

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1293 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA TEA DEVELOPMENT AGENCY

HOLDINGS LIMITED.....CLAIMANT

VERSUS

LEE KIMATHI.....1ST RESPONDENT

IRENE ODHIAMBO T/A ZASHA AUCTIONEERS....2ND RESPONDENT

MERITAD LAW AFRICA LLP ADVOCATES

(Formerly PROTUS SAENDE GATHENGE AND

JOHN ODHIAMBO OCHOLA

P/A SAENDE & OCHOLA ADVOCATES.....3RD RESPONDENT

RULING

By a notice of preliminary objection dated 16th December 2020, the 2nd Respondent, IRENE ODHIAMBO T/A ZASHA AUCTIONEERS prays for the striking out or dismissal of the instant suit on the following grounds: -

- 1. That this Court does not have jurisdiction to hear and determine this case.*
- 2. The case as filed is incompetent and an abuse of the court process.*

The cause of action in this suit arises from execution process in ELRC Cause No. 658 of 2011 where the Claimant herein sued LEE KIMATHI, the 1st Respondent herein. The 2nd Respondent was the executing auctioneer while the 3rd Respondent herein was Counsel for the 1st Respondent, Lee Kimathi.

In the claim herein, the Claimant sets out the issues in dispute in the instant suit at paragraphs 10 and 11 thereof to be amounts irregularly and illegally obtained, received and withheld by the Respondents pursuant to the nullified and/or lifted executions in Cause No. 658 of 2021 during which the Claimant suffered loss as particularised below: -

Item Particulars	Value (Kshs.)
1 Direct Amount paid to by way of RTGS to MERITAD.	5,565,717.00
2 Cash Amount Paid to Zasha, Auctioneers.	820, 000.00
3 Storage, Labour and Transport of seized KTDA goods.	77, 600.00
4 Labour to return the seized KTDA goods	14, 000.00
5 Manpower labour from ground floor to 2 nd and 3 rd floors of KTDA Farmers Building on return of part of seized goods.	7, 000.00
6 Costs of repairs to broken doors/glasses - main entrance	3,950.00
7 Costs of repairs to broken doors/glasses - Server room	3,850.00
8 Transport costs for Inspector of Police/KTDA Staff and Auctioneer to Labour Court to peruse court file.	3,500.00
TOTAL	6,495,617.00

The Claimant seeks the following prayers in the claim: -

(a) *Special damages for Kenya shillings Seven Million, Five Hundred and Sixty Six Thousand, Nine Hundred and Sixty Six and Ninety Seven Cents (Kshs.7,566,966.97/-).*

(b) *General damages.*

(c) *Exemplary damages.*

(d) *Costs of this suit be borne by the Respondents.*

(e) *Compound interest on (a), (b) and (c) herein above from 1st December, 2016 until payment in full.*

The preliminary objection was disposed of by way of written submissions.

Objector's/Respondent's Submissions

The 2nd Respondent submits that

(a) *The primary cause of action giving rise to this suit does not relate to employment and labour relations as envisaged by Article 162(2) of the Constitution of Kenya 2010 and Section 12 of the Employment and Labour Relations Court Act Cap 234(B).*

(b) *The primary cause of action giving rise to this suit is not a dispute relating to or arising out of employment between an employer and an employee and or a dispute of the nature listed in Section 12 1(a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of the Employment and Labour Relations Court Act Cap 234(B).*

(c) *The cause of action giving rise to the Claimant's cause is the execution of the decree and warrants issued in Nairobi ELRC No. 658 of 2011.*

(d) *The Claimant's claim is based on trespass, irregularities and illegalities allegedly committed by the respondents in the execution of the decree and warrants of attachment and sale issued in Nairobi ELRC No. 658 of 2011.*

(e) *The Claimant seeks to recover from the respondents the decretal sum and auctioneer's charges paid in Nairobi ELRC No. 658 of 2011.*

(f) *The execution of the decree and warrants which forms the basis of the Claimant's case did not arise from this case but from Nairobi ELRC No. 658 of 2011. This court has no place or jurisdiction to issue orders touching on the decree and warrants issued in another case namely Nairobi ELRC No. 658 of 2011.*

It is the 2nd Respondent's submissions that the jurisdiction of this court as set out in Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act does not extend to questions arising from or relating to execution of decrees.

The 2nd Respondent relies on the decision in **Celina Atieno Ogut v Undugu Society of Kenya (2019) eKLR** where the court stated: -

“This court has on several occasions been confronted with questions of mixed jurisdiction.

