



REPUBLIC OF KENYA



KENYA LAW
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**Conpak Industries Ltd v Muturi (Miscellaneous Application
E041 of 2021) [2022] KEELC 121 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E041 OF 2021**

EK WABWOTO, J

APRIL 28, 2022

BETWEEN

CONPAK INDUSTRIES LTD APPLICANT

AND

SAMUEL MUTURI RESPONDENT

RULING

1. This Ruling is in respect to the Respondent's preliminary objection dated 13th October 2021. The Preliminary Objection was based on the following grounds: -
 - i. The court lacks jurisdiction to hear the matter.
 - ii. There are no proceedings known in law in which a notice of motion can originate a suit hence the current suit offends the provisions of Order 3 rule 1 of the *Civil Procedure Rules*, 2010.
 - iii. The suit herein is premature and fatally defective for failure to accord the doctrine of exhaustion of other avenues of dispute resolution provided for in law.
 - iv. As a consequence, the suit herein is incompetent, frivolous, fatally defective and an abuse of the court process and hence should be struck out with costs to the Respondent.
2. Pursuant to the court's directions issued on 21st October 2021. The court directed that the preliminary objection be canvassed first by way of written submissions. Parties were granted time to file and exchange their written submissions which the court has considered.
3. The Respondent filed his submissions dated 16th February 2022 through the firm of Kakai Mungalo & Co. Advocates. Counsel submitted that the courts lacks jurisdiction to hear the Application for want of a final order of eviction and that the said application offends Order 3 Rule 1 of the *Civil Procedure*



Rules. It was argued that the Applicant ought to have moved the court by way of a formal suit. In support of this position Counsel relied on the cases of Joseph Kibowen Chemjor v William C Kasera (2013) eKLR, Samuel Chege Thairi & another v Iddah wanjiru Wangari & others (2018) eKLR among others.

4. It was also submitted that the Applicant had not exhausted all the avenues prior to instituting the suit and hence the same was premature and defective for failure to accord to the doctrine of exhaustion.
5. In opposing the preliminary objection, the Applicant filed its submissions dated 30th November 2021 which were filed by the firm of Githiomi Mungai Advocate. On jurisdiction. Counsel referred to Article 162(2) of the Constitution and Section 13(2) of ELC Court Act No 19 of 2011. Citing the case of Samuel Kamau Macharia & others v KCB & 2 others (2012) eKLR. It was argued that this court had jurisdiction since the cause of action was in respect of L.R No. 209/7214 which falls squarely under the jurisdiction of this Court.
6. On whether or not the suit could be instituted vide a notice of motion, Counsel referred to the case of Abdi Abdulabi Sinko v Ben Chikamai & 2 others (2016) eKLR where Gikonyo J. held that a suit can be properly instituted by way of a notice of motion if so provided by the applicable provisions of the law.
7. On whether the plaintiff had exhausted all avenues prior to commencement of the suit, counsel submitted and outlined how the applicant had complied with the provisions set out at Section 152 (E) of the Land Act No 6 of 2012.
8. The main issue for determination is whether the preliminary objection is merited. The case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 has been the watershed as to what constitutes preliminary objections. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection 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...”
9. This statement of the law has been echoed time and again by the courts: see for example, Oraro v Mbaja [2007] KLR 141.
10. In Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:-

“.... 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”. [emphasis added]
11. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary



objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added].

12. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.”
13. Section 150 of the *Land Act* No. 6 of 2012 also stipulates that the ELC has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act. The Applicant’s motion was brought under sections 152A and 152E of the *Land Act*. Section 2 of the Act defines “court” to include the environment & Land Court. Hence this limb fails.
14. On whether a suit can be instituted by a Motion. This suit was instituted pursuant to section 152E of the *Land Act* seeking for various orders as outlined in that provision. From a reading of sections 152A and 152E it is not clear how a party ought to approach the court for a relief. However regardless of the procedure that is adopted, what matters is that the affected party is accorded an opportunity to be heard.
15. In view of the foregoing, the applicant cannot be faulted on the procedure adopted and neither can such be a reason to defeat the suit. Hence therefore this limb of preliminary objection equally fails.
16. In the end, I find that the preliminary objection lacks merit and the same is dismissed with an order that costs to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022

E. K. WABWOTO

JUDGE

In the Virtual Presence of:-

Mr. Githiomi Mungai for the Applicant

Ms. Vuchocho for the Respondent.



Court Assistant: Caroline Nafuna

E. K. WABWOTO

JUDGE

