



REPUBLIC OF KENYA



Ethics & Anti-Corruption Commission of Kenya v Maxtowers Limited & 20 others; Kenya Revenue Authority (Interested Party) (Environment & Land Case E022 of 2023) [2024] KEELC 5437 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E022 OF 2023**

NA MATHEKA, J

JULY 24, 2024

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION OF KENYA PLAINTIFF

AND

MAXTOWERS LIMITED 1ST DEFENDANT
FRANCIS KIRUNGIE NGATIA 2ND DEFENDANT
MARY WACUKA NGATIA 3RD DEFENDANT
PRETTY BLOSSOMS LIMITED 4TH DEFENDANT
ASHOK KUMAR DEVSHI 5TH DEFENDANT
SHEELA ASHOK KUMAR SHAH 6TH DEFENDANT
AERIAL DEVELOPERS LIMITED 7TH DEFENDANT
ENOCK TUITOEK 8TH DEFENDANT
CINTY MUENI MALIKA 9TH DEFENDANT
SCLERACA LIMITED 10TH DEFENDANT
KIPCHUMBA KANDIE 11TH DEFENDANT
SUNNEX ENTERPRISES LIMITED 12TH DEFENDANT
ANISH MAHESHKUMAR DOSHI 13TH DEFENDANT
SUNIR MAHESHKUMAR DOSHI 14TH DEFENDANT
SHEILA DOSHI 15TH DEFENDANT
DELGREEN LIMITED 16TH DEFENDANT



ASHOK LABHSHANKER DOSHI 17TH DEFENDANT
PRATIBHA ASHOK DOSHI 18TH DEFENDANT
DOSHI GROUP OF COMPANIES 19TH DEFENDANT
WILSON GACHANJA 20TH DEFENDANT
SAMMY SILAS KOMEN MWAITA 21ST DEFENDANT

AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. The 16th, 17th, 18th and 19th defendant have moved the court seeking the following orders:
 1. That the suit herein be struck out as it is otherwise an abuse of the process of the court.
 2. That costs of the suit and of the instant application be borne by the plaintiff.
2. The application was predicated on the fact that there is a suit ELC 55 of 2008 Delgreen Limited vs Odindo Alfred & 14 Others where the interested party was joined as the 16th defendant where they have lodged their defence and subsequently other pleadings were filed by the other parties; that this matter is substantially and directly in issue in ELCC 55 of 2008 and that consequently that court will determine the true ownership of the parcel L.R No. Mombasa/Island/Block XXVI/1081 hereafter suit property.
3. The 13th, 14th and 15th defendants raised preliminary objection stating that they have been wrongly joined as parties to this suit as they have been sued contrary to the cooperate personality of a company. Counsel for the 13th, 14th and 15th defendants filed their submissions on the preliminary objection. Counsel for the 16th, 17th, 18th and 19th defendant filed their submissions on the instant application.
4. After careful consideration of the application and the notice of preliminary objection and the submission thereto I find that the issues for determination is whether the notice of preliminary objection and application dated 11th December 2023 have merit and who bears the costs?
5. A notice of preliminary objection was discussed in *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696* where their Lordships observed thus:

----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 a contract giving rise to the suit to refer the dispute to arbitration”.
6. In the same case Sir Charles Newbold, P. stated:

"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 preliminary objections does nothing but



unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

7. In *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* (2015) eKLR the supreme court made the following observation as relates 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.”

8. The plaintiff who is the party most affected by the preliminary objection did not oppose or dispute any of the facts giving foundation to the same. The notice is premised on the fact that the 13th, 14th and 15th defendant have been wrongly sued in their personal capacities and that they are the directors of the 12th defendant who is the party the plaintiff claims from. Since the plaintiff has not filed any submissions I have to rely on the plaint and I have observed paragraph 49 (g) states as follows:

‘The 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th and 19th Defendants illegally and fraudulently caused registration of the suit property in their names while fully aware that neither the Minister responsible for Lands, Transport or Finance consented to the allocation of the suit property as provided for in the Government Lands Act, Cap. 280, Registration of Titles Act Cap 281, Registration of Lands Act, Cap 300 and Government Financial Regulations and Procedures.’

9. It is clear that the 13th, 14th and 15th defendant are alleged to have participated in the transfer in their personal capacities. The ruling in ELC No. 21 of 2023 on a similar PO applies mutatis mutanda and the said defendants ought to be given a chance to defend themselves against the allegations of fraud. I find the preliminary objection is not merited and it is dismissed with costs.

10. With respect to the application dated 11th December 2023, it is trite that this court expresses its observation that the instant application is similar to the application dated 11th December 2023 by the 11th, 12th, 13th and 14th defendant in ELCC 21 OF 2023 who are the 16th, 17th, 18th and 19th defendant respectively in this suit. In that matter this court dismissed the application in suit ELCC 21 of 2023 is not res sub judice to ELC 55 of 2008 for the following reasons;

- i. In ELCC 55 of 2008 Delgreen Limited seeks vacant possession against several defendants in suit properties L.R No Mombasa Island/XXVI/1081,1082 and 1015 while in ELCC E021 of 2023 the claim is by the EACC challenging the subdivision of Mombasa Island/XXVI/269 into interalia subdivisions L.R No. Mombasa Island/XXVI/1081, 1082 and 1015 without approved part development plans.
- ii. The parties in ELC 55 of 2008 and ELC E021 OF 2023 are different save for Delgreen Limited and Kenya Revenue Authority.

11. I wholly adopt my ruling of 11th June 2024 in ELCC E021 of 2024 which shall apply mutatis mutandis to the suit property herein and I dismiss it with costs.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JULY 2024.



N.A. MATHEKA
JUDGE