The main claim as pleaded by the Claimant concerns the termination of his services by the 1st respondent for which he seeks compensation as set out in the memorandum of claim. The Claimant does not only seek compensation for wrongful and or unfair termination of his services from the 1st respondent but damages for defamation and malicious prosecution against the 4 respondents jointly and severally as joint tortfeasors. This means, the jurisdiction of this court is attracted by the reason of the fact that the factual background of the claims presented by the Claimant arose out of his contract of employment with the 1st respondent and once the court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction.

Courts do not encourage multiplicity of actions arising from the same facts. Jurisdiction will be determined from the most dormant issue and the court will after determining the issue of jurisdiction based on the dominant subject be clothed with jurisdiction to determine all secondary issues.”

The 2nd Respondent urges this Court to down its tools as it lacks jurisdiction relying on the decision in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, the Court of Appeal stated as follows: -

“That a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court.

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and that the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ”

Claimant's Submissions

The Claimant opposes the preliminary objection through its submissions dated 4th February 2021.

The Claimant submits that the preliminary objection is based on the defence of the 2nd Respondent dated 8th December 2020. That the defence is not properly on record as it was filed more than two years after pleadings in this suit were closed and after directions had been given by the Court on 16th July 2019 when the claim was certified ready for hearing without the defence of the 2nd Respondent. That the 2nd Respondent is guilty of inordinate delay in filing both the defence and the preliminary objection. That Rule 13 of the Employment and Labour Relations Court (Procedure) Rules requires a party served with a claim to file appearance and defence within 21 days.

That Rule 15(3) further provides that where no defence is filed within the prescribed period the court may upon application of the Claimant direct that the matter proceeds to formal proof. That the 2nd Respondent filed appearance but did not file a defence within the stipulated period.

It is the Claimant's submission that no leave of the court was sought before filing the defence upon which the preliminary objection is anchored.

For emphasis the Claimant relies on the decision in **Charles Nzeki Mwanga v Senaca East Africa Ltd [2017] eKLR** where the Court stated –

"The Court Finds:-

The Respondent has not given adequate explanation why no Statement of Response was filed, 21 days within receiving of the Statement of Claim, as required under Rule 13(1) of the E & LRC Rules 2016.

Respondent's Advocates wrote to the Respondent on 23rd November 2016, advising they had filed Memorandum of Appearance. The Advocates asked the Respondent to supply documents, and detail of circumstances under which the Claimant left employment. This was on 23rd November 2016.

The Draft Statement of Response is dated 30th October 2017, about 1 year, from the date Respondent's Advocates called for the instructions from the Respondent.

The Respondent does not explain why it took 1 year to avail further instructions to its Advocates. Default in filing of Statement of Response can only be attributed to the Respondent.

The E & LRC Rules 2016, do not require that a Party who has failed to file a Statement of Response, is given a hearing notice on formal proof. Rule 15(3) only requires the Court to order the matter proceeds for formal proof."

The Claimant urges the Court not to entertain both the defence and preliminary objection on grounds of inordinate delay, relying on the decision in **Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR** where the Court held that:

"Except, where reasonable explanation has been given on the delay, the court ought to consider it and often may look at the delay more leniently and excuse it. What about the present case? There has been a delay of 14 months, and no explanation that has been offered by the Respondent/plaintiff. In the absence of an explanation, the delay herein can only be termed as inordinate delay and is, therefore, inexcusable. I wish to state that, where no explanation for the delay has been offered by the Respondent, it would be extremely difficult for the court to assume one or try and offer any excuse for the Respondent's failure to move the court on his own case."

The Claimant submits that in view of the fact that a preliminary objection must arise expressly or by implication from pleadings, the same has no basis and should be dismissed with costs. For emphasis the Claimant relies on the decision in **George Waweru Njuguna v Pauline Chesang Gitau Kamuyu [2017] eKLR** where in dismissing a preliminary objection the Court stated –

"I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff's claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant's preliminary objection has no basis"

It is the Claimant's submission that the inordinate delay has not been explained by the 2nd Respondent, is inexcusable and undeserving of lenient consideration by the court.

On the substantive grounds in the preliminary objection, the Claimant submits that a preliminary objection must arise from pure grounds of law and must not be blurred with factual details liable to be contested or that require proof through evidence. That where a party needs to call or refer to evidence the preliminary objection must fail. On this point the Claimant relies on the decision in **A K N v J N M [2014] eKLR**, where the court in dismissing the preliminary objection held as follows;

*"...It is trite law that a preliminary objection should be based on pure points of law. Law J A in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:*

"So far as I'm 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."

