



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC APEAL CASE NO. E002 OF 2020**

**ROSE KOJE NDUBI.....APPELLANT**

**VERSUS**

**HARRIET MUTHONI KINYINGA.....1<sup>ST</sup> RESPONDENT**

**PAULINE KAGENDO KINYINGA.....2<sup>ND</sup> RESPONDENT**

**PURITY THIGAA MUCEE.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

(Being an appeal from the Ruling of the Chief Magistrate's court at Chuka, Hon. J. M. Njoroge dated 14<sup>th</sup> October, 2020 in ELC Case No. 24 of 2020)

1. The Memorandum of Appeal in this appeal reads as follows:

**MEMORANDUM OF APPEAL**

**ROSE KOJE NDUBI** the above named appellant appeals to the **High Court (Environment and Land Court) against the whole of the ruling of the above mentioned Chief Magistrate on the following grounds:-**

1. The learned trial magistrate erred in law and fact in failing to appreciate that the objection to the suit was on a pure point of law relating to the jurisdiction of the court being barred by section 13A (1) of the Government Proceedings Act, and no evidence was required to be adduced other than the perusal of the pleadings before the trial court.
2. The learned trial magistrate erred in law and in fact in failing to consider and appreciate that the suit against the 1<sup>st</sup> defendant was inseparable from the suit of the 2<sup>nd</sup> defendant as the orders made or to be made against the second defendant affected the rights of the 1<sup>st</sup> defendant as the compensation to the 1<sup>st</sup> defendant was payable by the 2<sup>nd</sup> defendant.
3. The learned Trial Magistrate erred in law in failing to take into account or consider the submissions made by the 1<sup>st</sup> defendant hence arriving at unjust decision in the ruling.
4. The learned trial magistrate erred in law and fact in holding that the 1<sup>st</sup> defendant could not object to the jurisdiction of the court since the 1<sup>st</sup> defendant's case was separate from the 2<sup>nd</sup> defendant's yet orders against the second defendant affected the property rights of the 1<sup>st</sup> defendant in respect of the payment of the compensation hence causing a miscarriage of justice .
5. The learned trial magistrate erred in law in dividing the suit into lanes by holding that the 1<sup>st</sup> defendant should keep to her lane yet orders made or to be made against the 2<sup>nd</sup> defendant would adversely affect the rights of the 1<sup>st</sup> defendant hence occasioning a miscarriage of justice.
6. The learned trial magistrate misapprehended the law and failed to find that the suit affected Government expenditure and it was against the law to allow the suit to proceed to full hearing without notice to the Attorney General.
7. The learned magistrate erred in law and in fact in misapprehending the import and tenor of the Government proceedings Act as it applies to the agents of the Government of Kenya and that Upper Tana and the Ministry of Water are agents or arms of the Government hence the requirement for notice to the Attorney General.

8. The learned magistrate erred in law in failing to appreciate that a suit- barred by statute is void ab initio hence allowing a defective suit to proceed to full trial thus causing a miscarriage of justice.

**IT IS PROPOSED TO ASK THE COURT FOR ORDERS THAT:**

1. The appeal be allowed.
2. The Ruling /Decree Order of the trial magistrate be set aside.
3. The preliminary objection be upheld on the question of lack of jurisdiction.
4. That this court be pleased to make such further relief as may appear just to the Honourable court.

**DATED AT CHUKA THIS.....21<sup>ST</sup> .....DAY OF.....OCTOBER .....2020**

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**P.M MUTANI ADVOCATE**

**FOR THE APPELLANT**

2. The appeal was canvassed by way of written submissions.
3. The Appellant's written submissions state as follows:

**THE APPELLANT'S FINAL SUBMISSIONS IN SUPPORT OF THE APPEAL**

**My Lord,**

I canvassing this appeal I will urge grounds 1 and 2 in the memorandum of appeal separately as they dwell largely on the jurisdiction of the trial court to entertain the suit as currently constituted.

I will then urge and canvass grounds 3, 4,5,6,7 and 8 together to the extent that they are in support of grounds 1 and 2 of the memorandum of appeal. I urging ground1 let me briefly give the background to the main suit before the trial magistrate.

