



REPUBLIC OF KENYA



**Rivers of Joy Ministries Kenya v Mwangi & another (Commercial Case E363 of 2022)
[2023] KEHC 3127 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E363 OF 2022
DAS MAJANJA, J
APRIL 6, 2023**

BETWEEN

RIVERS OF JOY MINISTRIES KENYA PLAINTIFF

AND

JULIUS KAMURU MWANGI 1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA 2ND DEFENDANT

RULING

1. The defendants have raised preliminary objections to the plaintiff's suit. A preliminary objection is founded on a pure point of law or undisputed fact which if accepted by the court will dispose of the suit. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion (see *Mukisa Biscuits Manufacturing Ltd v Westend Distributors* [1969] EA 696 and *Hassan Ali Jobo and Another v Suleiman Said Shabbal & 2 others* SCOK Petition No 10 of 2013 [2014]eKLR).
2. Before I deal with the substance of the preliminary objection, an outline of the plaintiff's case as set out in the plaint dated September 21, 2022 is necessary. The plaintiff states that it is a registered organization under the *Societies Act* (chapter 108 of the Laws of Kenya). It states that the 1st defendant is the registered owner of a property known as LR No 36/111/144 situated in Eastleigh section 3 within Nairobi City County ("the suit property"). The property is charged to the 2nd defendant ("the Bank").
3. The plaintiff avers that the 1st defendant defaulted in paying the mortgage loan advanced to it by the bank. He therefore entered into a sale agreement with the plaintiff to take over the loan toward purchase of the suit property for an agreed sum of Kshs 20,000,000.00. The plaintiff states that it paid the 1st defendant a deposit of Kshs 1,050,000.00 into the 1st defendant loan account with the Bank and through MPESA. It claims that it would have completed the sale but the 1st defendant started claiming that that the land area could not be established together with approval plans from the county.



4. The plaintiff avers that it has stepped in the position of the 1st defendant and is willing to redeem the mortgage. It urges that unless the defendants are ordered to perform their obligation then it has no other remedy yet it has put up an expensive tent on the suit property. It seeks a permanent injunction against the defendants to restrain them from dealing or otherwise interfering with the suit property, specific performance and in the alternative damages for breach of contract. It also seeks a declaration that it is entitled to a lien on the suit property in respect of damages.
5. The 1st defendant has raised two objections to the suit; First that the plaintiff lacks capacity to sue by its name and the suit is defective as it is not a legally constituted entity and second, there is no proof of contract between the plaintiff and the 1st defendant, a rescission of the agreement having been issued.
6. The 2nd defendant objects to the suit on the ground that this court lacks jurisdiction to entertain the claim as it relates to an agreement for the sale of land, that the remedies sought are a declaration of interest in land and the claim relates to enforcement of obligations in land matters. It also objects to the suit on the ground that the plaintiff lacks the capacity to sue or be sued by its own name and thus the plaint must be struck out.
7. The objections were canvassed by brief oral submissions by counsel. I reject the 1st defendant's second objection as it calls for the court to examine whether there is a contract and whether it has been rescinded as alleged since these are matters of evidence and are not apparent on a reading of the plaint. There are therefore two broad objections. First, the capacity of the plaintiff to sue and second, the jurisdiction of the court to entertain the claim.
8. On the first issue, the plaintiff does not dispute that it is a registered society registered under the Societies Act. A society is not a body corporate and therefore cannot sue or be sued in its own name. Registration of a society under the Act does not confer on it corporate personality to enable it sue or be sued in its own name. Since it is a collection of its members, it must sue with the consent of the members who constitute it. The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of order 1 rule 8 of the Civil Procedure Rules (see Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others [2011] eKLR, Africa Orthodox Church of Kenya v Rev Charles Omuroka and Another KKG HCCC No 299 of 2013 [2014]eKLR and Islamia Madrassa Society v Zafar Niaz & 8 others [2021] eKLR). In the absence of the consent of members or an order of representation being made by the court, the plaintiff in the case is non-existent and cannot agitate the suit as such. The plaint must therefore be struck out.
9. The second objection concerns the jurisdiction of the court. As I understand, the 2nd defendant's case is that this court lacks jurisdiction as the subject matter falls within the jurisdiction of the Environment and Land Court ("the ELC"). I note that the 2nd defendant framed its objection in vague and unclear terms which is a practice to be deprecated. A preliminary objection must be clearly stated with precision so that the opposing party and the court know the case being made out.
10. The question is whether the cause of action set out in the Plaint falls within the exclusive jurisdiction of the ELC. Article 162(2)(b) of the Constitution empowers parliament to create courts with the status of the High court to hear and determine disputes relating to, "the environment and the use and occupation of, and title to, land." This provision is given effect and translated in the Environment and



Land Court Act, 2011 particularly section 13(2) thereof which outlines the jurisdiction of the ELC as follows:

- (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 interests in land; and
 - e. any other dispute relating to environment and land.

11. From the facts pleaded in the plaint, it is evident that the plaintiffs seeks to enforce a sale agreement so that it can acquire an interest in the suit property. The substance of the plaintiff's case and the reliefs sought ultimately seeks the plaintiff to be the owner of the suit property. In other words, it seeks a determination relating to enforceable interest in land within the meaning of section 13(2)(d) of the Environment and Land Court Act. I therefore hold that the dispute between the plaintiff and defendants falls outside the jurisdiction of this court.

12. Nyarangi JA, in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] KLR 1 stated 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction" (see also Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others SCK Application No 2 of 2011 [2012]eKLR). I too must down tools.

13. For the reasons I have set out above, the suit is now struck out with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Oloo instructed by Benedict Odhiambo Oloo and Company Advocates for the plaintiff.

Ms instructed by Maina and Njuguna and Associates Advocates for the 1st defendant.

Ms instructed by Igeria and Ngugi Advocates for the 2nd defendant.

