



J.B Construction Company v Kipchumba (Being Sued as Personal Representative of the Estate of Mary Keter - Deceased Who Was t/a Riverside Academy) (Miscellaneous Application E071 of 2024) [2025] KEHC 255 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS APPLICATION E071 OF 2024
JK SERGON, J
JANUARY 23, 2025**

BETWEEN

J.B CONSTRUCTION COMPANY APPLICANT

AND

ARNOLD KIPCHUMBA (BEING SUED AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY KETER - DECEASED WHO WAS T/A RIVERSIDE ACADEMY) RESPONDENT

RULING

1. The application coming up for determination is a chamber summons dated 4th December, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That pending the hearing and determination of the arbitral proceedings between the parties herein, this Honourable Court do issue an interim order restraining the Respondent either by itself, its agents, employees or assigns from constructing, painting, clearing and/or in any way dealing with the construction on Uns: Residential Plot K Municipality.
 - (iv) That pending the inter partes hearing and determination of the Arbitral proceedings between the parties herein, this Honourable Court do issue an order restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with the construction on UNS: Residential Plot K Municipality;



- (v) This Honourable Court be pleased to make such further or other Order(s) as it may deem appropriate; and
- (v) The costs of this Application be borne by the Respondent.
2. The application is supported by grounds on the face of it and the supporting affidavit of Joel Anduvati the Director of Applicant herein hence competent to swear this Affidavit on behalf of the Applicant.
 3. The applicant avers that on the 16th August, 2023 they entered into a contract with the Respondent's mother Mary Keter who was t/a Riverside Academy for the construction of a tuition, Dining and Administration block on that parcel of land known as Plot No. Uns. Kericho Municipality within Kericho County and attached a copy of the agreement, building plans and drawings and Certificate of Registration of the Respondent.
 4. The applicant avers that as per the agreement, the total cost of the project was Kshs.18,752,000/= in terms of labour which was a third of the total project cost including the materials which was Kshs.62,540,022/=. The applicant avers that it was further agreed between the parties that the payments would be done on installments as the work was ongoing.
 5. The applicant avers that he executed his end of the bargain as per the contract without any strain or complaint and that the total work completion rate at the moment is 95% of the agreed work thereby qualifying him to the payment of Kshs.11,257,200/= which money is due and owing to the Applicant.
 6. The applicant avers that the Respondents management through the son herein has since breached the agreement by failing to pay the amount due and by further hiring another contractor to continue with the building without any proper site hand over and/or contract completion.
 7. The applicant avers that from the foregoing, it is clear that a dispute has arisen between him and the Respondents and the same needs to be solved amicably.
 8. The applicant avers that Clause 11 of the agreement between the parties provides that in case of any dispute, the same shall be solved through arbitration. The parties herein have had their relationship totally broken down and are not in any way going to agree on the appointment of an arbitrator amongst themselves. The applicant further avers that vide a letter dated the 3rd December, 2024, he wrote to the Chartered Institute of Arbitrator to appoint an Arbitrator in regard to this matter, he attached a copy of the said letter.
 9. The applicant avers that owing to the nature of the arbitral proceedings, he seeks this court's intervention in protecting the status quo in regard to the building pending the hearing and determination of the matter before the arbitral tribunal.
 10. The respondent herein filed a notice of preliminary objection dated 11th December, 2024 in response to the application based on the following grounds;
 - (i) That the application herein is fatally and incurably defective, bad in law, incompetent and misconceived.
 - (ii) That this Honourable court sitting as a Civil court lacks the express requisite jurisdiction under Article 162 (2,b) of the *Constitution* of Kenya 2010 as read with Section 13 of the *Environment and Land Court Act* that vests Original Jurisdiction on the Environment and Land Court to hear all disputes relating to land and the use of land.
 - (iii) That this Application is offends the provisions of Order 31 Rule 1 of the *Civil Procedure Rules* 2010 as read with Section 2 *Civil Procedure Act* and Sections 82 of the *Law of Succession*



Act as the Respondent herein lacks the requisite "locus standi" to be sued in this suit as an administrator and or personal representative of Mary Keter (Deceased) since he has not taken out the requisite Limited Grant of Administration.