**BACKGROUND**

The appellant is the registered owner of **LR. KARINGANI/NDAGANI/4243** and the respondents are adult daughters of the appellant. It is pleaded to that effect in the appellant's defence. The appellant is a person living with an amputation of one leg. The suit relates to compensation to be paid to the appellant by the Government of Kenya. These facts are pleaded in the suit (see paragraph 6, 7, and 9 of the defence on page 24 of the record of appeal).

In short, all the facts that needed to be considered are on the written statement of defence which raised new grounds which called for a reply by the plaintiffs. No reply to the defence is on record hence the facts remain as pleaded by the defendant. The plaint in paragraph 3 (page 11 of the record of appeal) shows the ministry of water and sanitation as the principal actors in the compensation of the persons displaced by the Upper Tana Project.

**GROUND1**

The gist of this appeal is that the learner trial magistrate erred in law and in fact in allowing an incompetent suit to proceed to full hearing. This is prohibited by S. 13A (1) of the Government Proceedings Act, Cap, 40 Laws of Kenya. (See paragraphs 14 and 15 of the defence on page 25 of the record of appeal.

**“S.13A (1) No proceedings against the government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the government in relation to those proceedings”**

The learned trial magistrate ought to have struck out the suit as was held in the case of **OWNERS OF MOTOR VESSEL”LILIANN S” VERSUS CALTEX OIL (KENYA) LTD 1989 KLR1**

Where it was held on page 14 of the report that:-

**(“Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” page 14 of the law report (A copy of the report is annexed to these submissions).**

In the light of S. 13A (1) of the Government Proceedings Act, that barred the suit without notice, the suit ought to have been stopped. The court was expected to down its tools by striking the suit out. On this question of jurisdiction I invite this court to allow the appeal and strike out the main suit accordingly.

By and large the main objection before the trial magistrate was that of a competent suit arising out of the lack of jurisdiction for the trial court proceed with the suit in violation of S.13A (1) of the Government Proceedings Act. In other words the suit before the trial magistrate was bad in law of the lack of jurisdiction. I wish to draw this court attention to (paragraphs 14 and 15 in the statement of defence on page 25 of the record of appeal. No denial was ever raised nor a reply to the defence filed in rebuttal of that fact that is apparent on the face of the record.

The question of want of jurisdiction having been raised in the written statement of defence and there being no Reply to the defence it is deemed that question of the lack of jurisdiction was admitted in law.

It is submitted that the Government of Kenya as per Section 2 with the Government Proceedings Act, includes any agents of the Government such as the Upper Tana Project and the Ministry Of Water and Sanitation as pleaded in the paragraph 3 of the plaint.

My lord, there is no truth in the submission that the suit was not against the government the moment the ministry of water through Upper Tana Project was sued.

In section 2 of the Government Proceedings Act, an agent of the Government includes an independent contractor. To sue an independent contractor a notice to the Attorney General is mandatory as per section 13A (1) of the Government Proceedings Act. No evidence was required to find that the suit was barred by statute. The pleadings in particular the defence, which was not replied to was there for the learned magistrate to see. In short, the learned magistrate misdirected himself in failing to enforce the law thus occasioning a miscarriage of justice.

In the light of the trial court failing to enforce the law as it stands, I urge your Lordship to allow the appeal strike out the suit. The trial magistrate in allowing an incompetent suit to proceed to full hearing in light of the prohibition by S. 13A (1) of the Government Proceedings Act made a grave error . At this juncture I would like to refer your Lordship to paragraphs (14 and 15) of the statement of defence on page 25 of the record of appeal.

From the ruling ,page 56 of the Record of Appeal the learned magistrate appears to accept that the suit was indeed against the government, but the appellant was not the right person to object to the suit. It is submitted with profound respect that holding is a travesty of justice for an illegality can be pointed out by any party to a suit.

