



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 371 OF 2012

LEEBARN BUILDERS LIMITEDPLAINTIFF

VERSUS

KENYA BANKERS' SAVINGS AND

CREDIT COOPERATIVE SOCIETYDEFENDANT

RULING

1. Coming up for ruling is a Preliminary Objection dated 24th July 2013 by the Defendant raised on the following grounds;

1) That the Plaintiff's application contradicts clause 18 of the memorandum of agreement dated 26.7.2007 entered between the plaintiff and the Defendant which sets out arbitration to be used to resolve any dispute or agreement.

2) This Honourable court therefore lacks original jurisdiction as it is expressly excluded by the parties who agreed to submit themselves to arbitration in the event of a dispute.

2. The Defendant in their submissions dated 9th August 2021 stated that the objection was based on a point of law as laid down in the case of **Mukisa Biscuit v West End Distributors Ltd [1969] EA 696**. They indicated that the contract entered into between the parties on 26th July 2007 had an arbitration clause that governed how disputes were to be resolved. In this regard, the suit was in violation of the contract and the court did not have jurisdiction to entertain the matter. Reference was made to the case of **Kenneth Kinoti Muriuki & 5 others v Dinara Developers Ltd & Another (2020) eKLR**.

3. The submissions of the Plaintiff are dated 21st October 2021, Just like the Defendant, the Plaintiff has relied on **the Mukisa Biscuit case**, to buttress the point that a preliminary objection should be on a point of law. The Plaintiff however claims that the Defendant's objection would require the court to interrogate contents of the agreement thus making the objection invalid, adding that the Environment and Land Court has constitutional and statutory powers to hear disputes pertaining to land and environment. Therefore the Preliminary Objection should be dismissed.

4. It is common practice that a preliminary objection should be raised on a point of law as has been entrenched in the case of **Mukisa Biscuit v West End Distributors Ltd [1969] E.A.** The Preliminary Objection dated 24.7.2013 is directed upon the **plaintiff's application dated 27.6.2012**. The said application is the one filed contemporaneously with the suit seeking injunctive orders against the Defendant. The aforementioned Application and the Preliminary Objection have remained dormant for the last 9 and 8 years respectively. I discern that efforts to prosecute the two pleadings fizzled away with time due to various factors including attempts at settlement.

5. This court has a constitutional mandate to ensure that justice is expedited in line with the provisions of **Article 159 (2) (b) of the Constitution**. To this end, this court will apply Active Case Management principles and techniques to ensure that the trial shall not be derailed by interlocutory issues that have been lying in slumber for the last 9 or so years. In the case of **Lawrence Kinyua Mwai vs. Nyariginu Farmers Co Ltd & Another (2019) EkLR**, while dismissing about 16 unprosecuted applications at one go, I stated as follows;

“ Active Case management enhances processing efficiency, promotes court control of cases, and provides Judicial Officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts”.

6. It is not fathomable that an application for injunction has remained inactive for the last 9 years and counting. I hereby *suo moto* proceed to dismiss the same. There being no application anymore, it follows that the preliminary objection has been rendered superfluous and it faces the same fate of dismissal. Each party to bear their own costs in so far as the application and the preliminary objection are concerned. Parties are hereby encouraged to focus on the substantive issues in order to bring a closure to this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

NYAMBUTO HOLDING BRIEF FOR M/S KAKI MBULA FOR THE PLAINTIFF

ODHIAMBO FOR THE DEFENDANT

COURT ASSISTANT: EDDEL BARASA