



**Noorani v Ochieng & another (Environment & Land Case
319 of 2008) [2021] KEELC 4777 (KLR) (20 May 2021) (Ruling)**

*Ahmed Noorani v Joyce Akinyi Ochieng & Onesmus G
Githinji t/a Onesmus Githinji & Co Advocates [2021] eKLR*

Neutral citation: [2021] KEELC 4777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 319 OF 2008**

BM EBOSO, J

MAY 20, 2021

BETWEEN

AHMED NOORANI PLAINTIFF

AND

JOYCE AKINYI OCHIENG 1ST DEFENDANT

**ONESMUS G GITHINJI T/A ONESMUS GITHINJI & COMPANY
ADVOCATES 2ND DEFENDANT**

RULING

1. The subject of this ruling is the 2nd defendant's preliminary objection dated 12/6/2019 through which the 2nd defendant seeks an order wholly dismissing this suit in limine on the following verbatim grounds:
 1. This suit is barred by the doctrine of res judicata by dint of Section 7 of the [Civil Procedure Act](#) (Cap 21) Laws of Kenya which bars a court of law from trying any suit or issue which has been substantially heard and determined by a court of competent jurisdiction.
 2. The 2nd defendant lacks privity of contract between himself and the plaintiff and 1st defendant as he is not a party to the letter of offer dated 1st October 2007
 3. The 2nd defendant only acted as the agent of the 1st defendant as such this suit offends the principle of law that where a principal is known, an agent shall not be sued.
 4. The 2nd defendant cannot be compelled by law to disclose privileged information which is protected by the privilege of advocates in Sections 134 and 137 of the [Evidence Act](#) (Cap80) Laws of Kenya.



5. The plaintiff has never filed his reply to the 2nd defendant's statement of defence dated 1st July 2013. It is a trite in law that he who does not file a reply to the defence is deemed to have admitted the said allegations.
2. Before I analyse and pronounce myself on each of the above five grounds, I will outline a brief background of this suit. At all material times, the 1st defendant was the registered owner of Land Reference Number 3734/223 on which were erected some villas. The plaintiff contends that on 28/9/2007, the 1st defendant offered to sell to him one of the villas, namely, Villa No 5 (the suit premises). The plaintiff paid a deposit totaling Kshs 4,400,000 through the 2nd defendant. It is further contended that the 2nd defendant was at that time acting for both the purchaser (plaintiff) and the vendor (1st defendant). It is further alleged that the 1st defendant subsequently failed to complete the sale but retained the deposit. The plaintiff contends that the 2nd defendant unlawfully released the deposit of Kshs 4,400,000 to the 1st defendant without his instructions.
3. Consequently, the plaintiff seeks the following reliefs against the two defendants, jointly and severally, through the Re-Amended Plaint dated 13/5/2013.
 - a. An order for specific performance of the sale agreement.
 - b. A permanent injunction prohibiting the 1st defendant by herself, her servants, agents, assignees or any person claiming under his restraining her from putting up constructing, developing and or erecting two (2) more Villa Units and or constructing more than six (6) Villa Units on the same property known as Land Reference number 3734/223, Lavington, Nairobi.
 - c. A permanent injunction prohibiting the 1st defendant by herself, her servants, agents, assignees or any person claiming under her restraining her from selling, disposing off and or transferring ownership of a Villa known as Villa Number 5 erected on the suit property whether by private treaty or by public auction to any third party and or her estranged husband.
 - d. In the alternative special damages for Kshs 4,400,000 being a deposit paid by the plaintiff towards the purchase of Villa Unit to the 2nd defendant.
 - e. General and exemplary damages for breach of contract in lieu of or in addition.
 - f. Costs of this suit
 - g. Interest on Kshs 4,400,000 at commercial rates from the 2nd day of October 2007 being date of payment of the same till payment in full.
 - h. Any other relief this honourable court may deem fit to grant in the circumstances of this case.
4. From the record, the Court of Appeal was at one point seized of this matter on an interlocutory appeal culminating in the Court Appeal's Judgment dated 31/3/2017 in which the Court of Appeal committed the 1st defendant to civil jail for a period of 30 days on account of her failure to deposit the sum of Kshs 4,400,000 with the plaintiff's advocates. I will now turn to the preliminary objection.
5. The preliminary objection was canvassed orally in the virtual court on 12/12/2020 and 1/2/2021 by the 2nd defendant's counsel, Mr Mworira. Mr Michuki responded on behalf of the plaintiff. I have considered the respective submissions. I will sequentially analyse and make my findings on the grounds of objection in the order in which they were itemized in the notice of preliminary objection. Before I do that, I will briefly outline the relevant jurisprudence on the broad subject of preliminary objection.



