



**Valmo Limited v Lamu Two Thousand Limited (Commercial Appeal E318 of 2023)  
[2024] KEHC 14501 (KLR) (Commercial and Tax) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14501 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E318 OF 2023  
BK NJOROGE, J  
NOVEMBER 21, 2024**

**BETWEEN**

**VALMO LIMITED ..... APPELLANT**

**AND**

**LAMU TWO THOUSAND LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Ruling delivered on 10/11/2023 by Hon. Rawlings Liluma (SRM). This was in respect to (Milimani) Commsu E077 of 2022.
2. The Trial Court made the following orders;
  - a. That the Notice of Preliminary Objection dated the 15<sup>th</sup> November, 2022 is merited and it is allowed.
  - b. That the suit be and is hereby dismissed entirely.
3. The Appellant is the Plaintiff in the Lower Court while the Respondent is the Defendant.

**Background facts**

4. The salient facts are that the Appellant alleges that the Respondent advertised an investment opportunity.
5. The Respondent invited interested investors to purchase half-acre plots of land, situated on L.R Number 26781 Lamu, Lamu County. The Appellant took up this offer and signed up an application form, registration form and plot selection form. The Appellant selected plots Nos W252 and W231.



6. The Appellant paid the initial 40% deposit by way of a cheque No. 004261 dated 6/12/2012 drawn upon KCB Bank Gateway House-Mombasa Road. M/s Waweru Kihara & Co. advocates who were paid the said amount on behalf of the Appellant, issued receipts Nos 686 and 687 dated 7/12/2023 for the said amounts.
7. The balance of the purchase price of Kshs.1,140,000/- was paid through a finance arrangement with NIC Bank. The Appellant alleges to have paid the entire purchase price of the Kshs.2,000,000/- for the two half acre plots. However, it is yet to receive any land.
8. A demand for the refund of this purchase price as well as interest at commercial rates was sent through a letter dated 18/2/2021. The demand letter did not elicit the refund sought. Hence the Appellant filed suit.
9. Several preliminary applications took place in the matter before the hearing of the Respondent's Notice of Preliminary Objection dated 14/11/2022. It challenged the Jurisdiction of the Trial Court to hear the case. The Respondent maintained that the Milimani Chief Magistrates Court lacked the jurisdiction to hear the case. That the dispute involved land and should have been heard before the Environment and Land Court. That the suit ought to have been instituted in Lamu County, when the subject matter, being land is situated.
10. The Appellant opposed the Preliminary Objection, arguing that this was a simple claim for refund of monies paid. That the suit was filed at Nairobi where the contract was signed and the monies paid. This was at the convenience of the Appellant.
11. The Trial Court in its Ruling of 10/11/2023 upheld the Notice of preliminary Objection. It proceeded to dismiss the suit in its entirety.
12. This is what has triggered this Appeal.
13. The Appellant has filed a Memorandum of Appeal. It contains 9 grounds of Appeal.
14. This Appeal was admitted for hearing on 23/05/2024. Directions were given on the same date that the Appeal be canvassed by way of written submissions. The Court has seen and perused the Appellants written submissions dated 3/7/2024. It has also seen the Appellant's list and bundle of authorities. The Court has also read and understood the Respondent's written submissions dated 29/7/2024. The Court has similarly perused the Respondent's authorities. Counsel appeared before this Court on 3/10/2024 and orally highlighted their submissions.

### **Issues for determination**

15. The Court having perused the Record of Appeal filed, the Memorandum of Appeal and the submissions filed frames 2 issues for determination as follows;
  - a. Whether the Trial Court had the jurisdiction to hear and determine the suit before it?
  - b. What reliefs should flow from this Appeal?

### **Analysis**

16. This is a first Appeal. The Court is therefore duty bound to re-look, re-consider and re-evaluate the evidence presented before the Trial court afresh. Then this Court has to reach its own conclusions. However, this Court has to bear in mind that it neither saw nor heard the witnesses, and should make allowances for such. See *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A 123.