In Paragraph 3 of the plaint (page 11 (eleven) of the Record of Appeal ) the plaintiffs describe the 2<sup>nd</sup> defendant as the Project co-ordinator in the ministry of water and sanitation in Tharaka Nithi responsible for establishment of sewerage system within the area of location of the suit land. This paragraph lays bear the fact that the Government was a party in the suit. A notice to sue was mandatory. That this issue was raised in the defence dated 29/5/2020 (paragraph 14) the same was nor replied to hence an admission in law that the suit was incompetent and the learned magistrate erred in law and in fact in failing to uphold the law and strike out the suit.

Further, on the legality of the suit there is no evidence the Attorney General was served since there is no return of service to indicate that, yet the learned magistrate with tremendous respect imagined service was done which is a fatal misdirection in his ruling ( see page 55 and 56 of the record of appeal).

## **GROUND 2**

I would submit that the orders to be made by the court against the 2<sup>nd</sup> defendant would affect the rights of the 1<sup>st</sup> defendant. That is why the 2<sup>nd</sup> defendant has been joined in the suit .It is submitted that the learned trial magistrates erred in law in failing to appreciate that the suit against the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant could be separated thus the separation of the suit between the 1<sup>st</sup> and 2<sup>nd</sup> defendant has resulted in a miscarriage of justice since lack of jurisdiction was the main issue in the preliminary objection on the point of law raised by the appellant on the notices dated 20/7/2020.

The issue before the sub-ordinate court was compensation of the land acquired by the Government **KARINGANI/NDAGANI/4243**. This land is registered in the name of the appellant. It is shown on the pleadings. It was not something to be found else where hence the case of **MUKISA BISCUIT VERSUS WEST END LTD** is distinguished in its application. The pleadings as they are disclose the defendant is the registered owner of **Karingani/Ndagani/4243**.The prayer by the plaintiff in the Lower Court was that the Government be barred by an injunction not to compensate the appellant.

How then would the appellant have allowed an incompetent suit to deny her just compensation to proceed? Hence the Learned Magistrate erred in law in failing to find the appellant stood to suffer irreparable loss in failing to get just compensation if she never stopped the incompetent suit. The appellant was urging her case not holding brief for the Government of Kenya.

The trial magistrate in holding that the appellant should have confined herself to her own lane is a misapprehension of the law. The appellant in raising the P.O was not holding brief for the Government. The appellant was correctly stopping an incompetent suit from proceeding to her detriment.

## **FOUNDATIONS 3, 4, 5, 6, 7, AND 8**

I will urge, and canvass grounds 3, 4,5,6,7, and 8 together to the extent that they support grounds 1 and 2 of the Memorandum of Appeal.

In a nutshell, it submitted in failing to follow the law as submitted in the Preliminary Objection and holding that the appellant be confined to her lane indicates that the learned Trial Magistrate did not take a keen interest and /or consider the appellants submissions, bearing in mind that in the appellant's defence, she had indicated from the word go, she would object to the continuation of the suit to go for full hearing as the same was barred by statute (see page 25 of the Record of Appeal). In other words, the Attorney General was not notified of the suit as per the demands of the law hence the suit was incompetent. No reply to the defence was filed to contest this assertion hence deemed to have been admitted.

That the Government Proceedings Act, provides that an agent of the Government shall be deemed to be acting on behalf of the Government as provided vide S. 2 of the Government Proceeding Act, the Law requires that the Government should have been notified before suing the Upper Tana Project, or the Ministry of water, hence failure to see the case in its totality was a misdirection and the Trial Magistrates ruling dated **14/10/2020** be set aside as the ruling has occasioned a miscarriage of justice.

Finally, it submitted that once a suit is barred by statute the entire suit is void ab initio and cannot be divided into lanes as the entire edifice of the suit in law crumbles in its entirety and can not leave one leg standing for the appellant to wrestle with. An illegal suit is a house built on quicksand and must collapse in its entirety once the illegality is raised in the

main suit.

### **CONCLUSION**

In conclusion I would pray that the appeal be allowed, the ruling and/or order of the learned Trial magistrate be set aside and the this Honourable court be pleased to strike out the main suit for want of jurisdiction the case being barred by statute. It was also an error of law and fact to separate one case into two or more rates bearing in mind that the suit was filed as one suit. This separation as resulted into an incompetent suit being allowed to proceed to full hearing to the detriment of the appellants right to compensation of her property occasioning a miscarriage of justice.

