



**Clean Degree Limited v Kenya Medical Research Institute (Commercial Case E750 of 2021) [2023] KEHC 17342 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17342 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E750 OF 2021**

**DAS MAJANJA, J**

**MAY 12, 2023**

**BETWEEN**

**CLEAN DEGREE LIMITED ..... PLAINTIFF**

**AND**

**KENYA MEDICAL RESEARCH INSTITUTE ..... DEFENDANT**

**RULING**

1. What is before the court for ruling is the Defendant’s Notice of Preliminary Objection dated February 14, 2022 seeking to strike out the suit on four broad grounds; First, that the court lacks jurisdiction to entertain the suit in light of the Public Procurement and Disposal Act, 2005 (Repealed) (“the PPDA”). Second, that the Plaintiff has filed the claim without a written contract as required by section 68(1) of the *PPDA*. Third, that the matter is sub-judice NRB CMCC No 7887 of 2015 and an appeal therefrom being NRB HCCA No 287 of 2019 and last, that the suit is time barred by reason of section 3(2) of the *Public Authorities Limitation Act* (chapter 39 of the Laws of Kenya) (“PALA”). The Preliminary Objections were canvassed by way of written submissions but before I consider them, it would be in order to outline the Plaintiff’s suit as set out in its plaint dated April 9, 2021.
2. The Plaintiff’s case was that after undergoing a competitive tendering process, the Defendant awarded it a tender for the provisions of cleaning services (Tender No KEMRI/SVS/05/2015-16) for one-year renewable term commencing January 1, 2016 to December 31, 2016 vide a tender notification award letter dated December 21, 2015 which it acknowledged and accepted by its letter dated December 22, 2015.
3. The Plaintiff avers that upon acceptance, the parties agreed on terms and conditions for provision of internal cleaning services whereupon it mobilized equipment and machinery and employed staff in order to fulfil the contract. However, it was unable to commence the work under the contract as the previous provider of cleaning services refused to leave the Defendant’s premises. The Plaintiff therefore



claimed that Defendant had breached its contract by failing to provide an environment for the Plaintiff to perform its contractual obligations by failing to allow the Plaintiff to enter its premises and that it had failed to pay the Plaintiff the agreed consideration. It therefore prays for damages for breach of contract, special damages, costs of the suit and interest at commercial rates.

4. The Plaintiff contends that the issues raised in the Notice of Preliminary Objection cannot be determined as preliminary objections as they do not raise pure points of law or undisputed facts. This is the position settled in the seminal case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696 where the Court (Law, JA at P 700) observed that,

“So far as I am aware, 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 preliminary point may dispose of the suit.”

Thus for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct and the matter of law raised must be capable of disposing off the suit. A preliminary objection must not involve contested factual details which can only be resolved by calling for evidence or call upon the court to exercise discretion.

5. I agree with the Plaintiff that some of the objections raised by the Defendant do not fall within the four corners of a preliminary objection as defined by the *Mukisa Biscuits* case (*supra*). I will start with the issue of sub-judice. The sub-judice rule is to be found in section 6 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which provides as follows:

6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

6. In *Kenya National Commission on Human Rights v Attorney General; Independent Electoral and Boundaries Commission & 16 others* (2002) eKLR, the Supreme Court of Kenya explained the rationale and purport of the rule as follows:

The purpose of *sub-judice* rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

7. The Plaintiff is correct to point out that the suit referred to in the Notice of Preliminary Objection namely; NRB CMCC No 7887 of 2015 and the appeal therefrom are not pleaded in the Plaintiff. The court cannot tell who the parties are and the subject matter therein unless the pleadings are produced through evidence. In any case, the court would have to determine from the pleading whether the case satisfied the elements of the sub-judice rule. In the circumstances, it cannot therefore form the basis



of a preliminary objection as urged by the Defendant. In this respect, I adopt what the court stated in Margaret Wachu Karuri v John Waweru Ribiro [2021] eKLR that:

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court's considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

8. The Defendant's objections on jurisdiction of the court are also grounded on the PPDA. The Defendant argues that the Plaintiff's cause of action arose out of a procurement process that culminated in a letter of notification of award dated 21<sup>st</sup> December 2015. It avers that the Plaintiff ought to have pursued its claim before the Public Procurement Review Board ("the Review Board") in the first instance as provided for in section 93 of the PPDA which states as follows:

93. Request for review

- (1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss and damage due to breach of a duty imposes on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.
- (2) The following matters shall not be subject to the review under subsection (1) –
  - (a) the choice of a procurement procedure pursuant to Part IV;
  - (b) a decision by the procuring entity under section 36 to reject all tenders, proposal or quotations;
  - (c) where a contract is signed in accordance with section 68; and
  - (d) where an appeal is frivolous.

