



Antidote Agencies Limited v Tysons Limited & another (Environment & Land Case E037 of 2023) [2024] KEELC 5563 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E037 OF 2023**

CA OCHIENG, J

JULY 29, 2024

BETWEEN

ANTIDOTE AGENCIES LIMITED PLAINTIFF

AND

TYSONS LIMITED 1ST DEFENDANT

KCB BANK KENYA LIMITED 2ND DEFENDANT

RULING

1. What is before Court for determination is the 2nd Defendant's Notice of Preliminary Objection dated the October 25, 2023 against the Plaintiff's Notice of Motion Application dated the October 5, 2023 and the entire suit. It is premised on the following grounds:-
 - a. Jurisdiction of the Honourable Court has been wrongly invoked in relation to an action for recovery of money under an Agency Agreement and not a dispute relating to the environment and land within the contemplation of section 13 of the *Environment and Land Court Act*.
 - b. The 2nd Defendant/Respondent has been wrongly joined in the proceedings as it is not a contracting party to the Agency Agreement dated May 13, 2012 on which the Application is premised.
 - c. The prayers for injunctive orders over the 2nd Defendant/Respondent's property Land Reference No. 8786, Mavoko Sub County pending arbitration are misplaced and untenable. The 2nd Defendant is not privy to and cannot be bound by the Dispute Resolution Clause contained in Clause 17 of the Agency Agreement dated May 13, 2021.
 - d. The Application is misconceived to the extent that wrongly it seeks injunctive orders over the 2nd Respondent's property which is not under contestation whilst the substratum of its



dispute with the 1st Respondent is payment of monies as between the Applicant and the 1st Respondent.

- e. Neither the Applicant's Application nor the underlying suit disclose any cause of action against the 2nd Respondent. The action as against the 2nd Respondent should be struck out in limine.
 - f. The Plaintiff's Application and the underlying suit are presented in manifest abuse of process.
2. The Notice of Preliminary Objection was canvassed by way of written submissions which were highlighted on May 16, 2024.
 3. The 2nd Defendant in its submissions provided a background of the dispute herein and contended that the jurisdiction of this court has wrongly been invoked in relation to a claim for recovery of money for services allegedly rendered. It argues that, from the pleadings, the substratum of this suit is an Agreement between the Applicant and the 1st Respondent dated the May 13, 2021 in which the Applicant was contracted for marketing services and community liaison in relation to sale of land. Further, the Applicant alleges that the Agency Agreement was wrongly terminated by the 1st Respondent that seeks payment of commissions for what it describes as an expanded scope of services.
 4. It avers that among the prayers the Applicant seeks to have Land Reference Number 8786 preserved pending the outcome of the Arbitration process on the grounds that it had allegedly entered into an agreement with the 1st Respondent who in turn had entered into an agreement with the 2nd Respondent. It reiterates that the Plaintiff does not disclose a cause of action against it. Further, that there is no allegation of wrong doing against it. It sought for the suit against it to be struck off with costs. To support its arguments, it relied on Section 13 of the *Environment and Land Court Act* as well as the following decisions: *Owner of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* (1989) KLR 1; *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR; *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service* (2019) eKLR; *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 Others* (2018) eKLR; *Attorney General & Another v Andrew Maina Githinji & Another* (2016) eKLR; *Anne Jepkemoi Ngeny v Joseph Tireito & Another* (2021) eKLR; *Susan Rokih v Joyce Kandie & 6 Others* (2018) eKLR and *Republic Wairimu Munene, ex parte Applicant Ihururu Dairy Farmers Cooperatives Society Ltd*, Judicial Review No. 6 of 2014 which was cited in the approval in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR.
 5. The Plaintiff in its submissions provided a background of the dispute herein and insisted that the instant Notice of Preliminary Objection is incompetent and defective as the same is not accompanied by substantive pleadings. It submits that the prayers sought target an immovable property and this falls within the ambit and jurisdiction of this court. It made reference to the Agency Agreement which forms the fulcrum of the dispute herein and insists that the 2nd Defendant should take the responsibility for its agent's actions. Further, that the performance of the Agency Agreement could not have been possible in the absence of the 2nd Defendant.
 6. It contends that the court is limited to addressing the question of preservative orders, pending the arbitration process. It further submits that the 2nd Defendant was properly enjoined in these proceedings. To support its arguments, it relied on the following decisions: *Machiri Limited v Sokea Satom Kenya Branch* (2020) eKLR which cited the case of *Scope Telematics International Sales Limited v Stoic Company Limited & Another* (2017) eKLR; *Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others* (2010) eKLR; *Karanja v Phoenix of EA Assurance Co. Ltd* (1991) eKLR; *Royal British Bank v Turquand* (1885) E & B 327; *Civicon Limited v Fuji Electric Co. Limited & Another* (2020) eKLR; *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 and *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* (2015) eKLR.



Analysis and Determination

7. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the issues for determination are whether this Court has jurisdiction to handle this matter and if the 2nd Defendant is properly enjoined in this suit.
8. The Plaintiff filed this suit vide a Plaint dated the October 5, 2023 where it sought for the following orders:-
 - a. That an order of injunction do issue restraining the 1st and 2nd Defendants by themselves, their agents, employees and/or servants, legal representatives or assigns from mutating and subdividing, selling, charging, parting with and or disposing off in whole or in part all that property Land Reference Number 8786, Grant registered at the Lands Title Registry as IR Number 11095/1, Land Survey Plan Number 57398 measuring approximately 745 acres pending the hearing and determination of the Arbitration proceedings as envisaged in clause 17 of the Contract dated the 13th of May, 2021.
 - b. That costs of the suit be borne by the 1st and 2nd Defendants jointly and/or severally.
9. The Plaintiff contemporaneously filed a Notice of Motion Application dated the October 5, 2023 where it sought orders of interlocutory injunction restraining the Defendants' from interfering with Land Reference Number 8786, pending the outcome of the Arbitration process.
10. The Defendants though duly served failed to file Statements of Defence to controvert the Plaintiff's averments but instead the 2nd Defendant opted to file the instant Notice of Preliminary Objection claiming that it was not properly joined in these proceedings and that this court is devoid of jurisdiction to handle the dispute herein. The Plaintiff opposed the Preliminary Objection and insisted that this court is clothed with jurisdiction to handle the dispute herein as it involves land.
11. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited* (1969) EA 696; the Court held that:-

“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 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
12. While in the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine
13. Further in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* Civil Application No. 36 of 2014, it was held that:-

“A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may



dispose of the suit... it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.”

14. In this instance, the Plaintiff has raised various issues touching on an Agency Agreement between the 1st Defendant and itself and how it involved the marketing and removal of squatters on land belonging to the 2nd Defendant. It contended that the said Agency Agreement was terminated by the 2nd Defendant, before it was paid its commission on services it rendered on the land, which belonged to the 2nd Defendant. Further, that the aforementioned Agency Agreement made reference to an Agreement the 1st Defendant had with the 2nd Defendant.
15. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiff's averments, the claim remains unopposed. However, in this instance, while associating myself with the decisions I have cited, I opine that since the 2nd Defendant did not expressly deny the averments in the Plaintiff's plead and plead misjoinder, the said claim remains uncontroverted. In my view, its Notice of Preliminary Objection is not anchored on any of its pleadings as is required by law.
16. In the circumstances, I find the instant Notice of Preliminary Objection premature and will strike it out.
17. I direct the Defendants to file and serve their respective Defences within twenty-one (21) days from the date hereof.
18. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

No appearance for Plaintiff

Ms. Burugu for 2nd Defendant

No appearance for 1st Defendant

Court Assistant – Simon/Ashley

