



**Bestlines Express (K) Ltd v China Road & Bridge Corporation(K) Ltd. t/a China Road and Bridge Corporation; Kenya Revenue Authority (Interested Party) (Civil Case E327 of 2019) [2021] KEHC 360 (KLR) (Commercial and Tax) (9 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 360 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E327 OF 2019  
WA OKWANY, J  
DECEMBER 9, 2021**

**BETWEEN**

**BESTLINES EXPRESS (K) LTD ..... PLAINTIFF**

**AND**

**CHINA ROAD & BRIDGE CORPORATION(K) LTD. T/A CHINA ROAD AND BRIDGE CORPORATION ..... DEFENDANT**

**AND**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**RULING**

1. The plaintiff herein, Bestlines Express (K) Limited, instituted this suit against the defendants through the plaint dated 27<sup>th</sup> September 2019 seeking the following orders; -
  - a. An order compelling the defendant to cancel the customs bond or pay taxes amounting to Kshs 48,166,769.00 together with accrued interest as demanded by KRA.
  - b. Compensation for loss of business opportunity of Kshs 50,000,000
  - c. General damages.
  - d. Cost of suit.
  - e. Interest on items (a) and (b)



- f. Any other relief or further relief as this honourable court may deem fit.
2. The plaintiff's case is that it acted as an agent for the defendant in clearing imports from the Mombasa Port and that the defendant ought to have cancelled the importation bonds within a period of 90 days. The plaintiff contends that defendant did not cancel the bonds within the stipulated period thereby resulting in the cancellation of the plaintiff's trade license thus occasioning it business losses. The plaintiff therefore accused the defendant of gross violation of duty of care.
3. The defendant filed its statement of defence dated 11<sup>th</sup> December 2019 together with a notice of preliminary objection which is the subject of this ruling. The objection is premised on the grounds that: -
1. The plaintiff has no locus standi to sue the defendant to enforce the alleged security bonds because the plaintiff is not privy to the said bonds. The customs bonds are between the Defendant, the Interested Party and the defendant's insurers Monarch Insurance Co. Ltd & Corporate Insurance CO.Ltd
  2. This suit is misconceived because;
    - a. Under Sections 106 & 107 of East African Community Customs Management Act, Customs bonds are normally executed between the importer, the Interested Party and a surety to secure payment of duty importation of goods to the Interested Party.
    - b. The plaintiff is not an importer or a surety to the bond.
    - c. Under Section 104(4), the bonds are discharged and cancelled once the importer pays all duties due.
    - d. Section 109 empowers the Commissioner to enforce the bonds against the sureties if the duties remain unpaid.
    - e. The suit is contradictory by alleging that the plaintiff suffered loss because the defendant failed to pay duties while conceding that the payment of the duties was secured by the custom bonds.
    - f. The Commissioner does not claim duties when the same are secured.

4. The preliminary objection was canvassed by way of written submissions which I have considered. The main issue for determination is whether the preliminary objection is merited. What amounts to a preliminary objection was discussed in the often cited case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696* as follows: -

“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 a preliminary point may dispose of the suit per Sir Law J.A.”

In the same case, Sir Charles Newbold P. stated that: -

“A preliminary objection is in the nature of what use to be a demurer. It raises a pure point of law which is argues on the assumption that all the 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 exercise of judicial discretion.”

5. In *Hassan Ali Jobo & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* the Supreme Court stated that: -

“ .... 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 a preliminary point may dispose of the suit”.

6. The Supreme Court also pronounced itself over the same subject in *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others [2015] eKLR* as follows: -

2. “[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

7. It was the defendant’s case that the plaintiff has no locus standi to sue the defendant in order to enforce the security bonds as the plaintiff was not privy to the said bonds. The defendant contended that the custom bonds were between the Defendant, the interested party and the defendant’s insurers.

8. The plaintiff, on the other hand, submitted that the preliminary objection does not raise a pure point of law because it requires ascertainment of facts. The plaintiff further submitted that the issues raised concerning which party was privy to the bond will be best determined at trial. The Plaintiff cited the case of *Margaret Nyiha Gatambia & 2others v Peninah Ngechi Njaaga & 3 others [2019] eKLR* where the court stated thus: -

“Further this Preliminary Objection as raised does not stem from the pleadings but it requires the Court to call for ascertainment of facts. Given the limited scope of the jurisdiction on Preliminary Objection and the test to be applied, the Court finds that an issue of res judicata, involves probing of evidence and therefore the same cannot be determined via a Preliminary Objection. Therefore, this Court finds and holds that the Notice of Preliminary Objection as filed by the 1st Respondent is not a Preliminary Objection as per the Mukisa Biscuits case.”

9. In *Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000* the court defined locus standi, as follows: -

“Locus Standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of Law”



10. Further in the case of *Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229*, the court held that: -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

11. The plaintiff’s suit is based on the claim that the defendant failed to cancel the bonds within the prescribed period of 90 days thus paralyzing its financial operations by occasioning the loss of its trade license and.

12. My finding is that while it is apparent that the plaintiff’s name does not feature in the custom bonds, the plaintiff’s case is with respect to the alleged loss incurred as a result of the defendant’s actions. I find that the determination of whether or not the defendant is liable for the alleged loss is a matter of fact which cannot to be dealt with at this interlocutory stage of the proceedings before considering the evidence to be presented by the parties. I further find that the issue of the existence of an Agency relationship between the parties herein will also require the examination of evidence before the court.

13. In conclusion, I find that since the issues raised by the defendant will require the ascertainment of facts by way of evidence, the instant preliminary objection does not meet the Mukisa Biscuits case test and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Masila for Defendant.

No appearance for Plaintiff.

Court Assistant: Margaret

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