



**Jashbahi v Nampaso & another (Environment & Land Case
E014 of 2024) [2024] KEELC 5390 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E014 OF 2024**

CG MBOGO, J

JULY 24, 2024

BETWEEN

PATEL SANJAYKUMAR JASHBAHI PLAINTIFF

AND

FREDRICK LANKANONI NAMPASO 1ST DEFENDANT

NAROK COUNTY LAND REGISTRAR 2ND DEFENDANT

RULING

1. Before this court for determination is the notice of preliminary objection dated 4th July, 2024, filed by the 1st defendant challenging the plaintiff's application dated 11th June, 2024, on the following grounds: -
 1. That the pecuniary and monetary jurisdiction of this suit is of the Chief Magistrate and not the High court because;
 - a. That the subject property parcel of land registration number: Narok Township/132 is valued at Kshs. 3,500,000/= (Three Million, Five Hundred Thousand). Attached is a copy of the valuation form)
 - b. That this honourable court is not conferred jurisdiction to hear matters below its pecuniary jurisdiction.
 2. That there is a pending matter in the Chief Magistrates Court at Narok, Case Number ELC Case No. E041 of 2022 and the same offends Section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides that no court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.

3. That subject to Section 9 (a) of the Magistrates Act, a magistrate's court shall in the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* (Cap 12A) and subject to the pecuniary limits under Section 7 (1), hear and determine claims relating to;
 - i. Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
 - ii. Compulsory acquisition of land.
 - iii. Land administration and management.
 - iv. Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. Environment and land generally provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates' Courts Act*.
 4. That on the other hand the supporting affidavit by the plaintiff/applicant has been sworn by a notary public outside Kenya and outside the commonwealth jurisdiction which is contrary to the provisions of Section 88 of the *Civil Procedure Act*, Cap 21 laws of Kenya on administration of oath on affidavit.
 5. That in the premises, application dated 11th June, 2024 is an abuse of the process of this honourable court and as such should be dismissed with costs to the plaintiff.
 6. That based on the aforesaid reasons, the jurisdiction of this honourable court has been erroneously invoked.
2. The notice of preliminary objection was canvassed by way of written submissions. The 1st defendant filed his written submissions dated 15th July, 2024 where he raised three issues for determination:
 - a. Whether the jurisdiction is erroneously invoked.
 - b. Whether the subject suit offends Section 6 of the *Civil Procedure Act* through sub-judice.
 - c. Issue of jurisdiction.
 3. On the first issue, the 1st defendant submitted that the suit property is valued at Kshs. 3,500,000/-, and its pecuniary jurisdiction lies with the magistrates' courts as provided under Section 7 (1) of the Magistrates Court Act. To buttress on this issue, the 1st defendant relied on the cases of *Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and *Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd* [1989] KLR 1.
 4. On the second issue, the 1st defendant submitted that there is a similar case pending before the magistrates' court in CMCC ELC Case No. E041 of 2022. He further submitted that the reliefs sought in the former matter by the interested party, are issues of ownership between the parties in the instant suit, and that the instant suit is sub-judice.
 5. The plaintiff filed his written submissions dated 17th July, 2024. The plaintiff submitted that the preliminary objection is spurious as it ought to stem from the pleadings, and must be based on



undisputed question of fact. He submitted that it is not permissible for a party to attach documentary evidence in support of a preliminary objection. The plaintiff relied on the case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* [1969] EA 696. The plaintiff further submitted that the 1st defendant has not filed a statement of defence, and the value of the property at Kshs. 3,500,000/- has no basis in the pleadings.

