



**Faith & Hope Properties Kenya Limited & 7 others v Waweru & 3 others (Environment & Land Case E058 of 2022) [2023] KEELC 20371 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20371 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E058 OF 2022**

**A NYUKURI, J  
OCTOBER 4, 2023**

**BETWEEN**

**FAITH & HOPE PROPERTIES KENYA LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
KYALO OKIMWERE ..... 2<sup>ND</sup> PLAINTIFF  
MICHAEL KINGA KAMAU ..... 3<sup>RD</sup> PLAINTIFF  
MARY KATANU KAMEME ..... 4<sup>TH</sup> PLAINTIFF  
MACHARIA MWANGI ..... 5<sup>TH</sup> PLAINTIFF  
LUCY WANGECHI MATHENG ..... 6<sup>TH</sup> PLAINTIFF  
MAGDALENE WANJIRU ..... 7<sup>TH</sup> PLAINTIFF  
NANCY NJERI ..... 8<sup>TH</sup> PLAINTIFF**

**AND**

**JAMES MUCHIRI WAWERU ..... 1<sup>ST</sup> DEFENDANT  
SUSAN NTHAMBI MUSEI ..... 2<sup>ND</sup> DEFENDANT  
THE REGISTRAR OF LANDS, MACHAKOS COUNTY ..... 3<sup>RD</sup> DEFENDANT  
COUNTY LANDS SURVEROR, MACHAKOS COUNTY ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Before court is a Notice of Preliminary Objection filed on November 3, 2022 by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants seeking the dismissal and or striking out of this suit in limine on the following grounds;
  - a. That the Plaint is incompetent and untenable as no cause of action has been lodged as per Order 2 Rule 15 of the [Civil Procedure Rules](#).



- b. That this suit offends the mandatory provisions of section 3(1) and (2) of the [Law of Contract Act](#) Cap 23 Laws of Kenya.
  - c. That this suit is fundamentally defective and incompetent.
2. The preliminary objection was disposed by way of written submissions. On record are the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' submissions filed on November 15, 2022 and the Plaintiffs' submissions filed on January 27, 2023.

### **3<sup>rd</sup> and 4<sup>th</sup> Defendants' Submissions**

3. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants cited the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 and submitted that the preliminary objection herein met the threshold for a preliminary objection as it raised points of law.
4. It was contended for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that while the decisions in the cases of [D.T Dobie Kenya Co. Ltd v Joseph Mbaria Muchina & Leah Wanjiku Mbugua](#) (1982) KLR 1 and [Elijah Sikona & Another v Mara Conservancy & 5 Others](#) [2013] eKLR, require courts to loathe dismissal of a suit on grounds of failure to disclose a cause of action, it was clear that no reasonable cause of action was raised against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
5. On whether the suit raised a cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, counsel argued that Order 2 rule 15 of the [Civil Procedure Rules 2010](#), provides the principles which guide the court in striking out pleadings, including failing to disclose any reasonable cause of action. It was further submitted for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants that although the Plaintiffs have a triable issue before the court, the issues are in respect to actions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They argued that the Plaintiffs had failed to particularize any alleged harm or actions done by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to warrant the court's intervention against them.
6. It was further contended that the Plaintiff has not sought for any prayer against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, as the Plaintiff's prayer is for specific performance in regard to their contractual relationship between them and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
7. Besides, counsel argued that there is no privity of contract between the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and placed reliance on the cases of [Dunlop Pneumatic Tyre Co- Ltd v Selfridge & Co Ltd](#) [1915] AC 847, [Yaya Towers Limited v Trade Bank Limited \(In liquidation\)](#) Civil Appeal No. 35 of 2000 and [Mercy Nduta T/A Mwangi Ken'gara & Co. Advocates v Invesco Assurance Company Limited](#) [2019]e KLR for the proposition that while striking out a suit should be exercised sparingly, where it is clear that the suit does not raise a cause of action against the defendant, the court ought to strike out such suit.

