



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

ELC CASE NO. E034 OF 2021

HYDROMASTERS DRILLING COMPANY.....PLAINTIFF/APPLICANT

-VERSUS-

NGONG BUTCHERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT/RESPONDENT

RULING

This ruling is on the Preliminary Objection dated 24th May, 2021 filed by the Defendant. The Preliminary Objection raises five (5) grounds namely;

1) THAT the Plaintiff has no cause of action against the Defendant.

2) THAT the Plaintiff has previously filed several unsuccessful suits against the Defendant all of which relate to the suit premises now in question before this court.

The Plaintiff is therefore barred by the doctrine of *res judicata*.

3) THAT the Plaintiff is guilty of forum shopping because the Arbitral Tribunal has no jurisdiction in this matter due to the Plaintiff's acquiescence thereby waiving the right to go for arbitration.

The Plaintiff has been filing numerous court cases instead of going for arbitration in the first instance.

4) THAT the subject leases dated 28th September, 2010 and 17th November, 2010 have been terminated. The Arbitration Clauses have thus been rendered null and void.

5) THAT this suit offends Rule 1 (4) and (6) of the Civil Procedure Rules as George Melonyie and the firm of Muguku Kimathi had no requisite authority to file it.

6) THAT this suit ought to be struck out forthwith with costs to the Defendant.

In opposing the Preliminary Objection the Plaintiff's Counsel raised four issues;

Firstly, Counsel urged that the suit is not *re judicata* because what is in issue in this suit had never been an issue in the previous suits.

Relying on the case of *Kibundi –vs- Mukobwa and another (1993) eKLR*, Counsel urged that the Defendant has not been specific on the issues in the previous suit *vis – a- vis* those in this suit.

Secondly on forum shopping, Counsel urged that this court has jurisdiction as the two leases the subject of this case are registered with the Ministry of Lands and under **Section 7(1) of the Arbitration Act**, it is not incompatible with an arbitration agreement for a party to request the High Court, before or during Arbitration Proceedings for an interim relief measure of protection and/or for the High Court to grant that measure.

Thirdly, the applicant denied that the Arbitration Clauses in the leases were rendered null and void and that is why the Plaintiff has commenced the Arbitration Process.

Finally, Counsel urged that the authority to act was filed together with the Supplementary Affidavit of George Melonyie dated 26th May, 2021.

The Defendants' Counsel filed written submissions on 24th August 2021 while the one for the Plaintiff filed his on 24th September, 2021.

I have carefully considered the Preliminary Objection in its entirety including the grounds, the submissions by both sides and also the pleadings.

I make the following findings;

Firstly, I find that it is true that there have been previous proceedings between the parties. They are all enumerated in the Replying Affidavit of Moses Muraya Sironik dated 24/5/2021 at paragraph 16 and they are seven (7) in number.

This fact is not denied by the plaintiff. However, we do not know what issues arose in those previous suits as neither party has so far specified in the materials before the Court.

Secondly, striking out a suit is a very drastic and draconian move which results in the derogation of the right to a fair hearing under **Article 50(1) of the Constitution**.

If a suit can be salvaged by an amendment, then striking out should not occur.

Thirdly, a Preliminary Objection should be on pure points of law such as can be discerned from the pleadings without requiring any facts. See **Mukhisa Biscuit Manufacturing Co. Ltd –v-s West End Distributors Limited (1969) E.A. 696**.

In this case, the Preliminary Objection dated 24/5/2021 raises many points of fact such as;

- (i) Does the Arbitral Tribunal have jurisdiction in the dispute between the parties?
- (ii) Have the two leases herein terminated?
- (iii) Was authority to sue available to the plaintiff at the time of filing of the suit and can it be obtained subsequent to the filing of the case?

For the above reasons, I dismiss the Preliminary Objection dated 24/5/2021.

Further to the above, I give the following directions under **Section 1A (2) and (3) of the Civil Procedure Act**.

- (a) The plaintiff to specify what the issues in the seven previous, referred to earlier, were and how they differ from the ones herein
- (b) To do so within 60 days.
- (c) If the Plaintiff fails to comply with (a) and (b) above, the Defendant at liberty to renew the Preliminary Objection by showing the similarity between the issues in this suit and the previous ones.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22ND DAY OF NOVEMBER, 2021.

M.N. GICHERU

JUDGE