6. The plaintiff further submitted that the documents attached as the basis for the value of the property is a requisition for valuation, and not a valuation report from any known authority. The plaintiff further submitted that under Section 18 of the *Civil Procedure Act*, the court has jurisdiction to transfer a suit from itself to the subordinate court for trial and disposal.
7. On whether the instant suit is sub judice, the plaintiff submitted that the issues in CMCC ELC Case No. E041 of 2022 and the instant matter are not similar. Further, he submitted that in CMCC ELC Case No. E041 of 2022, the issues therein are between the 1st defendant and the County Government of Narok, and the orders sought are that the parcels of land be transferred to him. That in the instant suit, the plaintiff seeks orders that the certificate of lease illegally acquired by the defendant be revoked. The plaintiff relied on the cases of Republic versus Paul Kihara Kariuki, Attorney General & 2 Others; Ex-parte Law Society of Kenya [2020] eKLR, SOCAF & Company Limited v John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party) [2022] eKLR and Francis Karioko Muruatetu & Another v Republic & 5 Others [2016] eKLR.
8. The plaintiff further submitted that the 1st defendant has failed to demonstrate the manner in which the affidavits offend Section 88 of the *Civil Procedure Act*. He relied on the cases of Raccolta Molnar & Greiner versus Royal Trading Company Limited [2014] eKLR, Qad Software South Africa (Pty) Limited v Rift Valley Railways Investments (Pty) Limited [2013] eKLR and Peeraj General Trading & contracting Company Limited, Kenya & Another v Mumias Sugar Company Limited [2016] eKLR. In conclusion, the plaintiff submitted that the preliminary objection is an abuse of the court process and ought to be dismissed.
9. I have considered the preliminary objection and the written submissions filed by the plaintiff and the 1st defendant. In my view, the issue for determination is whether there is merit in the notice of preliminary objection.
10. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

Per Law, JA

“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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Newbold, P stated 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 had 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 issue. The improper practice should stop”.



11. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.
12. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“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.”
13. It is also this court’s opinion that in determining a preliminary objection, the court will also consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where 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.”
14. In applying the above principles to the circumstances of this case, I note that the 1st defendant in his notice of preliminary objection, annexed a copy of what is referred to as Valuation Requisition for Stamp Duty, which is evidence in support of the preliminary objection. Where the court is invited to look at that which is outside the pleadings, and more particularly the evidence in support thereof, the preliminary objection is defeated.
15. The 1st defendant further contended that the suit is sub judice by the fact that there is a pending matter in ELC Case No. E041 of 2022, which offends Section 6 of the *Civil Procedure Act*. The provisions of Section 6 of the *Civil Procedure Act* defines the above principle or the doctrine as follows;

“...No court shall proceed with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.”
16. In considering whether the instant suit is sub judice, this court will be required to ascertain through the evidence which would again defeat the objective of a preliminary objection. Where the court is called to draw inference to that which is outside the pleadings, or that which is not a pure point of law, the preliminary objection must fail.
17. On whether the suit offends Section 88 of the *Civil Procedure Act*, the 1st defendant seems to have abandoned this claim. However, it is necessary to address the same. Section 88 of the *Civil Procedure Act* provides: -

“In the case of any affidavit under this Act—

 - (a) any court, magistrate, registrar of a court, notary public or commissioner of oaths; or



(b) any officer or other person whom the high court may appoint in this behalf, may administer the oath to the deponent.”

18. I have looked at the pleadings in this matter. The supporting affidavit sworn by the plaintiff is said to have been sworn at Feimster Street Stateville NC 28677 United States of America by Mary Ellen King, the same applies to the verifying affidavit and the witness statement dated 11th June, 2024. In *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* [2016] eKLR, it was held as follows: -

“ 11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.”

19. While I place reliance on the above cited authority, the supporting affidavit and the verifying affidavit contains depositions, and more importantly is the fact that the plaintiff stated that he currently resides in the United States. It follows that the depositions could only be witnessed by a person in that jurisdiction duly authorized to do so. In this case, it is Mary Ellen King of the Common Wealth of Virginia. It is my finding that the pleadings are thus properly on record.

20. Having said the above, the notice of preliminary objection dated 4th July, 2024, totally lacks in merit, and it is dismissed. Costs in the cause.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

24/07/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

