



**IN THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 385 OF 2017**

**KENYA MEDICAL ASSOCIATION HOUSING COOPERATIVE**

**SOCIETY LIMITED.....PLAINTIFF**

**=VERSUS=**

**ARTHI HIGHWAY DEVELOPERS LTD.....1<sup>ST</sup> DEFENDANT**

**THE HON.ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a preliminary objection raised by the first defendant through notice dated 24<sup>th</sup> July 2017 and filed in Court on 26<sup>th</sup> July 2017. The first defendant contends that this court does not have jurisdiction because the claim herein is a money claim which has nothing to do with Land or Environment as envisaged by the Environment and Land Court Act. The first defendant also contends that the suit herein is an abuse of the process of court which ought to be struck out.

2. The parties agreed to dispose of the preliminary objection by way of written submission. The first defendant filed its submissions on 18<sup>th</sup> April 2018. On 11<sup>th</sup> June 2018 when the date for ruling was given, the plaintiff had not filed its submissions. A request was made by the plaintiff to file its submissions within 7 days. As at the time of writing this ruling, the plaintiff had not filed submissions and if it did, the same are not in the court file.

3. The first defendant argues that since the plaintiff is seeking a sum of Kshs.1,087,197,920.84, this claim cannot be entertained by the Environment & Land Court. The first defendant further argues that this claim is an abuse of the court. I have looked at the submissions by the first defendant and there are only two issues for determination. The first is whether this court has jurisdiction to entertain this suit and second is whether the suit herein is an abuse of the process of the court.

4. In determining the first issue on jurisdiction, a brief background of this suit is necessary. A company called West End Butchery Limited (the Company) was the registered owner of a property in Mavoko area of Machakos County. Some fraudsters created a parallel company and proceeded to subdivide the land which was then fraudulently sold to third parties. The company filed a suit in Nairobi ELC 167 of 2007 against seven defendants who included the two defendants in the present suit as well as the current plaintiffs. Some of the defendants in that suit raised counter-claims. At the conclusion of the hearing a judgement was delivered by justice Nyamweya who found that the plaintiff herein was entitled to indemnity from the two defendants who were also defendants in that suit. This is how this suit was filed to claim indemnity as per the judgement of the court.

5. The judgement of the court was clear that indemnity was to be claimed in accordance with the provisions of the Land Registration Act. Section 83 of the Land Registration Act provides as follows:-

**“If any funds are paid by way of indemnity under this Part, the Cabinet Secretary shall be entitled to recover by suit or otherwise the amount so paid from any person who has caused or substantially contributed to the loss by fraud or negligence, and to enforce any express or implied agreement or other right which the person who has been indemnified would have been entitled to enforce in relation to the matter in respect of which the indemnity has been paid”.**

The court has already found that the plaintiff is entitled to indemnity. What is remaining to be determined is the amount of indemnity which will include expenses properly incurred in relation to the matter.

6. The Land Registration Act defines a court as the Environment and Land Court established under the Environment and Land Court Act

2011. It is therefore clear that this Court has jurisdiction to hear this suit.

7. On the second issue whether this suit is an abuse of the process of court, I will go to the definition of the term abuse of the process of court as stated in Bullen ,Leak and Jacob's precedents of pleadings 12<sup>th</sup> edition page 148 where it is defined as follows:-

**“ The term “abuse of the process of the court” is a term of great significance . It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its functions as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation”.**

8. In the instant case, I have demonstrated herein above that the plaintiff is pursuing indemnity which the court found that it is entitled to. There was an appeal against the judgement to the Court of Appeal but the appeal was dismissed and the judgement as well as the orders of the Judge were affirmed. The plaintiff is therefore perfectly in order to pursue the indemnity due to it. I therefore find that the preliminary objection by the first defendant is baseless. The same is overruled with costs to the plaintiff. It is so ordered.

**Dated, Signed and delivered at Nairobi on this 4<sup>th</sup> day of October, 2018**

**E.O.OBAGA**

**JUDGE**

In the presence of:

Mr Mbaluto for Plaintiff

M/s Mucharo for Mr Thuita for 1<sup>st</sup> defendant

Court Assistant : Hilda

**E.O. OBAGA**

**JUDGE**