This court shall also be at liberty to make any other or further orders in the interest of justice that it deems fit.

I rest the Appeal.

**DATED AT CHUKA 4<sup>th</sup> DAY OF DECEMBER 2020**

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**P.M MUTANI ADVOCATE**

**FOR THE APPELLANT**

4. The Respondents' submissions state as follows:

### **RESPONDENTS' FINAL SUBMISSIONS**

May It Please Your Lordship, herein are the Respondents' submissions in respect to the appeal here.

My Lord, this appeal arises from the Respondents' suit filed in the Lower Court vide the **Chuka Chief Magistrate's ELC Case No. 24 of 2020**.

The suit in the trial court basically emanates from the reason that the appellant herein is in the process of disposing part of the family's ancestral land LR. NO. **KARINGANI/NDAGANI/4243** without involving and/or in total exclusion of the Respondents herein who are her children yet she holds the said property in trust for all the family members. The appellants legitimately fear that the appellant's unlawful acts are likely to occasion them prejudice as she has already received part payment from the 2<sup>nd</sup> defendant in **Chuka Chief Magistrate's ELC Case No. 24 of 2020** a big share of which she has unfairly and discriminatively given out to the sons in total disregard and exclusion of the Respondents on the untenable, unlawful and frivolous basis of their gender. The appellant has already shared out most of the proceeds thereof with her sons in blatant exclusion of the Respondents.

Upon the Respondents instituting their suit against the Appellant in the trial court through **Chuka Chief Magistrate's ELC Case No. 24 of 2020** and which suit was filed on 8<sup>th</sup> May, 2020, the appellant tried all attempts at blocking them and/or ensuring they (Respondents) do not get/ justice, one of which was the Preliminary Objection dated 20/7/2020 which is the subject of this appeal.

In a ruling delivered on the 14<sup>th</sup> October, 2020 the Preliminary Objection was found by the trial court to lack merit and the same was dismissed with costs. This is the ruling that aggrieved the Appellant thereby lodging this Appeal.

My Lord, as we will elaborately demonstrate in our submissions herein the ruling by the trial court was properly informed, right and sound both in fact and law. That on a balance of probability any Honorable Court faced with a similar application would arrive at similar conclusions and deliver such a ruling as was delivered by the Learned Magistrate on the Preliminary Objection by the Appellant.

The main issue informing the Preliminary Objection is the question as to whether the 2<sup>nd</sup> Defendant in **Chuka Chief Magistrate's ELC**

**Case No. 24 of 2020** is a government entity or not. The Preliminary Objection is brought on the premises of the false presumption that the 2<sup>nd</sup> defendant is a government entity. It is not. The appellant has tried to allege the 2<sup>nd</sup> defendant is a government entity qualifying to be covered under the provisions of S. 13 (A) 1 of the Government Proceedings Act, Cap. 40, Laws of Kenya. It is well known that all government entities, organs, agencies or authorities are clearly established under some statutory provisions. The Appellant has not tendered any proof of the presumed fact to the effect that the 2<sup>nd</sup> Defendant is in any way a government entity allowed to benefit or capable of provided by the services of the Attorney General. The 2<sup>nd</sup> defendant is not capable of benefitting from the services of the Attorney General. As a consequence the Preliminary Objection can not stand.

It is unfortunate that that by seeking to overturn the ruling of the trial court on the Preliminary Objection is tantamount to inviting this Honorable Court into declaring the Upper Tana Natural Resources Development Project a government entity thereby giving it legal effect without the essential legal frame work.

More instructively, My Lord, the Upper Tana Natural Resources Development Project (popularly locally referred to as “Upper Tana”) is a civil organization, an entity, dedicated to alleviating poverty in local communities through such initiatives as capacity building through provision of facilities such as livestock and amenities. It should not be mistaken for such an entity as the Upper Tana Development Authority.

While submitting on this Appeal, My Lord, we are dutifully canvassing the merits of the Respondents herein case/claim in the suit filed in the trial court and, also, on the Preliminary Objection and the contents/arguments of the Appellant in her Final submissions in support of her appeal.