17. The Trial Court was confronted with the issues raised in the suit through a Preliminary Objection. A Preliminary Objection can only be sustained if it successfully raises pure points of law. A Preliminary Objection that seeks to rely upon evidence to prove it, is bound to fail. Matters of evidence are issues of trial and cannot properly be the subject of a Preliminary Objection. The leading decision is on what constitutes Preliminary Objections is *Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd* [1969] EA 696. The Court said the following;

“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 the other 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.”

18. In the case of; *Quick Enterprises Ltd vs Kenya Railways Corporation Kisumu HCCC No. 22 of 199*, the Court stated;

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

19. In another decision in *Oraro vs Mbaja* [2005] IKLR 141, the Court had the following to say;

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

20. A Preliminary Object should also arise once issues have been joined. It has to rest on the basis of some pleadings. A defence ought to have been filed. This is the finding of the Court of Appeal in *Stephen Onyango Achola & another v Edward Hongo Sule & another* (Civil Appeal 209 of 2004) [2004] KECA 156 (KLR) (30 April 2004) (Judgment)

“The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second respondent be entitled to rely on that defence during the trial of the suit unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to rely on the defence of limitation is perfectly entitled to waive such defence and thus let the suit proceed to trial on its merit.”

21. The Court also adopts *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* (Environment & Land Case 14 of 2020) [2020] KEELC 1071 (KLR) (12 October 2020) (Ruling) where the Court stated as follows;

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage,



it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.”

22. The Court has also taken note of the decision in *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* (Environment & Land Case 14 of 2020) [2020] KEELC 1071 (KLR) (12 October 2020) (Ruling)

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.”

### **The Appellant’s submissions**

23. The Appellant in its submissions argues that the claim before the Trial Court was for refund of the purchase price of Kshs.2,000,000/-. It advanced the argument this was not a claim for land or arising out of land, which would properly be before the Environment and Land Court. A simple claim for refund should be before the Commercial Court, which exercises a Civil Jurisdiction. The Court has been referred to *Dominic Mathenge & another -vs- Belle Holdings Limited & another* [2020] eKLR. The Court has also been referred to *Suzanne Achieng Butter & 4 others -vs- Redhill Heights Investments Limited & another* [2016] eKLR, *Martin Luther MC Were -vs- James Mabango Ambundo* [2022] eKLR and lastly *Moses Barto Cherop t/a Crater Center -vs- Postal Corporation of Kenya* [2022] eKLR.
24. Further, the Appellant submitted that pursuant to Section 12 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, the Trial Court had the jurisdiction to hear this case. The Appellant submits that Section 13 of the *Environment and Land Court Act* as read with Section 9 of the Magistrates Court Act and Article 162 (2) of *the Constitution* of Kenya did not apply to this suit. This is because this was a claim for refund of money paid and not a suit for title or land. The Court was referred to the decisions in *Peter Njuguna Gitau -vs- Daniel Kiprono Kiptum & 3 others* [2022] eKLR, *Adan Isaak Ali -vs- Ismail Issackow Hassanoj & another* [2010] eKLR and *Korea Nyamai -vs- Neema Parcels Limited* [2021] eKLR.
25. The Court was also referred to Section 15 of the *Civil Procedure Act* which provides for institution of suits. It was submitted that the contract was made in Nairobi. Payments were also made in Nairobi; hence the Trial Court had the necessary jurisdiction to hear this suit under Section 12 of the *Civil Procedure Act*.
26. Finally, it was submitted that the Trial Court exercised its jurisdiction wrongly in striking out the suit. That rather than strike out, the Trial Court ought to have transferred this suit to the Court it opined had the requisite jurisdiction. This Court has been referred to *Kenya Medical Research Institute -vs- Davy Kiprotich Koech* [2018] eKLR.