In **Oraro v Mbaja [2005] 1 KLR 141** Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

"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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... 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 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..."

The Claimant further relied on the decision in **Wilson Kiarie Kimani (suing as the personal Legal Representative of Margaret Wangui Kimani v Aberdare Investment Limited & 3 Others [2019] eKLR**, where the Court observed as follows;

*"Before the court embarks on determining the merit of the Notice of Preliminary Objections, it has to first determine whether what has been raised herein satisfy the ingredients of a Preliminary Objection. As the Court determines whether what the Respondents have filed amounts to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of **Oraro...Vs...Mbaja (20Q5) 1KLR 141**, where the Court held that:-*

"Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence."

It is the Claimant's submission that the averment of the 2nd Respondent that this suit arises from **ELRC Cause No. 658 of 2011** is a disputed

fact. That for the Court to ascertain this fact it will have to call for file **No. 658 of 2011** for scrutiny, thus Section 34 of the Civil Procedure Act is not applicable.

The claimant submits that the parties in the instant suit are not the same as those in **ELRC Cause 658 of 2011** and the prayers sought in the two suits are different. The Claimant relies on the decision in **Kuronya Auctioneers v Maurice O. Odhoch & Another [2003] eKLR** where in addressing a similar issue the Court of Appeal observed;

"In his first ground of appeal the auctioneer takes issue with the learned Judge that he erred in failing to find that Maurice's suit was barred by Section 34 of the Civil Procedure Act, which section reads as follows: -

"34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit,

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a Party, such question shall, for the purposes of this section, be determined by the court."

Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails."

The Claimant further relies on Section 26 of the Auctioneers Act, which provides that –

26. Right to recover damages from auctioneer

(1) Subject to the provisions of any other written law, a person who suffers any special or general damages by the unlawful or improper exercise of any power by a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action:

Provided that nothing in this section shall—

(a) prevent the auctioneer from claiming contribution or indemnity from any other person;

(b) limit the damages recoverable under any other written law.

For further emphasis the Claimant relies on the decision in the case of **Josephat Lishenga v Muganda Wasuliva t/a Keysian Auctioneers [2018] eKLR** where the Court relied on the Court of Appeal case of **Kuronya Auctioneers v Maurice O. Odhoch & Another (Supra)** and held as follows;

"The aforesaid provision of the law has not barred actions for damages against auctioneers who have unlawfully or improperly exercised the powers of a licenced auctioneer.

Although Section 34 Civil Procedure Act provides for all questions relating to the execution, discharge and satisfaction of a decree between parties in a suit and their representatives, it does not provide for payment of damages to a person who is not a Judgment debtor...

...In Kuronya Auctioneers v Maurice Odhoch & another [2003] eKLR, the Court Appeal faced with a similar situation, held as follows:

"Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment-debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails."

The Claimant also relied on the case of **Hezron Otochi Nyambane v Alfred Mudeizi Sagwa t/a Pave Auctioneers & Another [2020] eKLR**, where the court held as follows;

"Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree.

In addition, Section 26 of the Auctioneers Act permits any person to institute an action against an auctioneer who exercises his powers without following the law..."

The Claimant further relied on the decision in **K.T.DA. (Ogembo Tea Factory) v Charles Nyaundi Okemwa [2009] eKLR** held as follows with regard to Section 34 of the Civil Procedure Act, 2010;

"Mr. Minda's contention was that the Auctioneer did not require to file a separate suit, he rightly proceeded pursuant to the provisions of Section 34 of the Civil Procedure Act. I think counsel misapprehended the provisions of that section. The section states as follows:

34 (1) "All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."

For purposes of that section, an Auctioneer is not a representative of a party."

In conclusion, the Claimant submits that the preliminary objection is fatally defective, untenable in law and lacks merit. That its continued prosecution is an abuse of the Court process and the same ought to be dismissed with costs.

The 1st and 3rd Respondents did not file any submissions in respect to the preliminary objection although both were granted leave to do so on 9th December 2020.

Analysis and Determination

I have considered the submissions of the 2nd Respondent and the Claimant filed in respect of the preliminary objection and the authorities relied upon by both. Two issues arise for determination in my view; whether the defence and preliminary objection in which it is anchored is properly before this court, and whether the suit herein is properly before this court in view of the jurisdiction of this court under Article 162(2) and Section 12 of the Employment and Labour Relations Court Act as well as under Section 34 of the Civil Procedure Act.

