



**Husseini Builders Limited v Oceanic Towers Limited (Environment and Land
Case Civil Suit 110 of 2018) [2022] KEELC 3661 (KLR) (16 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 110 OF 2018**

NA MATHEKA, J

MAY 16, 2022

BETWEEN

HUSSEINI BUILDERS LIMITED PLAINTIFF

AND

OCEANIC TOWERS LIMITED DEFENDANT

RULING

1. The defendant raised a preliminary objection dated April 27, 2021 on the following grounds;
 1. This honourable court has no jurisdiction to hear and determine this suit as it does not relate to
“the environment and the use and occupation of, and title to, of the purely of the
land”
as stipulated under article 162 (2) of the *Constitution*;
 2. The issues arising out of this matter are existence and/or validity of a contract, contractual
duties, obligations and breaches thereof.
 3. This matter relates to a sale agreement dated 6th October and raises issues which do not fall
within the jurisdiction of the Environment and Land Court for the following reasons
 - a. Apart from the agreement for sale aforementioned, the defendant and plaintiff herein
entered into a contract whereby the plaintiff was engaged as a contractor in the said
development in which apartment number 703 is part of, and was contracted to carry
out certain aluminium and glazing works on the said development; commercial in
nature
 - b. The dispute that has arisen now relates to the plaintiff's failure to carry out the
contracted works in accordance with the contract and its abandonment of the site, as



a result of which, completion of the agreement for sale for apartment number 703 has not occurred due to the plaintiff's aforesaid breaches under its contract to carry out certain works.

- c. Further and in any event the plaintiff has by its advocate's letter dated March 23, 2018 rescinded the agreement for sale.

4. The issues herein therefore do not relate to

"the environment and the use and occupation of, and title to, land"

but are commercial / contractual in nature.

2. In the premises, the defendant prays that this honourable court to declare it has no jurisdiction to hear this matter and this suit be struck out and/or dismissed with costs to the defendant.

3. This court has considered the preliminary objection and the submissions herein. A preliminary objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696,

"..... 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"

4. In the same case, Sir Charles Newbold said:

"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 had to be ascertained or if what is sought is the exercise of judicial discretion".

5. JB Ojwang, J (as he then was) in the case of *Oraro v Mbaja* [2005] eKLR had the following to state regarding a 'preliminary objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that,

"where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

6. The issue as to whether or not this court has jurisdiction is therefore properly raised as a preliminary objection and the court will consider the same. The defendant filed submissions on February 15, 2022. Counsel submitted that the defendant entered into a contract with the plaintiff to carry out development works. The plaintiff failed to deliver on time, which in turn led to the defendant failing to complete the agreement for sale. Counsel submitted that the dispute between the parties is commercial in nature and not dispute about title or use of land, and relied on the case of *Owners of the Motor Vessel Lillian S' Caltex Oil Kenya Limited* [1989] KLR 1 where it was held that a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. He also referred court to article 162 (2)(b) of the *Constitution*, section 13 of *ELC Act* and section 150 of



the [Land Act](#) to argue the issue before court does not fall within the preview of the court's jurisdiction. He urged court to dismiss the suit for lack of jurisdiction.

7. The plaintiff filed submissions in opposition of the preliminary objection on March 16, 2022. Counsel submitted that this court has jurisdiction to hear and determine the dispute herein. On the ground that the dispute relates to a sale agreement dated October 6, 2015 over an apartment situated on LR No Mombasa/Block XXVII/1063 for Kshs 22,000,000/=. That the issue before court for determination is the defendant's refusal complete the agreement by handing over the apartment to the plaintiff. Counsel argued that the issue is related to the use and occupation of and title to the land as stated in article 162 (2)(b) of the [Constitution](#). Counsel submitted that the defendant's argument that the sale of the apartment was tied to another transaction between the parties is misguided. He argued that the defendant has failed to direct court to the specific clause in the sale agreement that ties the sale of the apartment to any other transaction between the parties. He relied on the Court of Appeal case in [Five Forty Aviation Ltd v Erwan Lanoë](#), to submit that court cannot rewrite the contract between parties as they are bound by its terms. Counsel maintained that the prayer of specific performance was tied directly to the sale and purchase of the apartment which is within the jurisdiction of this court. The plaintiff urged court to dismiss the preliminary objection with costs and proceed with the hearing. The preliminary issue for determination here is whether this court has the jurisdiction to hear and determine the suit.
8. The jurisdiction of the ELC Court flows from article 162 (2)(b) of the [Constitution of Kenya 2010](#). Section 13 (2) of the [ELC Act](#) vests this court with wide powers over any dispute relating to land it provides that;

"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"

9. The jurisdiction of this court to hear and determine this suit flows from the [Constitution](#) and the law. The jurisdiction of court is not conferred upon it by parties nor can the court confer upon itself jurisdiction. The Supreme Court in [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR held that;

"A court's jurisdiction flows from either the [Constitution](#) of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."



10. I have perused the pleadings in this matter and find that the suit was instituted through a plaint filed on May 15, 2018. The plaintiff's case is that they entered into a sale agreement on October 6, 2015 over an apartment situated on LR No Mombasa/Block XXVII/1063 for Kshs 22,000,000/=. The plaintiff claims to have paid the purchase price but the defendant has failed to complete the said sale despite receiving the purchase price in full. The plaintiff prayed for inter alia specific performance for breach of contract by the defendant.
11. The defendant filed their defence on May 2, 2019, they admitted to entering into an agreement with the plaintiff over the sale of the apartment on the suit premises on October 6, 2015. However, they averred that apart from the sale agreement, the parties had entered into another agreement where the plaintiff was supposed to carry out glazing works on the suit premises in 2015. That the said agreement could be evidenced from the communications between the two as well as the oral agreements reached by their respective directors. That the plaintiff failed to complete the glazing works and abandoned the site, it then led the defendant's inability to discharge its obligation to deliver an apartment devoid of defects as stipulated in the sale agreement. I find that the agreement relates to use, occupation and title to land and this court has jurisdiction to hear and determine the same. This preliminary objection has no merit and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF MAY 2022.

NA MATHEKA

JUDGE

