



**Olonkarie v Kipsha (Environment & Land Case E020 of 2024)
[2025] KEELC 296 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E020 OF 2024
MN MWANYALE, J
FEBRUARY 4, 2025**

BETWEEN

STEPHEN OLONKARIE APPLICANT

AND

WILSON KEMBOI KIPSHA RESPONDENT

RULING

1. Before Court for determination is the Notice of preliminary Objection dated 12th August 2024 against the Application dated 9th August 2024 as well as the Plaintiff in this matter. The P/O is premised on grounds inter alia;
 - i. that the entire suit is frivolous, vexatious, scandalous and grossly misconceived and an abuse of the court process as it discloses no reasonable cause of action against the Defendant/Respondent thus rendering it fatally and incurable defective.
 - ii. that, lack of Notice of appointment of the Advocate, offends the express provisions of Order 9 rule 7 of the Civil Procedure Rules 2010, the procedure mentioned therein is couched in mandatory terms and is not a mere technicality.
 - iii. That the suit offends the clear provisions of order 5 rules 1 and 2 of the Civil Procedure Rules 2010 which makes it mandatory for every Plaintiff to accompany the summons to enter appearance.
 - iv. That the suit has been bated for want of summons to appear contrary to order 5 rule 1 of the Civil Procedure Rules.
 - v. That the plaintiff's suit is filed in complete breach of section 9 of the Magistrates Court [Act no. 26 of 2015](#) which confers jurisdiction to the Magistrates courts to hear and determine and



disputes in exercise of jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act*.

- vi. That the suit has been instituted in contravention of the pecuniary limits under section 7 of the Magistrates court Act.
 - vii. That the suit is also filed contrary to mandatory provision of section 11 of the *Civil Procedure Act* as read together with section 19 of the same Act which provides that every suit shall be instituted in the court of the lowest grade to try it as well as institution of suits.
 - viii. That the instant suit offends the word and spirit of the provisions of order 4 rule 1(1)(f) of the Civil Procedure Rules.
 - ix. That the proceedings before this court is legally untenable null and void ab initio for all intents and purposes as the entire suit together with the application are irregular, improperly on record and bereft of merits.
2. Parties were directed to canvass the preliminary objection by way of written submissions which both parties and their submissions are summarized as follows;

Defendant/Respondent Submissions.

3. In support of the preliminary objection the Defendant has framed and submitted on 5 issues to wit;
 - i. whether the Notice of preliminary objection meets the threshold of a pure point of law?
 - ii. whether non -service of summons to enter appearance is fatal and renders the entire suit incompetent?
 - iii. whether there is reasonable cause of action disclosed against the defendant?
 - iv. whether the suit before this court amounts to an abuse of the court process?
 - v. who bears the costs?
4. With regard to issue number 1 the submissions are incoherent save that the Defendant has cited Black's law dictionary and the decision in Mukhisa Biscuit on the definition of a Preliminary Objection is but did not address the issue he had framed as to whether the preliminary objection herein raises pure points of law. The defendant further submitted that a preliminary objection could be raised at any time.
5. On issue number 2, the Defendant submits that non service of summons renders the case incompetent and has cited the case of Frenze Investments Limited vs Kenya Way limited to support this position. The defendant submits that nonservice of summons herein renders this suit incompetent.
6. On issue no 3 the defendant submits that the suit is incurably defective hence it discloses no cause of action against him and the same ought to be struck out. On issue no4, the defendant submits that the suit is an abuse of the court process. On the strength of the above the Defendant urges the court to file

Plaintiff's Submission

7. In opposition to the Preliminary Objection the Plaintiff/Applicant submits on 3 issues as follows
 - i. Whether or not the plaintiff ought to have filed notice of appointment pursuant to Order 9 Rule 7 of the civil procedure rules, to which the plaintiff submits that the said requirement exists where a litigant has acted in person and afterwards appoints an Advocate or and advocate



who wishes to appear for a party in suit and not a requirement when filing a suit as was the case herein.

- ii. On whether lack of service of summons to enter appearance makes suit incompetent, the plaintiff submits that the Application dated 5th of August 2024 is the one that was ordered to be served upon the Defendants and they expected the defendant to file a replying affidavit only but the defendant having been aware of the suit filed the preliminary objection as well as a Defence and counterclaim yet the summons had not been served. That indeed summons had been prepared and were pending signature of the Deputy registrar as evidenced by annexure SOK 1. The plaintiff further submits that the issue of ascertainment of whether or not the summons to enter appearance were actually prepared is thus an issue of ascertainment of facts which makes the preliminary objection not to be based on pure points of law and the plaintiff places reliance on the case of Mukhisa Biscuits and urges the court to dismiss the preliminary objection.
- iii. On the last issue as to whether the court has the competent jurisdiction to hear and determine this matter, the plaintiff submits that the court is empowered under section 13 of the *Environment and Land Court Act* to hear matters both in an Original and Appellate Jurisdiction and that the defendant has not provided valuation report to assist the court in ascertainment as to whether the matter falls within the jurisdiction of the Magistrates court. On the strength of the above the Plaintiff submits that the preliminary objection be dismissed.

Issues for Determination

8. Having analyzed the Notice of preliminary objection as well as the rival submissions by the parties, the court frames the sole issue for determination as follows,

Whether the Preliminary objection before court meets the threshold of a preliminary objection capable of determining the suit in limine

Analysis and Determination

9. Whereas some of Issues raised by Defendant like the issue of non-filing of the notice of Appointment based on Order 9 rule 7, jurisdiction as well non extraction of summons to enter appearance premised on Order 5 rule I of the Civil Procedure Rules appear undoubtedly as points of law that would have been best argued as Grounds of Opposition to the application and may have the potential on a prima facie basis determining the application, some of the points so raised are factual needing examination of evidence.
10. The Court shall now consider whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of In Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”
11. Similarly in the decision in the case of Omondi vs National Bank of Kenya Limited and 2 others; as quoted in the decision of J. N. and 5 others vs Board of Management St. G. School Nairobi and Another where it was held 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.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

12. The above excerpts from the above cited decision shall guide this Court on whether the objection meets the criteria preliminary objections. From the above excerpts a preliminary objection must not deal with issues of ascertainment of the facts and evidence. The issue of the non-extraction and service of summons to enter appearance is a factual issue that requires the court to examine the existence or otherwise of the summons to enter appearance for good measure the plaintiff has annexed the said summons as annexure SOK 1 and that exercise moves the preliminary objection from being a pure point of law as required to an issue of ascertainment of facts through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. It follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as the same involves ascertainment of facts through the rules of evidence and the same must fail, as it hereby does, and the court shall not dwell on its merits or otherwise.
13. The preliminary objection as drawn thus fails the criteria of a preliminary objection and the must fails. The issues of law raised therein shall be deemed as Grounds of opposition to the application and will be dealt with during the hearing of the Application.
14. The upshot is that the preliminary objection dated August 12, 2024 is hereby dismissed with costs.

DATED AND DELIVERED AT KILGORIS THIS 4TH DAY FEBRUARY OF 2025

HON. M.N. MWANYALE

JUDGE

In the presence of:

Ms. Nakeeb h/b for Mr. Kilinyet for the Plaintiff

N/A for Mr. Samoita for the Defendant

C/A Emmanuel.