### **Plaintiffs' Submissions**

8. Counsel for the Plaintiffs submitted that the 1<sup>st</sup> Plaintiff had bought twelve acres from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but on the ground the land is only nine acres. It was their submission that the 3<sup>rd</sup> Defendant issued titles to land reference Nos Mavoko Town Block 3/13128-13135 respectively, subdivided from Plot No. 2643 which was approximately 12 acres, leaving out the question of how they got 12 acres. It was their argument that it was the duty of the 4<sup>th</sup> Defendant to explain how they arrived at nine acres.
9. It was also their argument that the documents attached in the Plaintiffs' list of documents were from the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that as authors of the said documents, they would be best placed to explain them. They further submitted that if the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not wish to be parties



to the suit, then they were obliged to give their views on the report on page 50-54 of the Plaintiffs' bundle of documents, to help the court arrive at a reasonable decision. They argued that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants ought to remain in the suit for the following reasons;

- a. That the 3<sup>rd</sup> Defendant is the custodian of the disputed titles.
  - b. That the 4<sup>th</sup> Defendant is the one to survey and identify the boundaries and the beacons of the existing parcel numbers.
  - c. In case of any boundary dispute or existence of a parcel of land then it is the 4<sup>th</sup> Defendant/Applicant to establish the same on the ground which is the position in this case.
  - d. The 3<sup>rd</sup> Defendant is to verify the ownership of the titles on paper and the existing maps since they are the custodians of government record of ownership of land.
10. It was their contention that it would be difficult to enforce any orders of the honourable court if the two Defendants are not made party to the suit and that the court can determine after full hearing, if the Defendants have no case to answer.
11. The parties did not address the second and third limb of the preliminary objection, namely whether the suit was contrary to Section 3 (1) and (2) of the Law of Contract Act and whether the suit was fundamentally defective and incompetent.

#### **Analysis and determination**

12. The court has considered the preliminary objection as well as the submissions by the parties. It is trite that a preliminary objection must not be vague but it must be clear and precise and based only on a point or points of law where facts relied upon are not in contest, as was held in *Mukisa Biscuits v West End Distributors Ltd* [1969] EA 696. Therefore, the averment that the suit is fundamentally defective and incompetent cannot be referred to as a preliminary objection as the allegation is vague with no reference to the law which would render the suit defective and incompetent. Similarly, the contention that the suit offends the mandatory provisions of Section 3 (1) and (2) of the Law of Contract Act cannot be said to amount to a preliminary objection as the applicants have not mentioned the manner in which those provisions of the law have been breached or the undisputed facts upon which that objection is based.
13. Consequently, the only issue remaining is whether the suit should be struck out for failure to disclose a reasonable cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as per the provisions of Order 2 Rule 15. That, in my view raises a pure point of law, as no evidence is admissible to demonstrate want of a reasonable cause of action.
14. Order 2 Rule 15 of the Civil Procedure Act provides as follows;
1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that
    - a. It discloses no reasonable cause of action or defence in law; or
    - b. ....
    - c. ....
    - d. ....



2. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.
15. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants argued that the dispute herein concerns a contract between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as the size of land that they purchased is more than what is on the ground. Besides, counsel argued that there is no single prayer sought against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. In response, counsel for the Plaintiffs argued that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants will be called upon to execute the ultimate decree of the court should the Plaintiffs be successful.
16. I have considered the Plaint and I note that the Plaintiffs' grievance is that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold plots Mavoko Town Block 3/13128- 13135 to the 2<sup>nd</sup> to 8<sup>th</sup> Plaintiffs but that the former have since refused to transfer the suit property to the 1<sup>st</sup> Plaintiff but instead intend to sell the same to third parties. The Plaintiffs sought for orders of specific performance and a permanent injunction to restrain the Defendants from trespassing, disposing of or interfering with the Plaintiffs occupation of the suit property. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the Land Registrar and the County Land Surveyor who are public officers with the mandate of land registration and survey of land within Machakos county respectively. The Plaintiff only argues that they must be in the matter so that in the event a decree is made in favour of the Plaintiff, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants will then execute the same. Clearly, the cause of action and the remedies sought do not touch on any actions of commission or omission on the part of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and it will not serve the interests of justice to encumber them with this suit. I disagree with the Plaintiffs' counsel's contention that if the orders sought in the plaint are granted, they will be enforced by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and a person can only be joined to a suit as a Defendant when there is an apparent cause of action against them and not merely for enforcing probable court orders as that would encourage unnecessary litigation against public officers, whose core duty is to render services to the public and not litigation. In any event this court will not allow a Plaintiff to maintain a suit against a party merely for speculative reasons to the effect that in the event they are successful, they will need the Defendants herein to enforce the orders in their favour. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants being public servants need not be made party to a suit for them to comply with orders intended to effect a decree of court.
17. In the premises, I find and hold that this suit does not disclose any reasonable cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the same is hereby struck out as against the said Defendants, with costs to them.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