1. As afore indicated herein, the facts surrounding the respondents suit in the trial court are that:-

- a. The Appellant in whose name LR. NO. **KARINGANI/NDAGANI/4243** is registered holds the same in trust for the benefit of all family members the said land being ancestral land and which was transmitted to and registered in the appellant’s name after the death of her husband the father of the Respondents together with other male children.
- b. That the 2<sup>nd</sup> Defendant in the suit before the trial court, Upper Tana Natural Resources Management Project, is a non governmental driven project funded by various multi-agencies, both local and international, for the purpose of reduction of rural poverty in the upper Tana river catchment. The organisation has entered into an arrangement for the acquisition of part of the suit property LR. NO. **KARINGANI/NDAGANI/4243** at a cost of over 7 (seven) million Kenya Shillings and which part payment amounting to KSh. 4 (four million) the Appellant has already received.
- c. That upon receiving the said payments, even without involving the Respondents who are legal beneficiaries of the suit property, the Appellant, in the most callous, unlawful and discriminative manner shared most of the proceeds to the male children at the exclusion of the female children.
- d. The Appellant was due to receive the last and final payment for the suit property when the respondents instituted the suit in the trial court in an effort to forestall the illegal acts/transactions which were illegitimate and against their lawful interest and legitimate expectations.

As we have canvased in our submissions for the Preliminary Objection, the suit land is rooted in the original title owned by the family. The said original land devolved to the spouse, the Appellant herein, upon her husband’s death and, therefore, any proceeds from the land ought to be shared equally which the Appellant is reluctant to ensure.

Section 23 of the Land Registration Act provides that proprietary rights can be obtained through transmission in the event of a deceased proprietor.

Notwithstanding the holding that the 1<sup>st</sup> Defendant is the prima facie registered owner of the suit land per dint of the title issued in her name, the registration of one as a proprietor of land while conferring on him all the rights and privileges shall not be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee. Section 28 of the current Registration of Land Act 2012, provides that unless the contrary is expressed in the register all registered land shall be subject to various overriding interests without their being noted on the register. Customary trust is one of such interests.

In the case of **Isack Kieba M’Inanga Vs Isaaya Theuri M’Lintari & Another**, SCoK No. 10 of 2015, the Supreme Court Justices held that;

**“...In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.”**

From the foregoing, we submit that the Preliminary Objection against the suit in the trial court is a fatal misadventure, is ill informed and that the Plaintiffs have a legitimate claim against the land the subject of the suit thereof. The claim can only be ascertained if the suit is allowed to be subjected to due process through a fair trial.

We submit that the appellant's Preliminary Objection by all manifestations lacks merit because if the same is allowed the Plaintiffs will suffer a serious injustice, prejudice, irreparable loss and damages. The Preliminary Objection in the trial court and the clamor to perpetuate and uphold it through this Appeal is inspired by improper and ill motivation. If this appeal is allowed the same would amount to a grievous assault on the letter and spirit of the law.

My Lord, the respondents dutifully and satisfactorily presented their case before the trial court while opposing the preliminary objection. If allowed, the consequence of the Preliminary Objection is that the Respondents' pursuit for justice would be terminally ended prematurely. This is not the spirit of our supreme law.

#### **THE APPELLANT'S GROUNDS FOR THE PRELIMINARY OBJECTION**

The respondents have substantively demonstrated that their claim in **Chuka Chief Magistrate's ELC Case No. 24 of 20** is mainly and principally against the 1<sup>st</sup> defendant therein, the appellant herein. That the purpose of enjoining the 2<sup>nd</sup> defendant in the suit is to be able to give them notice of the Plaintiffs'/Respondents' actions. In any case, My Lord, the respondents have also demonstrated that in its constitution the 2<sup>nd</sup> defendant is neither what can be referred to as Government, government agency/authority nor were they in their transactions with the 1<sup>st</sup> Defendant doing so as such. They are a civil organization. Therefore the suit in the trial court does not offend provisions of S. 13 (A) 1 of the Government Proceedings Act, Cap. 40, Laws of Kenya. The issue of Notice does not therefore arise and the Preliminary Objection as grounded does not therefore hold.

