviting the court to probe for evidence in order to ascertain, and that robs them of the character of a true preliminary objection. For instance see the objections on authority; they require the court to probe for evidence especially given the fact that the affidavit in support of the application has positively deposed that the deponent has the authority of the other Applicants to swear the affidavit on their behalf. Again, the other test is not met; the suit is for the benefit of the 1<sup>st</sup> Applicant too, and even the court were to find that she did not have the authority of the others-which has not been shown-the suit cannot be defeated in its entirety. On this basis, the objection will not decimate the suit completely.

[3] On jurisdiction, I say the following. After meticulously perusing the pleadings, there are no ownership issues being raised by the Applicants. Their case is a simple one, and is founded on shareholding in the Management Company called Scenic Court Management Limited. I have seen the Lease granted to the 1<sup>st</sup> Applicant about which I will not make any comments or express opinions for fear of hurting the trial of the suit. Except, it is sufficient to state that the said Management Company is registered under the Companies Act and issues on shareholding in such company fall within the ambit of the High Court. In the circumstances, this court has jurisdiction. I need not also mention that case **ELC No. 605 of 2012, Skyview Properties Ltd & anor Vs. Kennedy Amos Njoroge & 3 others** involves other parties who are not parties in this case. I should, however, state in passing that the Management Company has not been joined in this case, and the court prophesy issues around joinder thereto will ensue at one time or other. But that is for another day. In the premises, I am content to state the preliminary objection is a suitable candidate for dismissal.

[4] However, from the pleadings filed by the Respondent, I foresee a situation where the court may be driven towards ownership issues. And in order to allow full evaluation of all issues which parties may raise, it is safer to transfer the seat of hearing of this suit to the ELC Court for hearing and final disposal. I, accordingly, order that this file be transmitted to the ELC Court and be placed before the Presiding Judge, ELC on such date as shall be agreed among the parties for directions. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 24<sup>th</sup> day of March 2015**

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**F. GIKONYO**

**JUDGE**