## The Respondent's submissions

27. The Respondent in its submissions maintains that the Trial Court arrived at the correct decision. That it lacked jurisdiction. It sought to distinguish the decisions as cited by the Appellant as involving purely commercial matters.
28. The Respondent maintained that the subject matter at hand was land. That the Court should look at the real cause of action between the parties, so as to determine the issue of jurisdiction. The Court was referred to Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] eKLR.
29. The Court was urged to adopt the “pre-dominant purpose test” laid down in Suzanne Achieng Butler & 4 others -vs- Redhill Heights Investments Limited & another [2016] eKLR.
30. The Respondent urges the Court to look at the particulars of breach which buttress the issue that this dispute revolves around land. Hence it should be heard by the Environment and Land Court.
31. That the Trial Court will have to determine the rights and obligations of the parties under the sale agreement. That the Trial Court would have to determine whether with reference to the monies paid by the Appellant to the Respondent, the title to be two plots already vested in the Appellant.
32. Further that the Trial Court in determining the suit before it has to make a decision on the rights and obligation for the parties to the contact. This is more so once a breach is alleged. That this makes the claim more one of involving land use and occupation. That this is the prerogative of the Environment and Land Court.
33. On the predominant purpose test, the Court was referred to Phillip Jalango -vs- Ryan Properties Limited [2020] eKLR. Therefore, since this was an issue relating to Land, Article 162(2) and 165(5) of *the Constitution* of the Republic of Kenya, kick in. That the jurisdiction vests exclusively with the Environment and Land Court as per Section 13 of the Environment Court Act.
34. With regards to Section 12 of the *Civil Procedure Act*, it was submitted that this was a suit involving an immovable property. It should have been filed in Lamu within the local limits of the jurisdiction of the Lamu Court. The Court was referred to Koinange Investments & Development Ltd -vs- Robert Nelson Ng'ethe [2014] eKLR.
35. In closing, the Respondent restated the decision of The owner of the motor vessel “Lilian s” -vs- Caltex Oil Kenya Ltd [1989] KLR 1. That once the Court find that it lacks jurisdiction, it has to down its tools. It will not move even a step further.
36. On transfer, it was submitted that the Lower Court lacks the power to transfer any cases filed before it.
37. The Court proceeds to analyse the two issued framed in seriatim as follows;

### a. Whether the Trial Court had the jurisdiction to hear and determine the suit before it?

38. Counsels for both parties persuade this Court that it has to look at the real issues in controversy between the two parties. What is the contest about? This will assist the Court apply the “predominant purpose test” to determine the course of action. This will ultimately assist the Court determine whether jurisdiction vested with the Trial Court or not.
39. This Court as the 1<sup>st</sup> Appellate Court is to review, re-look and re-analyse the pleadings and proceedings of the Trial Court and reach its own independent conclusion. This is more so on the application of the predominant purpose test.



