



Ethics & Anti-Corruption Commission v Mbasu & 15 others; Kenya Revenue Authority (Interested Party) (Environment & Land Case E021 of 2023) [2024] KEELC 5436 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E021 OF 2023**

NA MATHEKA, J

JULY 24, 2024

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

E. M. MBASU 1ST DEFENDANT
D. KAMENE 2ND DEFENDANT
M. WANJIRU 3RD DEFENDANT
SCLERACA LIMITED 4TH DEFENDANT
CINTY MUENI MALIKA 5TH DEFENDANT
KIPCHUMBA KANDIE 6TH DEFENDANT
SUNNEX ENTERPRISES LIMITED 7TH DEFENDANT
ANISH MAHESHKUMAR DOSHI 8TH DEFENDANT
SUNIR MAHESHKUMAR DOSHI 9TH DEFENDANT
SHEILA DOSHI 10TH DEFENDANT
DELGREEN LIMITED 11TH DEFENDANT
ASHOK LABHSHANKER DOSHI 12TH DEFENDANT
PRATIBA ASHOK DOSHI 13TH DEFENDANT
DOSHI GROUP OF COMPANIES 14TH DEFENDANT
WILSON GACANJA 15TH DEFENDANT
SAMMY SILAS KOMEN 16TH DEFENDANT



AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. The 8th, 9th and 10th defendant filed a notice of preliminary objection on the reason that the same have been wrongly sued in their personal capacities since they are the directors of the 7th defendant. Counsel for the 8th, 9th and 10th defendant filed their submissions on May 15, 2024.
2. After careful consideration of the notice of preliminary objection and the submissions filed, I find the issue for determination is whether the same has merit and who bears the costs?
3. The submissions by counsel for 8th, 9th and 10th defendants filed herein were intentioned for ELCC E022 of 2023 but had the same tenor and effect as if it were properly filed. I will not dismiss the submissions as the inadvertence is only on the cited parties. 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".
4. 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".
5. 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."
6. 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 8th, 9th and 10th defendant have been wrongly sued in their personal capacities and that they are the directors of the 7th 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 43 and 44 states as follows:



43. By reason of the foregoing, the purported subsequent issuance of a lease to the suit property by the 16th defendant to the 7th and 11th defendants was fraudulent, illegal and void ab initio and incapable of conferring on the 7th and 11th defendants any good title, interest or right in the suit property.

The plaintiff justified the inclusion of the 8th, 9th and 10th defendant in paragraph 44 of the plaint which states as follows:

44. Further, the purported transfer of the suit property by the 4th, 5th, and 6th defendants to the 7th to 10th and subsequently to the 11th to the 14th defendants was void ab initio and incapable of conferring any good title, interest or right in the suit property.” Emphasis mine

7. However, in the particulars of the fraud paragraph 41 (d) of the plaint, the plaintiff’s case is that the 7th defendant dishonestly obtained letters of allotment and in paragraph 41 (f) the 8th, 9th and 10th defendants were alleged to have illegally and fraudulently caused registration of the suit property in their names. This means that the plaintiff has challenged the transfer of the suit property to the names of the 8th, 9th and 10th defendant. The defendants should therefore be given the opportunity to defend itself against the allegation, they are no longer clothed in the corporate veil of the 7th defendant. The notice of preliminary objection is dismissed with costs to be borne by the 8th, 9th and 10th defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE

