REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 6 OF 2019

MUNJO INVESTMENT LIMITED...PLAINTIFF/APPLICANT

VERSUS

GEORGE MURITI GATHECHA T/A MUNGARU ENTERPRISES...1ST DEFENDANT /RESPONDENT

HENRY NYAGA

SAMUEL WANGAI KANGARA

STARLIN KILISWA (sued as officials of

The SALVATION ARMY KENYA EAST TERRITORY..........................2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff filed suit against the Defendants on the 1/3/19 seeking interalia a permanent injunction restraining the Defendants from entering mining selling leasing or otherwise disposing the suit property known as LR No 10531 or committing any acts of trespass or waste thereon, eviction orders and general damages and costs of the suit.

2. Simultaneously with the filing of the suit, the Plaintiff filed a Notice of Motion on even date seeking the following orders;

a. Pending the hearing and determination of the application and/or suit, an interim injunction restraining the Respondents from entering mining selling leasing or otherwise disposing the suit property known as LR No 10531 or committing any acts of trespass or waste thereon.

b. That the OCS Gituamba Police station to ensure compliance of the orders

c. Cost of the application.

3. On the 4/4/19 the firm of Samuel Kiongera Advocate entered appearance on behalf of Henry Nyaga, one of the officials of the Salvation Army and filed grounds of opposition against the Notice of Motion.

4. Equally the firm of WEW& Associates Advocates entered appearance on behalf of Samuel Wangai Kangara and Starlin Kiliswa, the officials of Salvation Army on the 4/4/19. They too opposed the Notice of Motion through their grounds of opposition filed on even date.

5. Alongside the grounds of opposition, the firm of WEW & Associates filed a Preliminary Objection on the 4/4/19 on the following grounds;

a. The honorable Court lacks jurisdiction to hear and determine the dispute by virtue of the Applicants/Plaintiffs and the 1st Defendant purported agreements marked as ANM-1 and ANM -2 and annexed to the application specifically clause 4(d) made on the 15/3/2014 and clause 10(b) of the purported agreement made on the 1/8/10 respectively. That the matter should first be referred to arbitration.

b. The matter is incompetently before the Court as it ought to be filed before the chief Magistrates Court as the purported value on the face of the documents presented before the Court is Kshs 3.0 Million contrary to section 11 of the Civil Procedure Act, 2010.

c. The matter is either resjudicata or subjudice as the same is before the National Environment Tribunal Court in NET No. 006 between (?).

d. There is no privity of contract between the Applicant and Samuel Wangai Kangara and Starlin Kiliswa and further that neither the owners in the suit land nor decision makers.

6. They urged the Court to strike out the suit and the Notice of Motion dated 27/2/19 with costs.

7. On the 4/4/19 the 1st Respondent entered appearance through the firm of Kinuthia Kahindi & Co Advocates.

8. The 1st Defendant and Henry Nyaga did not file any response to the Preliminary Objection. None of the Defendants have filed any statement of defence either.

9. On the 7/5/19 the parties through Counsels on record elected to canvass the Preliminary Objection through written submissions. Both the Plaintiff and Samuel Wangai Kangara and Starlin Kiliswa (part of 2nd Defendant) filed their written submissions on the 12/6/19.

10. The 2nd Defendant citing the case of **Mukhisa Biscuit Vs Westend Distributors Ltd (1969) E.A. 696** stated that a Preliminary Objection ought to be raised on a pure point of law and should not invite an interrogation of facts by the Court. On the issue of Jurisdiction of a Court, the 2nd Defendant submitted and quoted the dictum as per Nyarangi J in **Owners of the Motor Vessel Lilian S Vs Caltex Oil Kenya Limited (1989) KLR 1** where the judge said

> "jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. 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."

11. As to whether the matter should be referred to arbitration, the 2nd Defendant stated that the suit is in contravention to para 4(d) of the contract between the Plaintiff and the 2nd Respondent. Further that the arbitration clause being couched in mandatory terms in the agreement between the Plaintiff and the 1st Defendant, the Court lacks jurisdiction to entertain the matter. To buttress this point, the 2nd Respondent pointed the Court to the provisions of section 6(1) of the Arbitration Act. The 2nd Defendant relied on the case of **Diocese of Marsabit Registered Trustees Vs Technotrade Pavillion Limited (2014) EKLR**. Further that section 6(2) of the said Act prohibits the Court from continuing with the proceedings before it where the application has been made under section 6(1).