40. To this Court, it is only confronted with one set of pleadings by the Appellant, being the Plaint dated 23/9/2022. No defence has been filed by the Respondent. At least none was attached to the Record of Appeal. It would appear that the Respondent chose to raise a jurisdictional issue rather than present its statement of defence and also raise a jurisdictional issue. As at this point it is not clear what defence the Respondent intends to raise against the Appellant's case, save for the jurisdictional issue.
41. It is for that reason that in *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* (Environment & Land Case 14 of 2020) [2020] KEELC 1071 (KLR) (12 October 2020) (Ruling) the Court declined to sustain a Preliminary Objection, in absence of a statement of Defence. This is because issues have not been joined. The objection has to be based on a pleading.
42. As matters stand, the Appellant's pleadings before the Trial Court were for a refund of Kshs.2,000,000/-. That is the only substantive pleading before the Trial Court.
43. The reliefs sought by the Appellant are as follows; -
- a. Refund of the plot purchase of Kshs.2,000,000/-
  - b. General damages
  - c. Costs
  - d. Interest on (a) and (b) above at Court rates.
  - e. Any other relief this Court may deem fit and just to grant.
44. A perusal of the Plaint dated 23/9/2022 does not reveal any claim for land or title to land. It does not reveal a claim for user of land. It does not seek any orders of specific performance.
45. This Court warns itself that this is an Appeal. If it is successful, the parties are yet to be heard. This Court should therefore exercise caution so as not to seem to determine the final rights of the parties at this stage. It should also not be seen to make determinations on issues of evidence. That will be within the province of the Trial Court that may ultimately hear this matter.
46. What the Court hears the Appellant to say is that I paid Kshs.2,000,000/- for two parcels of land. I did not get the land. Now I want my monies back, with general damages, costs and interest. This cannot be anything else than a commercial dispute.
47. The Trial Court in its ruling stated as follows; -
- “On the face of it, the Plaintiff seeks to have a refund of an amount of Kshs.2,000,000/- when title that was passed to him by the Defendant was subsequently revoked. I find that in order to determine whether the reliefs sought for by the Plaintiff are due to him it would be necessary to delve into the issue of land and if at all the title to land was property passed from the plaintiff to the defendant and reasons for the revocation of the said title to land as alleged by the Plaintiff. Consequently, the dispute ought to be determined by the Environment and Land Court.....”
- “Further the suit property is in Lamu therefore as per Section 12 of the *Civil Procedure Act*, the Chief Magistrates Court sitting at Nairobi is not the proper Court to handle the dispute. In the circumstances, I find the Notice of Preliminary Objection dated 15<sup>th</sup> November, 2022 merited and will allow it. The suit stands dismissed entirely.”



48. When the Court considers that the Respondent had not filed a defence to allege that it had transferred the titles to the Appellant and that those titles had been revoked, it becomes clear to this Court where the Trial Court fell into error. It assumed these as pleaded facts.
49. As this Court is not faced with a defence by the Respondent of such a nature, it is unable to read issues of transfer of title and revocation thereof into this dispute. In any event even if this position were true, then this is a matter of facts and evidence. Once we introduce facts to support a Preliminary Objection, it ceases to be a pure point of law.
50. In the considered opinion of this Court, this remains a simple fairly straight forward claim for refund of monies paid for which consideration has failed. This is a commercial transaction that the Trial Court had the jurisdiction to hear and determine.
51. It therefore follows that since the dispute facing the Trial Court was not one involving land or any interest in land, Section 12 of the Civil Procedure Act and Section 13 of the Environment and Land Court Act did not apply.
52. The Trial Court had the necessary jurisdiction to hear and determine this dispute. For avoidance of any doubt, the jurisdiction is restricted to the claim for refund of Kshs.2,000,000/- which is Commercial in nature.

**b. Which reliefs should flow from this Appeal?**

53. This Court is minded to allow the Appeal.
54. On the issue of Costs, they are awarded to the successful Appellant.

**Determination**

55. The Appeal herein succeeds;
  - a. The Order made by Hon. Rawlings Liluma (SRM) dated on 10/11/2023 allowing the Notice of Preliminary Object dated 15<sup>th</sup> March, 2022 and thus dismissing the suit before the Lower Court, is set aside in its entirety. Instead, it is substituted with an order dismissing the Notice of Preliminary Objection dated 10/11/2023.
  - b. The suit before the Lower Court is reinstated and the same to be mentioned before the Lower Court for further directions and or orders.
  - c. The suit before the Lower Court to be heard before any other Court other than the Court that delivered a Ruling dated 10/11/2023.
  - d. The Cost of the Preliminary Objection dated 15/11/2022 and those of this Appeal are awarded to the Appellant.
56. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024**

**NJOROGE BENJAMIN K**

**JUDGE**

In the presence of: -

.....for the Appellant



.....for the Respondent

Court Assistant.....