6. The principle governing general disposal of a preliminary objection was well articulated in the locus classicus case of *Mukisa Biscuits Co v West End Distributors Ltd* [1969]EALR 696 in the following words:

“ 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 has to be ascertained or if what is sought is the exercise of judicial discretion”

7. The court will be guided by the above principle when examining each of the grounds set out in the preliminary objection under consideration.

8. The first ground of objection is that the plaintiff's suit is barred by the doctrine of res judicata by dint of the provisions of Section 7 of the *Civil Procedure Act*. Counsel for the objector [2nd defendant] argued that Msagha J made a ruling in which he indicated that the plaintiff made a deposit which was utilized by the 1st defendant, hence this suit is res judicata. Firstly, the 2nd defendant elected to raise his objections on the platform of a notice of preliminary objection as opposed to a formal application. In so electing, he denied himself the opportunity to file a supporting affidavit and place before the court documentary evidence such as pleadings relating to any previous suit, statement of issues in the previous suit, and any determination which is alleged to have fully settled those issues.

9. The key issue for determination in the substantive suit between the plaintiff and the 2nd defendant is whether the 2nd defendant unlawfully, illegally and without lawful authority from the plaintiff, released the deposit of Kshs 4,400,000 to the 1st defendant as contended by the plaintiff in paragraph 15 of the Re-Amended Plaintiff. I have looked at the preceding rulings in this file, including the ruling rendered by Msagha J on 28/7/2010. I have not come across evidence of any conclusive determination of the above issue in any of the said preceding rulings. I do not therefore find any merit in the first ground of objection.

10. The second ground of objection is that there was no privity of contract between the 2nd defendant and the plaintiff, hence the suit herein cannot stand. I have considered this ground alongside the plaintiff's pleadings. The gist of the plaintiff's suit against the 2nd defendant is found in paragraph 15 of the Re-Amended Plaintiff which reads as follows:

“ 15 The 2nd defendant unlawfully and without lawful authority from the plaintiff allegedly released the deposit of the purchase price in the sum of Kshs 4,400,000 to the 1st defendant in total breach of his fiduciary duty, and which amount the 1st defendant has denied ever receiving from the 2nd defend ought, who out to now account for the said amount. [sic]”

11. It is clear from the above pleadings that the plaintiff's claim relates to the manner in which the 2nd defendant handled the deposit of Kshs 4,400,000. As a recipient of the deposit, the 2nd defendant is the proper person to explain how he handled the money and whether he remitted the money to the defendant. It is not lost to the court that the 1st defendant is alleged to have denied receiving the money from the 2nd defendant. In the circumstances, invocation of the doctrine of privity of contract by the 2nd defendant at this interlocutory stage is misplaced. Without saying much, I do not think the doctrine of privity of contract is applicable in the circumstances of the plaintiff's claim against the 2nd defendant, and in the circumstances of the pleadings before court. The second ground of objection is accordingly rejected.

12. The third ground of objection is that the suit herein cannot lie against the 2nd defendant because he only acted as an agent of the 1st defendant. Again paragraph 15 of the Re-amended Plaintiff which



constitute the tenor and import of the suit against the 2nd defendant is clear that the plaintiff is holding the 2nd defendant liable on account of the way he handled the deposit of Kshs 4,400,000. Secondly, in a scenario such as the present suit, where the 1st defendant is alleged to have denied receiving the sum of Kshs 4,400,000, the 2nd defendant is a necessary party for the complete and effectual adjudication of the dispute in the suit.

13. The fourth ground of objection is that the 2nd defendant cannot be compelled under Sections 134 and 137 of the *Evidence Act* to disclose privileged information. This, in my view, is an issue to be determined as and when it arises during trial, based on the kind of information sought and the party seeking the information. It is not a ground for dismissing a suit in limine. I therefore find no merit in this ground of objection.
14. The last ground of objection is that the plaintiff has failed to file a reply to the 2nd defendant's defence. I do not think the 2nd defendant is correctly interpreting the law on failure to file a reply to defence. Order 2 rule 12 (1) of the *Civil Procedure Rules* contains the following provision on this issue:

“2(12)(I) If there is no reply to a defence, there is a joinder of issue on that defence.”
15. Order 2 rule 12(4) contains the following framework on what constitutes a joinder of issue:

2(12)(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.
16. Suffice it to say, in the absence of a reply to the 2nd defendant's defence, there is deemed to be a joinder of issues on the said defence. Put differently, every material averment made in the defence is deemed to have been denied by the plaintiff. It is therefore erroneous to contend that the plaintiff is deemed to have admitted what is contained in the 2nd defendant's defence. Consequently, I find no merit in this ground of objection.
17. The net effect of the above findings is that the 2nd defendant's notice of preliminary objection dated 12/6/2019 is without merit and is rejected. The 2nd defendant shall bear costs of the preliminary objection.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Opundo holding brief for Mr Michuki for the Plaintiff

Court Assistant: Hilda