12. The 2nd Defendant stated that the Plaintiff having admitted the presence of an agreement between it and the 1st Defendant is bound by it and the clause on dispute resolution which is provided for therein. He relied on the case **National Bank of Kenya Limited Vs Pipeplastic Samkolit (K) Limited and another (2002) EA 503** which stated that;

> "a Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

13. As to whether the matter is incompetently before the Court, the 2nd Defendant submitted that section 7(1) of the Magistrates Act No 26 of 2015 empowers a Magistrate's Court to hear matters in proceedings of a civil nature in which the value of the subject matter does not exceed the stipulated values. That section 9 of the Magistrates Act gives jurisdiction to the Court to hear matters including those of environment and land. That the value of the subject matter in this case is less than Kshs. 20 Million and the Chief Magistrates Court has jurisdiction to adjudicate the same.

14. As to whether there is privity of contract between the Plaintiff and the 2nd Defendant lacks locus to institute the suit against the 2nd Defendant. The Plaintiff has no cause of action against the 2nd Defendant since the lease was between the Plaintiff and the 1st Defendant. They relied on the case of **Muchendu Vs Waita (2003) KLR 419** in which the Court stated that a contract cannot confer rights or impose obligations arising out of it on any person except the parties to it.

15. The Plaintiff submitted that the Court has jurisdiction to handle the matter. That the arbitration referred to in the agreements failed. That section 6(1) of the Arbitration Act states that the Court cannot refer a matter to arbitration after the parties have entered appearance. That in this particular case the parties have filed defences and grounds of opposition thus conceding to the jurisdiction of the Court. Further that a Court may not refer a matter to arbitration if it is inoperative and incapable of being performed. He reiterated that attempts at arbitration of the matter failed and that is the reason why they have approached the Court for adjudication of the matter.

16. The Plaintiff further submitted that the Court has jurisdiction to hear the matter and quoting Art 162(2) of the Constitution of Kenya 2010 whose provision empowers the Court to determine disputes relating to the environment and the use and occupation and title to land. The Plaintiff acceded that though the Magistrates Court has jurisdiction to determine disputes in land and environment subject to their pecuniary limits under section 7(1) of the Magistrates Act, the 2nd Defendant has not disclosed the value of the subject matter so as to determine where the jurisdiction falls.

17. Quoting the provisions of section 6 of the Civil Procedure Act on subjudice the Plaintiff stated that there is no matter pending in the tribunal for determination. It faulted the 2nd Respondent for raising the twin issues of resjudicata and subjudice at the same time.

18. On privity of contract between the Plaintiff and the 2nd Defendant, the Plaintiff submitted that the Samuel Wangai Kangara and Stalin Kiliswa have been sued as the officials of the Salvation Army, the 2nd Defendant. That the Salvation Army being a church organisation and classified under the Societies Act as such is sued and sue through its representatives and officials as they have no legal capacity to sue and be sued.

19. Having considered the Preliminary Objection, the written submissions and the case law supplied by the parties the issue for determination is whether the Preliminary Objection raises a pure point of law.

20. What then is a Preliminary Objection? As to whether the Preliminary Objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a Preliminary Objection as follows;

> "………a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

21. In the case of **Oraro vs. Mbaja (2005) I KLR 141** Ojwang, J (as he then was) held as follows:-

> "I think the principle is abundantly clear, a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point ....Anything that purports to be a Preliminary Objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ...."

22. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of Preliminary Objection.

23. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

24. It is the 2nd Defendant's argument in the Preliminary Objection that this Court is bereft of jurisdiction as the matter is one that the parties agreed to refer to arbitration in the agreements entered between them. I have looked at the tenancy agreement dated the 1/8/2010 between the Salvation Army (2nd Defendant) and the 1st Defendant in which the 2nd Defendant leased Land Reference Number 10531 measuring 957 acres to the 1st Defendant for quarrying for a period to terminate when the quarrying stones are exhausted from the quarry or a period of 15 years whichever is higher. The said agreement under clause 8 b and c allowed the 1st Defendant to permit any part of the premises to be used or occupied by others and that the 1st Defendant can assign, sublet or part with possession or the premises or any part thereof. Of relevance is clause 10 b which stated as follows;

> "save as hereinbefore specifically provide all questions hereafter in dispute between the parties hereto and all the claims for compensation or otherwise not mutually settled and agreed between the parties shall be referred to arbitration by a single arbitrator to be appointed by the chairman for the time being of the chartered Institute of Arbitrators (Kenya Chapter) and every award made under this clause shall be expressed to be made under the arbitration Act 1995 or any Act for the time being in force in Kenya in relation to arbitration.