- (iv) That this Court lacks jurisdiction to hear the Application as it offends the express provisions of Section (5) of the Civil Procedure Act as the suit herein is expressly barred by statute and ought to only be heard by the Environment and Land Court.
 - (v) That in the premise of the foregoing, this suit/application ought to be dismissed with costs to the Respondent.
11. This court directed the parties to file their written submissions and the parties complied.
 12. The Applicant contends the Respondent's assertion that he is not a proper party that was to be sued in the circumstance. The main argument to support that allegation is that the Respondent has neither been appointed as the legal administrator of the estate nor has he taken out the grant of letters of administration to give him the latitude to be sued to defend the interest of the estate of the deceased..
 13. The applicant contended that the respondent herein is described as the surviving son and successor in title to Mary Keter - deceased and further that it was commonly acknowledged by the parties that the contract related construction of tuition blocks on land which is well known to the Respondent in his personal capacity, notwithstanding the fact that the parcel of land in question is still registered in the name of the deceased.
 14. The applicant contended that the law on preliminary objections is well settled and cited the case of Seven Seas Technologies Limited versus Eric Chege [2014] eKLR where the court observed that: - A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The applicant contended that the preliminary objection by the respondent did not raise a point of law, capable of disposing of the suit rather the respondent invited the court to exercise its judicial discretion.
 15. The applicant argued that it retains the right to file suit against the respondent as a contractual right. The applicant cited Order 1 Rule 3 of the Civil Procedure Rules which provides for who may be joined as a defendant, in this case as a respondent. The said order provides that; "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise" and Order 1 Rule 7 which provides that; "Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."
 16. The Applicant contended that it is trite law that the court's jurisdiction flows from the Constitution or legislation, or both. A court cannot confer upon itself jurisdiction that it does not have as was in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. The Supreme Court succinctly stated: "A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law." The Applicant contended that a cursory perusal of the enabling laws on which the application is anchored gives a leeway to the intention and purpose of the application. The application is premised on section 7 of the Arbitration Act, 1995 for orders pending arbitration, otherwise referred to as pre - arbitration orders. The said section provides that; "it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an



interim measure of protection and for the High Court to grant that measure.” The applicant cited the case of *CMC Holdings Limited v Jaguar Land Rover Exports Limited*, where it was held that: “107 ...in practice, parties to...arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection. 108 As was held in the "*Peema Investments Co. Ltd v Principal Secretary, Ministry of Defence & another* 109" it was held that "the primary objective of the court when intervening under Section 7 is to ensure that the subject matter of the arbitration proceedings is not jeopardized before an award is issued, thereby rendering the entire proceedings nugatory.”

17. The applicant reiterated that this court is not sitting to determine the dispute as alleged by the respondent but is called upon to preserve the status quo pending the hearing and determination of the arbitral proceedings. The applicant contended that for the court to grant interim reliefs as sought, it needs not consider the merits of the matter, but rather, the possibility of interference with the state of the subject matter, once the arbitral proceedings are concluded. This position was reiterated in "*Infocard Holdings Limited vs AG & 2 Others* where it was held *inter alia* that; "Section 7 does not give courts the power to look into the merits of the agreement and the dispute generally lest it interferes with the jurisdiction of the arbitral tribunal.
18. The Respondent in his submission reiterated the grounds on the preliminary objection and contended that a preliminary objection must meet the threshold set out in *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited*, (1969) EA 696 cited in numerous authorities with approval, a preliminary objection should purely raise a point of law which has been pleaded and/or arises from an implication of the pleadings and does not require any further interrogation of facts.
19. The respondent conceded that it was not in dispute that the applicant is seeking to enforce some alleged rights over a parcel of land that belongs to a deceased person, Mary Keter(Deceased), he submitted that the applicant is thereby seeking for orders against the property of a deceased person through the respondent who contends that he does not have the capacity to act on behalf of the deceased's estate as he has not obtained the requisite Letters of Grant of Representation. The respondent cited the provisions of the Section 82 of the *Law of Succession Act*, only personal representatives of an estate are allowed to bring suits or defend suits on behalf of a deceased and reiterated that a cause of action cannot therefore be brought against a deceased person through a person who does not have the capacity to be sued on behalf of that Estate. He cited the Court of Appeal in the case of *Alfred Njau & Others v City Council of Nairobi* [1982-88] 1 KAR 229 cited with approval in *Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others* [2018] eKLR where the court authoritatively gave meaning to the term locus - standi by stating:-