My Lord, it is instructively notable that nowhere in both the Grounds for the Preliminary objection and the appellant's submissions for Preliminary Objection does the Appellant raise the issue of jurisdiction. The Preliminary Objection merely refers to the suit being alleged statute barred and against public policy, and which is not true. The issue of jurisdiction is vainly introduced by the appellant in her submissions for the appeal. This afterthought, which still does not hold, is an abuse of due process.

From the face of the Appeal, and the manner in which the contents of the Appellant's submissions have been crafted, it is clear that the same is designed to misinform, misdirect and/or mislead this Honorable Court into heading into an invitation to aid the perpetration on a serious injustice by finding the trial court to be at fault. The trial court duly and diligently exercised its mandate. It is being unreasonably, unfairly and wrongly being faulted to achieve an illegal end by a determined and an unrelenting party aggressively keen at and eager to perpetuate an injustice. The toe of the wordings betrays the essence of both the Preliminary Objection and the Appeal hereof. This is notable especially where the Appellant, in her submissions for the appeal refers to the respondents as "**adult**" daughters of the appellant and further refers to "**...The appellant is a person living with an amputation of one leg.**" This is shrewdly designed dissuade and persuade this court against the respondents. These personal circumstances can not be employed and/or used as an excuse or license to a party to act either unreasonably or unlawfully. It is also unfortunate that the Appellant so vehemently refer to and brand the Respondent suit as incompetent. This subjective condemnation has no basis, is null and void. It is of no reliable effect or consequence.

My Lord, the trial court did not at all error in its findings and ruling on the Preliminary Objection. The question as to whether or not the 2<sup>nd</sup> defendant fell under the real of what can be described as Government is an issue of both fact and law that may need to be ascertained. Yet it is trite that a preliminary objection is in its nature referred to as a demurrer. It must raise 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 what is sought is the exercise of judicial discretion. We submit with reference to the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** as per Sir Charles Newbold.

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. On this basis the Preliminary Objection fatally fails the test prescribed therein.

On the contention by the appellant to the effect that the suit before the trial magistrate was bad in law it is our humble submission that it is in the contrary the appellants that tried to push a Preliminary Objection on faulty premises and wrong presumptions that are both misleading and untenable. Those presumptions, misconceptions and theories by the appellant can not be relied on to discredit the well reasoned findings and ruling by the learned Chief magistrate. The Appellant, in their submission are also pushing the argument that the Court has no mind and discretion to exercise. This postulation is null, void and bereft of any good reasoning.

My Lord, in summation we submit that in the Appellant's are asking too much of this Court. This is because allowing this appeal will unfairly render the Respondents' suit in the trial court important and which will deny the respondents claim an opportunity to be heard and determined on merit in the interest of justice.

The Respondents averments are unreliably and gravely misleading to achieve unlawful ends, the appeal is a relentless aggressive attempt at actualizing illegal motives and the substance of the appellant's submissions for the appeal are so irrelevant and remote with a capacity to mislead and misdirect this Court into arriving into a wrong decision if the same are not carefully considered. The contents of the appellant's submissions for the appeal smirk of an embodiment of an air entitlements by the appellant at the cost of the interests of the respondents in their lawful claim.

My Lord, in the interest of justice this Appeal should not be allowed. The respondents' claim against the appellant deserve to be proceed for hearing and determination on merit.

We pray that the appeal herein be dismissed with costs.

We humbly submit and pray.

Dated at Chuka this.....14<sup>th</sup> .....day of.....December.....2020

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WAKLAW ADVOCATES

FOR THE RESPONDENTS

5. This appeal primarily concerns dismissal of a Preliminary Objection on a Point of Law filed by the appellant.

6. I have considered the submissions made by the parties. I have also considered the authorities proffered by the parties in support of their submissions. The case of *Mukisa Biscuits versus West End Limited* is the classic case in the area of Preliminary Objections. It is unequivocal in its holding that a Preliminary Objection can only be sustained if it raises a pure point of law. It is assumed that the issues raised in a Preliminary Objection will, of themselves, not invite further arguments. If it does so, it will not be a pure point of law.

