



**Ashire v ABSA Bank Kenya PLC & 3 others (Commercial Case E105 of 2024)  
[2024] KEHC 12550 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12550 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E105 OF 2024  
PM MULWA, J  
OCTOBER 17, 2024**

**BETWEEN**

**SAMUYAN ASHIRE ..... PLAINTIFF**

**AND**

**ABSA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**TWALA MANKI ..... 2<sup>ND</sup> DEFENDANT**

**SIMON MAISON TONGOYO ..... 3<sup>RD</sup> DEFENDANT**

**NAGIYO MEIKWAYA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. On 5<sup>th</sup> March 2024, the Plaintiff moved the Court by way of a plaint accompanied by an application seeking inter alia freezing orders for the funds held in the 1<sup>st</sup> Defendant's Bank account No. 20322 and an injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants (the defendants), their servants, agents or any other person from collecting, drawing or in any other way misappropriating funds in the aforementioned account. The Defendants have responded to the suit and application by filing inter alia a Notice of Preliminary Objection (the PO) dated 8<sup>th</sup> April 2024 on the grounds that this court lacks jurisdiction to hear and determine the same for the operative law on Group Ranches in Kenya is the Land (Group Representatives) Act (now repealed) by dint of the transitional clause of the [Community Land Act](#).
2. According to the Defendants, it therefore follows that the issues arising thereunder lie squarely within the jurisdiction of the Environment and Land Court (ELC). The Defendants further aver that the Court lacks the requisite jurisdiction to hear and determine the application and the suit as the same is tantamount to sitting on an appeal of a decision of a court with the same jurisdiction being the ELC



at Narok, a specialized court established under *the Constitution* of Kenya with the status of the High Court. That the suit and application are also res judicata and an abuse of court process.

3. The court directed that the PO be determined first and be canvassed by way of written submissions which I have duly considered.

### **Analysis and determination**

4. The parties are in agreement that the leading decision on Preliminary Objections is that of the predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* (1969) EA 696. This decision has since been affirmed by the Supreme Court in the case of *Joho and another v Shahbal and 2 others* [2014] KESC 34 (KLR)].

5. In *Mukisa* (supra) Law J.A., and *Newbold P.* respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

*Newbold, P.:*

“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 points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

6. In summary, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion.
7. The present PO challenges inter alia the jurisdiction of this court. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. This is so because ‘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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’ (*Nyarangi JA., in The Owners of Motor vessel Lillian ‘S’ v Caltex Kenya Limited* [1989] KECA 48 (KLR)].
8. It is therefore my finding that the Defendants’ challenge on the jurisdiction of this court is a point of law that can be brought by way of a preliminary objection.
9. The Defendants have also raised the issue that this matter is res judicata *Petition No. 268 of 2017* filed at the ELC at Narok and that hearing and determining the suit and application would be tantamount to sitting on an appeal of a decision of a court of concurrent jurisdiction. I would be inclined to agree with the Plaintiff’s submission that for this court to determine whether this is true, the court would need to make reference to the pleadings in that suit which could only have been introduced herein by



way of evidence through an affidavit. As stated, a preliminary objection frowns upon evidence and the court having to ascertain factual issues.

10. Whereas there is no legal provision barring the Defendants from raising the doctrine of res judicata by way of a preliminary objection, there is also none barring it from ventilating the same by way of a formal application. The advantage of an application is that the applicant has the luxury and liberty of presenting evidence as opposed to a preliminary objection. It would have been prudent for the Defendants to raise the challenge of res judicata by way of a formal application where it could have annexed the pleadings and judgment of the former suit and such other evidence that would have guided the court in its determination. As such, I am constrained to find that the Defendants' challenge of res judicata herein does not fall within the ambit of a pure point of law espoused in Mukisa (supra). Therefore, this ground of the PO has to be struck out meaning that the court will only consider the issue of whether it has jurisdiction to determine the suit and application.
11. As stated, the Defendants averred that this matter falls within the jurisdiction of the ELC which is a specialized court established under Article 162(3) of *the Constitution* and the *Environment and Land Court Act* to hear and determine disputes relating to the environment and the use and occupation of and title to land. Under the *Environment and Land Court Act*, the jurisdiction of the ELC is set out in Section 13 as follows:
  13. Jurisdiction of the Court
    - (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
    - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-
      - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
      - (b) relating to compulsory acquisition of land;
      - (c) relating to land administration and management;
      - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
      - (e) any other dispute relating to environment and land.
12. The Supreme Court in Republic v Karisa Chengo and 2 Others SCK Petition No. 5 of 2015 [2017] eKLR emphasized that the High Court, the Environment and Land Court (ELC) and Employment and Labour Relations Court (ELRC) are three different and autonomous courts which exercise different and distinct jurisdictions. Further, that Article 165(5) of *the Constitution* precludes the High Court from entertaining any matters that fall within the jurisdiction of the other two equal status courts.
13. The answer to the objection raised by the Defendants on jurisdiction depends on the nature of the cause of action as set out in the Plaintiff's plaint dated 15<sup>th</sup> February 2024. I have gone through the same and I do not find any issue or scenario relating to the environment and the use and occupation of and title to land as contemplated under Section 13 of the *Environment and Land Court Act* above.



14. The Plaintiff's case relates to the funds of Majimoto Group Ranch held in the 1<sup>st</sup> Defendant Bank and the Plaintiff specifically seeks orders on the same and does not seek any order directly or ancillary to the 'use' of land. I am in agreement with the Plaintiff's submission that in applying the 'dominant issue' test, the issue at hand is about the funds domiciled in the 1<sup>st</sup> Defendant's account which is outside the purview of the ELC. It is therefore my finding that this court has jurisdiction to adjudicate this matter.

**Final disposition**

15. In conclusion and without belaboring the matter any further, I find that the Defendants' Preliminary Objection dated April 8, 2024 lacks merit and the same is dismissed with costs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI**

**THIS 17TH DAY OF OCTOBER 2024.**

.....

**P. MULWA**

**JUDGE**

In the presence of:

Mr. Ometo h/b for Mr. Munyua for plaintiff

Ms. Moturi for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants

Court Assistant: Carlos