9. The Defendant submits that on December 30, 2015, Superclean Shine Limited filed a suit against the Defendant in NRB CMCC No 7887 of 2015 concerning the subject tender and the court restrained the Defendant from awarding the contract. It points out that the Plaintiff was joined as a party to that suit and that in the intervening period, the Plaintiff had the right to move the Review Board as the 14-day period for it to file its case had not lapsed.

10. The Defendant further contends that the Plaintiff and the Defendant are yet to enter into a written contract and as such it cannot raise a claim against the Defendant. It relies on section 68(1) of the PPDA which provided that,

"No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into."



11. The Plaintiff submits that the Defendant proceeded with NRB CMMC No7887 of 2015 without its knowledge and notwithstanding that at the point when the injunction was issued, the Plaintiff had already acknowledged and accepted the Notification of Award by its letter dated December 22, 2015. While making investments to perform the tender, it learnt of the injunction orders issued on 31<sup>st</sup> December 2015 on January 26, 2016 after 14 days had lapsed hence it was not possible to move to the Review Board.
12. The Plaintiff holds that the relief sought herein can be granted by the court. It maintains that the award of tender has not been cancelled as provided for under the PPDA to warrant it to move the Review Board as the Defendant had deliberately participated in NRB CMCC No 7887 of 2015 without objecting to the court's jurisdiction and or informing the Plaintiff. The Plaintiff also relies on section 99 of the PPDA which provides that,

“The right to request for a review under this Part (Part VII) is in addition to any other legal remedy a person may have.”

It therefore argues that it has a right to pursue its action in the High Court.

13. While I agree with the Defendant that the issue of jurisdiction is fundamental and must be determined at the earliest opportunity in accordance with established principles set out in many cases among them Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] 1 KLR 1 and S. K. Macharia v Kenya Commercial Bank Limited and 3 others [2012] eKLR, the issue may be one of pure law or mixed law and fact. In this case, both parties have referred to other proceedings affecting the award of the tender to the Plaintiff which may have affected its right to apply for review, the fact that another court issued an injunction and the contention that the award was not cancelled. All these are factual matters and in order to resolve them the court would need to see the evidence in support of the various contentions in order to determine the issue of jurisdiction bearing in mind that section 99 of the PPDA ultimately preserved the residual jurisdiction of this court to grant the Plaintiff relief. I therefore find and hold that the objection raised by the Defendant on jurisdiction are not in the nature of a preliminary objection.
14. The Defendant also objects to the suit on the ground that the suit is time barred under section 3(2) of PALA which provides that. “No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.” It contends that the Defendant is a State Corporation established under the Kenya Medical Research Institute Order, 2021 as a State Corporation and duly accredited under the Science, Technology and Innovation Act, 2013 hence it is entitled to benefit under statutory limitation of actions. It points out that that the suit was instituted on April 9, 2021 based on tender award letters dated December 22, 2015 hence the suit is over four years outside the prescribed limitation period and ought to be struck out.
15. The Plaintiff submits that PALA is not applicable as the Defendant is a corporate body and that it is neither the Government or a local authority. It relies on the interpretation provision at section 2 thereof which states that a,  
  
“local authority” means a municipal council, county council, town council, urban or area council, and, in respect of any function delegated to or conferred upon a local council, such local council.”



It cites *Bob Thompson Dickens Ngobi v Kenya Ports Authority and others* [2017] eKLR where the Court held that *PALA* did not apply where a statutory body is created by specific legislation as it is not a public authority.

16. On this issue, I accept that the Defendant is a corporate body capable of suing and being sued. It is established under Legal Notice No 35 of March 31, 2021 pursuant to powers granted to the President under the *State Corporations Act* (Chapter 486 of the Laws of Kenya). A state corporation under the said statute has perpetual succession, has the capacity to sue and be sued and to hold and alienate moveable and immovable property in its own name. There is no limitation under the statutory order or parent statute limiting the right of any party to sue the Defendant. I therefore reject the objection grounded on *PALA*.
17. It must now be clear that the Defendant's Preliminary Objections raised in the Notice dated February 14, 2022 lack merit. They are dismissed with costs to the plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Manduku instructed by Kerandi Manduku and Company Advocates for the Plaintiff.

Ms M. Rigoro, Advocate instructed by the Defendant.