7. The Preliminary Objection was relying on section 13A of the Government Proceedings Act which decrees that no proceedings will be instituted against the Government until the expiry of 30 days after a Notice in writing has been served upon the government. The Preliminary Objection also relies on section 16A of the Government Proceedings Act which prohibits issuance of injunctions against the government in specific circumscribed circumstances.

8. Among other things, the Chief Magistrate dismissed the Preliminary Objection for the main reason that it was not pellucidly clear that the 2<sup>nd</sup> defendant was governed by the Government Proceedings Act. One other reason the Chief Magistrate gave for dismissal of the Preliminary Objection was that there was no evidence to show that the firm of P. Mutani & Co. had been appointed to act for the 2<sup>nd</sup> defendant and further that the 2<sup>nd</sup> defendant had not indicated that it was a government department and had not denied that the requisite Notice had been given to it. The Chief Magistrate felt that the Preliminary Objection was not based on a pure point of law as it invited arguments which could only be resolved during the full hearing of the suit.

9. Upon reading the Preliminary Objection, I opine that grounds 3 and 4 invited arguments. Evidence was necessary to prove that the suit was against public policy and was oppressive against the 1<sup>st</sup> defendant. Evidence was needed to show how the suit was oppressive. Evidence was also needed to show which public policy the suit had gone against. For these reasons, if I were the Chief Magistrate in the lower court, I would have dismissed the Preliminary Objection and ordered the suit to be escalated to full hearing.

10. The 2<sup>nd</sup> defendant is the project Coordinator Upper Tana National Resources Management Project. At the time the suit was filed, it was not immediately, without further inquiries, to know two things. One, is the 2<sup>nd</sup> defendant part of the government? Two was the project Coordinator sued in his personal capacity or in any other capacity? To answer these questions further inquiries would be needed including a perusal of the 2<sup>nd</sup> defendant's constitutive documents. These are not issues that could be dismissed off hand or willy nilly. They invite arguments to be canvassed by the parties. This debunks the suggestion that this Preliminary Objection was based on a pure point of law.

11. I need to point out one more thing. 30 days' notice is not required to be given in all suits involving legal bodies which have a nexus with the government. For parastatals, they have the authority to sue and to be sued in their own right. There is no necessity before a suit is filed to issue the 30 days' notice. When this suit was filed it was not pellucidly clear if the 2<sup>nd</sup> defendant was a parastatal or what status it held. Incidentally, the fact that a body uses government funds does not make it part of the government for the purposes of the Government Proceedings Act. Most of the parastatals are granted government funds. But for purposes of the Government Proceedings Act, proceedings against them are not government proceedings.

12. The cases of *Mukisa Biscuit versus West End Limited*; and *Isaack Kieha M'Iranga versus Isaaya Theuri M'Linturi & Another*, **SCOK No. 18 of 2015** are good authorities in their facts and circumstances.

13. The M'Iranga case (supra) is not very relevant to the determination of this Preliminary Objection. Canvassing on this Preliminary Objection ought to be confined to whether the Preliminary Objection was based on a pure point of law that the Chief Magistrate's Court lacked jurisdiction not to proceed with hearing of the case in view of the provisions of sections 13A and 16 of the Government Proceedings Act. Of course, the case "*Owners of the Motor Vessel "Lillian S" versus Caltex Kenya Limited, eKLR*" is good precedent that a court of law cannot hear a suit if it lacks jurisdiction.

14. I find that the Chief Magistrate's Court had the jurisdiction to hear this suit and to dismiss the apposite Preliminary Objection.

15. In the circumstances, I issue the following orders:

- a) This appeal is dismissed.
- b) Costs shall follow the event and are awarded to the respondents.

Delivered in open Court at Chuka this **25<sup>th</sup> day of May, 2021** in the presence of:

CA: Ndegwa

Mutani for the Appellant

Kirimi Muturi for Respondents

**P. M. NJORGE,**

**JUDGE.**