



**Keraco Holdings Limited v Opera Software Ireland Limited; Communication
 Authority of Kenya & another (Interested Parties) (Cause E145 of 2023)
 [2023] KEHC 22549 (KLR) (Commercial and Tax) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22549 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
 COMMERCIAL AND TAX
 CAUSE E145 OF 2023
 JWW MONG'ARE, J
 SEPTEMBER 19, 2023**

BETWEEN

KERACO HOLDINGS LIMITED APPLICANT

AND

OPERA SOFTWARE IRELAND LIMITED RESPONDENT

AND

COMMUNICATION AUTHORITY OF KENYA INTERESTED PARTY

COMPETITION AUTHORITY OF KENYA INTERESTED PARTY

RULING

1. On 6th April 2023 the Plaintiff/Applicant moved the court by a Notice of Motions seeking the following orders:-
 - i. Spent
 - ii. Spent
 - iii. Pending the hearing and determination of the suit herein, an order of injunction be and is hereby issued compelling the Respondent to immediately, and in any case within 24 hours, restore the Applicant's site access on all its browsers including but not limited to Opera Mini.
 - iv. That the Honourable Court be pleased to grant any other order that it deems fit, just and expedient to grant in the circumstances of this case.
 - v. That costs of this Application be provided for.



2. Subsequently and in response thereto the Defendant upon been served with the orders of the court proceeded to comply thereto but also filed a Notice of Preliminary Objection on the following grounds That:-
 - i. Service of the court process in this matter was effected upon the Defendant/Respondent who is domiciled in Ireland in clear contravention of Order 5 Rule 1(5), 21 & 27 of the *Civil Procedure Rules*.
 - ii. Parties by an insertion Order dated 25th December 2021(hereinafter “the Agreement”) submitted to the exclusive jurisdiction of the courts located in London, England with respect to any legal proceedings arising in connection with any dispute arising from the Agreement.
 - iii. Consequently, the Plaintiff’s plaint and Application therein dated 6th April 2023 should therefore be struck out with costs for want of jurisdiction and being an abuse of the court process.
3. Both parties filed submissions respectively and list of documents referenced thereto in support and opposition of the Notice of Preliminary objection.
4. I have considered carefully the rival submissions by either party. I note from the pleadings and the submissions by the parties that there is only one issue for determination; to wit; “whether the Preliminary Objection contesting the Jurisdiction of the Court has merit”. I note that the Preliminary Objection as filed challenges the jurisdiction of this court to hear and determine the suit as filed. As held in the famous case of *Owners of Motor Vessel “Lillian S v Caltex Oil(Kenya) Limited*(1998) eKLR, the court stated as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court finds that it has no jurisdiction, there would be no basis for continuation of the proceedings pending other evidence and 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.”
5. The challenge to the court’s jurisdiction has been brought by way of a Preliminary Objection to the suit and the application filed herein. The court in the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors Limited* (1969) EZ 696 held that:-

“A preliminary Objection consists of a point of law which has been pleaded or which by clear implication out of pleadings, and which if it is argued as a preliminary point may dispose of the suit. examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”..... 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 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 a Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issue, and improper practice should stop.”
6. The grounds upon which the Defendant seeks to oust the jurisdiction of this court are two. The first one is that service to itself was done without leave of the court as is required under Order 5 Rule 27 for service of process to foreign registered company. The Defendant argues that failure by the Plaintiff to obtain the requisite leave under Order 5 ousts the jurisdiction of this court. The rival argument by the Plaintiff is that Order 5 of the *Civil Procedure* has enlarged the ways in which parties may be served



including service by electronic mail. Specifically Order 5 Rule 22B provides service via electronic mail and how the same is to be proved.:-

- “ 1. Summons sent by Electronic Mail Service shall be sent to the Defendant's last confirmed and used E-mail address.
 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”
7. The second ground upon which the Defendant seeks to oust the jurisdiction of the court is the argument that the contract upon which the parties herein have contracted contains a clause requiring all disputes by and between the parties to be determined by the courts in London and apply English law. On this ground, the Defendant argues that the Kenyan Courts have no jurisdiction to entertain a suit by either party.
8. I have considered the above arguments as raised in the Preliminary Objection. The court in *Mukisa Biscuit*(Supra) envisions a scenario where the grounds upon which a Preliminary Objection to be clear points of law upon which no evidential material is required to further examine if the objection is correct. There are two issues here. One being whether the Defendant is a foreign company and if so, whether it is necessary to obtain leave before service of process of court process is effected. To determine if the Defendant is indeed a foreign company within the confines of the law is a matter of fact that has to be determined by the court examining the incorporation documents of the Defendant. Since there is no material placed before the court for it to determine this, the court cannot make the assumption, as it is called to do, that by virtue of having an address in a foreign country, the Defendant is a foreign company as provided for by law. This in my view, is not an issue that can be determined on a Preliminary Objection. The same can only be properly determine upon examination of matters of fact such as registration and licensing documents to carry on the business it does in Kenya and elsewhere. I am therefore persuaded that this is not a purely point of law as envisioned by the court in the *Mukisa Biscuit*(supra) decision.
9. The second ground is a determination whether by their own conduct parties herein have contracted to oust the jurisdiction of Kenyan Courts. To determine the parties, intend in a contract, the court is called upon to examine the contract in detail and may require to examine the parties in order to ascertain what the parties desired to achieve. It is therefore not enough in my view for a party to say that there is a clause in the contract that oust the jurisdiction of the court without affording the other party an opportunity to respond to the same. This is a matter of evidence requiring the court, in my view, to examine the said contract and the clauses thereto to confirm indeed there is a clause ousting the jurisdiction of our courts. It is in my view, not a pure point of law that can be relied upon to deny the court's jurisdiction to hear the dispute between the parties.
10. I am a therefore convinced that the jurisdiction of this court cannot be ousted on a Preliminary Objection upon whose grounds the court has to take evidence to determine matters of fact.



11. In conclusion therefore, I find and hold that the Preliminary Objection as framed has no merit and is hereby dismissed with costs to the Plaintiff. The parties may proceed and argue the application and the suit as this court finds and holds that it has requisite jurisdiction to hear and determine the same.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2023.

.....

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Kiplangat for the Plaintiff/Applicant.

Mr. Njuguna for the Defendant.

Mr. Mbaji for the 1st Interested Party.

Ms. Maina for the 2nd Interested Party.

Amos - Court Assistant

