



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO. 195 OF 2011
FORMERLY MILIMANI COMMERCIAL COURT CASE NO. 699 OF 2010

JOHN WANGUSI.....PLAINTIFF

VERSUS

1. BUSOLO WABUYELE

2. MATANDA WABUYELE

3. BIKETI WABUYELE.....DEFENDANTS

RULING

1. This is a ruling on the Defendants' Preliminary Objection dated 10th April, 2013, amended on 4th November, 2014. The objection was on the basis that this suit is misconceived and violates the express provisions of Section 3 (1) and (2) of the Law of Contract Act, Cap 23 of the Laws of Kenya and Section 97 (1) of the Evidence Act, Cap 80 the Laws of Kenya and that the High Court lacks jurisdiction to hear and determine this suit.

2. It was the Defendants' contention that no memorandum or note is signed by all the parties evidencing the advancement of USD 75,145.00 by the Plaintiff to the Defendants. It was submitted that Section 3(1) of the Law of Contract Act explicitly mandates the requirement of such a note or memorandum. That in absence of such memorandum or note, the Defendants cannot answer for any debt. It was argued that the representations alluding to the parties' agreements as pertains to the debt of USD 75,145 appear to have been oral according to the Plaintiff's assertions in the Plaint. It was further submitted that pursuant to Section 3 (2) of the Law of Contract Act, in the absence of a written and signed representation constituting an alleged debt, there is no competent suit pertaining to the debt. The Defendants took the position that Section 97 (1) of the Evidence Act expressly prohibits the admission of any oral evidence to substantiate the terms of a contract which the law mandates must be in writing.

3. On the second ground of the objection, the Defendants contended that this case involves persons who are domiciled in United States of America and this court cannot superintend its authority over transactions that happened in Portland Oregon in the United States of America. It was further submitted that due to the fact that payments were allegedly made to the 1st and 2nd Defendants' bank accounts in USA, this court lacks territorial jurisdiction over the events supposedly pertaining to this suit and it cannot adjudicate over the issues or rights of the parties. It was submitted that as per the definition of territory of Kenya under Article 5 of the Constitution, this court can only adjudicate over matters for which transactions have occurred in Kenya. The Defendants argued that the unlimited original jurisdiction of the High Court

enunciated under Article 165 (1) of the Constitution cannot be said to extend to matters for which transactions occurred abroad. Finally the Defendants submitted that cooperative arrangements between Kenya and the USA, through extradition treaties and legislation may exist for criminal law to aid the trial for offences such as genocide, crimes against humanity, piracy and terrorism committed outside national boundaries but not such legislative arrangements exist for civil cases.

4. To the Preliminary Objection the Plaintiff filed a Replying Affidavit sworn on 7th May, 2013. He contended that the Preliminary Objection lacks merit and should be dismissed as it raises issues which need evidence to prove. He averred that he entered into a business agreement with the Defendants and that the preliminary objection is raised on the basis of technicalities and is an attempt to deny him his rights and that Article 159 of the Constitution protects citizens from such abuse of the legal process. It was the Plaintiff's contention that the preliminary objection is baseless since it does not meet the conditions set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696.** It was argued that a reading of the Defendants' submissions confirm that their preliminary objection calls for evidence to prove or disapprove the fact of whether or not this court had jurisdiction to adjudicate this matter and the existence of written agreements between the parties herein.

5. The Plaintiff contended that the list of documents filed on 22nd August, 2012 contain written communication exchanged between the parties relating to this case, quotations for luxury buses to be bought at Ban Bros Bus & Coach Builders Nairobi, air travel tickets paid for by the Plaintiff in favour of the Defendants, bundle of emails exchanged by the parties confirming the existence of the business transactions, particularly confirming that the requirements of a written contract between the parties is satisfied vide the presence of the aforesaid written communication. On the issue of jurisdiction, the Plaintiff took the position that the parties herein intended for the business to be based in Kenya. The Plaintiff on this point made reference to the bus quotation and the emails by the Defendants selling to the Plaintiff the idea that the transport business was doing well in Kenya, requiring him to urgently pay the money to CMC Motors in Kenya, to pay Ban Bros Bus and Coach Builders in Kenya among others.

6. The Plaintiff further contended that the 2nd and 3rd Defendants are Kenyan citizen domiciled in Kenya and that the 1st Defendant partially resides in Kenya. He stated that the said issues called for proof by way of evidence; that he exhibited documents that he had commenced similar proceedings in USA but the same was struck out for lack of jurisdiction at the instance of the Defendants who pleaded that only Kenyan courts could handle the matter. The Plaintiff cited explanation 3 (ii) of Section 15 of the Civil Procedure Act and was of the opinion that the contract was to be performed in Kenya thereby the cause of action arose in Kenya. The Plaintiff urged this court to administer justice without undue regard to procedural technicalities pursuant to Article 159 (2) (d) of the Constitution.

7. I have considered the deposition of the parties herein in regard to the preliminary objection herein. The threshold of a Preliminary Objection was set out in **Mukisa Biscuit Manufacturing Co. Ltd** (supra) as follows:-

“So far as I am aware, 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

8. The question that arises here is whether an objection to the jurisdiction of the court, particularly the Defendants' objection automatically qualifies a preliminary objection as a valid objection on a point of law. I suppose not and I am fortified by Sir Newbold's holding in the Mukisa case wherein he stated as follows:-

“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 in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. As to the first ground that this suit is misconceived and violates the express provisions of Section 3 (1) and (2) of the Law of Contract Act, Cap 23 of the Laws of Kenya and Section 97 (1) of the Evidence Act, Cap 80 the Laws of Kenya, I am of the view that this court will be required to interrogate facts on what exactly constitutes a note or memorandum considering the Plaintiff's contention that the requirements of a written contract between the parties was satisfied by the written communication between the parties. As regards the second ground, facts have had to be delved into. The Plaintiff contended that he filed a suit in the USA which suit the Defendants successfully contested on the ground that USA had no jurisdiction to deal with and indeed from my perusal of the record, it is clear that the Defendants' contested USA's court's jurisdiction successfully on the ground that the dispute between them can only be resolved by Kenyan courts. There being the need to establish facts by way of evidence, I find that the preliminary objection does not meet the threshold required in law. I hereby decline to determine the issues raised in the preliminary objection. It is hereby struck out with costs to the Plaintiff.

Dated, Signed and Delivered at Nairobi this 22nd day of May, 2015.

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A. MABEYA

JUDGE