25. The second agreement dated the 1/3/2014 is between the 1st Defendant and the Plaintiff. In it the Plaintiff sublet 20 acres from the 1st Defendant being a portion of the suit land for a period until when the quarry stone is exhausted or a period of 10 years whichever is higher. Clause 4(d) contains an arbitration clause worded in similar manner like the first agreement.

26. The Plaintiff has argued that the arbitration failed to settle the matter between the parties. The Plaintiff failed to table the proceedings and the outcome of the arbitration (if any) for the Court to consider. The Court finds that the assertions are unsupported and untenable.

27. I have looked at the claim of the Plaintiff as set out in the plaint and it is purely a claim for trespass against the 2nd Defendants. Although the 1st Defendant is sued as a Defendant it is not clear what the charge or cause of action against them is. That being the case, it therefore follows that there is no agreement between the Plaintiff and the 2nd Defendant which contains an arbitral clause capable of being deployed to settle the disputes between these parties.

28. Section 6 of the Arbitration Act states as follows;

> "(1) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, <u>if a party so applies not later than the time when that party enters appearance</u> or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
>
> > (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the Court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the Court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings".

29. Even if the Court was to rely on the arbitral clause between the Plaintiff and the 1st Defendant as set out in clause 4(d) of the agreement dated the 1/3/14, it is to be noted that the provisions of section 6 of the Arbitration Act requires the party seeking the matter to be referred to arbitration to move the Court and seek a stay of proceedings not later than the time when that party enters appearance. In this case, the Defendants entered appearance on the 4/4/19 and failed to file an application for stay of proceedings nor acknowledge the claim for which the stay is sought nor sought the referral of the suit to arbitration. It is on record that the parties filed grounds of opposition to the Notice of Motion filed by the Plaintiff thus acceding to the jurisdiction of this Court. I have perused the Court file and the Court does not agree with the Plaintiff that the Defendants have filed defences. The correct position is that they have not.

30. The Plaintiff has urged the Court that the dispute was referred to a tribunal for arbitration which in its opinion has failed. It however failed to table any evidence of the arbitral proceedings for the Court to appreciate. The averment is unsupported and remains an allegation.

31. The Court finds that even if the dispute was to be determined through arbitration the Defendants failed to move the Court appropriately and it is too late in the day to refer the matter for arbitration. It is also clear that between the Plaintiff and the 2nd Defendant there is no agreement between them and therefore the basis of arbitration is unsupported.

32. The doctrine of subjudice is enshrined in Section 6 of the Civil Procedure Act it states as follows;

"No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed. Explanation.—The pendency of a suit in a foreign Court shall not preclude a Court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign Court".

33. On the other hand resjudicata is provided under section 7 of the Civil Procedure Act as follows;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court''.

34. Although the twin issues were raised by the 2nd Defendant in their Preliminary Objection it appears that they were abandoned in the submissions. That said for the Court to determine that a matter is subjudice and or resjudicata, the Court must satisfy itself that the requirement of subjudice and res judicata has been met so much so that the proceedings and judgement must be presented to the Court. The 2nd Defendant did not show any evidence of the proceedings in the NET No 006. It remains a mere allegation and is treated as such.

35. On the issue of privity of contract between the Plaintiff and the officials of the 2nd Defendant, the Court finds that it is an issue that calls for investigation by the Court and as such ceases to be a pure point of law.

36. I have looked at the claim of the Plaintiff and although it does not disclose the value of the subject matter, the value of the lease agreement is stated to be Kshs 3.0 Million. In that regard I agree with the 2nd Respondent that this is a matter that can be determined in the Chief Magistrates Court whose pecuniary jurisdiction is below Kshs 20 Million. I will make the final orders at the end.

37. In the end the Preliminary Objection is unmerited. It is dismissed.

38. The suit is transferred to the Chief Magistrate Court at Murang'a for hearing and determination. I order that the file be mentioned before the Chief Magistrate within a period of 14 days from the date of this ruling for hearing and determination.

39. The costs of the Preliminary Objection shall be met by the 2nd Defendant in favour of the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF OCTOBER 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ngetich HB for Ndungu for the Plaintiff/Applicant

Defendant/Respondent – Absent

Matoke HB for Endoo for the 2nd Defendant/Respondent

Irene and Kuiyaki, Court Assistants