“ ... to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

46. To that effect thereof I find that the issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiffs herein did not take out the letters of administration, they lacked the capacity to sue or be sued which renders the suit incompetent.”



20. The Respondent conceded that from the applicant's pleadings, it is not in dispute that the alleged bone of contention relates to the use, occupation, construction and planning of that parcel of land in LR No. Uns. Residential Plot 'k' Municipality, however, the same is a land dispute arising out of an alleged lease agreement with an arbitration clause. It is not a matter that can be determined by this honourable court in light of the express provisions of Article 162 (2,b) of the Constitution of Kenya 2010 as read with Section 13 of the Environment and Land Court Act that vests original jurisdiction on the Environment and Land Court to hear all disputes relating to the use, planning, construction and planning of land. The respondent cited the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR where the Learned Judges of the Court of Appeal started off by stating that: "In common English parlance, "Jurisdiction" denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and to make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae." The Respondent maintained that the Civil Procedure Act which arrogates jurisdiction upon this court to hear and determine disputes under section 5, clearly bars this court from hearing matters whereupon the same are barred by statute.
21. I have considered the application and the preliminary objection and submissions filed by the parties. The main issues for determination are whether the preliminary objection has merit and whether this court can issue interim orders restraining the Respondent either by itself, its agents, employees or assigns from selling, disposing of, exchanging, mortgaging, transferring or in any other way dealing with the construction on the suit property.
22. On the issue as to whether the preliminary objection dated 11th December, 2024 is merited, on one part the respondent contended that he did not have capacity to be sued, on the other part, the applicant maintained he retains the right to file suit against the respondent as a contractual right, the issue not of capacity notwithstanding. This court wishes to refer to case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 which is instructive on the issue of what constitutes a preliminary objection where their Lordships observed thus: "... 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".

In the same case Sir Charles Newbold, P. stated:

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

23. It is apparent that the Respondent has raised two Preliminary points of law.
24. The first one is to the effect that this court lacks jurisdiction since the dispute relates to land and environment. This court has looked at the pleadings and it is clear that the dispute before this court arose out of a contractual relationship. In fact it relates to a contract to put up premises on the land



belonging to the late Mary Keter. This court is of the opinion that it has jurisdiction to hear and determine a dispute arising out of a contract. The first Preliminary issue is overruled.

25. The second Preliminary point of law relates to the capacity of one Arnold Kipchumba, Respondent herein to be sued. There is no dispute that the Respondent has not obtained letters of administration over the estate of Mary Keter, deceased. It is trite law that in the absence of letters of administration, the Respondent cannot be sued and cannot sue on behalf of the estate. With respect, I am convinced that the second Preliminary Objection has merit, it is upheld.
26. It is therefore the finding of this court that Arnold Kipchumba, the Respondent herein has been wrongly sued. Consequently, the suit as against the Respondent is hereby ordered struck out together with the instant application.
27. A fair order on costs is that each party should meet their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 23RD DAY JANUARY, 2025.

J.K. SERGON

JUDGE

In The Presence Of:

Court Assistant: Rutoh

Morata for the Respondent

No appearance for Okok for the Applicant