I will start with the first issue of the validity of the 2nd Respondent's defence and preliminary objection. The Memorandum of Claim herein is dated 6th August 2018 and was filed on 8th August 2018. The firm of KEFA OMBATI AND COMPANY ADVOCOATES entered appearance for the 2nd Respondent which is dated and filed on 4th September 2018. No defence was filed for the 2nd Respondent until 8th December 2020 when it was filed together with the preliminary objection under consideration in this ruling.

On 16th July 2019 when the suit came up for pre-trial directions, all the parties were represented. Specifically Ms. Awori held brief for Mr. Ombati for the 2nd Respondent. Mr. Ochieng for the claimant informed the court that although the matter had come up for mention for pre-trial directions, he had been served with an application by the 1st and 3rd Respondents which in his view ought to be heard before the directions were given for hearing of the main suit.

Ms. Awori informed the Court that Mr. Ombati was yet to put in a response to the Memorandum of Claim for reason that his client had a problem. That nature of the problem was not disclosed to the Court.

The Court thereafter gave directions as follows: -

"The application dated 8th July 2019 is consolidated with the claim and will be heard together as in the opinion of the Court the issues therein are matters that should have formed the defence, of the 3rd Respondent to the Claim.

The Claim is certified ready for hearing without the defence of the 2nd Respondent.

Parties to take a hearing date in the Registry."

The matter came up again on 20th November 2020 when the 2nd Respondent was not represented. On that date Counsel for the 1st and 3rd Respondents sought a date for hearing of their application dated 8th July 2019. The Court in response observed that directions had already been given on the hearing of the application which cannot be reviewed on a mention date. Further, that should Counsel for the 1st and 3rd Respondents wish to review those directions, he was free to make a formal application.

The matter again came up on 9th December 2020 when all parties were represented. Mr. Kefa Ombati appeared for the 2nd Respondent. It is on that date that the Court gave directions for disposal of the preliminary objection.

Rule 13 of the Employment and Labour Relations Court (Procedure) Rules provides that: -

13. Response to pleadings

(1) If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.

(2) A respondent's statement of response shall contain—

- (a) the respondent's name and address for purpose of service;
- (b) a reply on the issues raised in the statement of claim;
- (c) any admission of any statement of facts set out in the statement of claim as the respondent admits, and a denial of any statements made in the suit that the respondent does not admit.
- (d) any additional statements of fact which the respondent may wish to make in support of its reply;
- (e) any defence or grounds upon which the respondent may wish to rely;
- (f) any principle, policy, convention, law, industrial relations or management practice to be relied upon;
- (g) a counterclaim; or
- (h) any relief that might be sought by the respondent against the claimant.

(3) A party served with a response to any pleading under paragraph (1) may file and serve a reply within seven days of service of the response.

(4) The pleadings in a suit shall close fourteen days after the service of a reply under paragraph (3) or, where a reply is not filed, fourteen days after service of a response to pleadings under paragraph (1).

(5) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading

Rule 15 further provides that;-

15. Pre-trial procedure

(1) The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain:

- (a) points of agreement and disagreement;
- (b) the possibility of alternative dispute resolution or any other form of settlement;
- (c) whether evidence is to be oral or by affidavit;
- (d) whether legal argument shall be written or oral, or both;
- (e) the estimated length of the hearing; and
- (f) any other matters the Court may deem necessary.

(2) Paragraph (1) shall not apply where parties act in person and the subject matter of the suit is, in the opinion of the Court, not complex.

(3) Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct that the matter proceed for formal proof.

The 2nd Respondent does not dispute that she filed her Statement of Defence long after pleadings had been closed and without leave of the Court as provided in Rule 15(3). It is therefore not contested that the defence of the 2nd Respondent is not properly on record as no application has been made for its admission or for expansion of the time for filing thereof.

In the introductory part of her submissions in support of the preliminary objection, the 2nd Respondent states as follows: -

“The 2nd Respondent filed a notice of preliminary objection on a point of law dated 8th December 2020.

Together with the notice of preliminary objection, the 2nd Respondent filed a statement of defence.

In paragraphs 32 and 33 of the statement of defence, the 2nd respondent denies the jurisdiction of this court to hear and determine

this case.

The 2nd Respondent has set out two (2) grounds in the notice of preliminary objection and in her statement of defence namely: -

- 1. That this Honourable Court does not have the jurisdiction to hear and determine this case.*
- 2. That the case as filed is incompetent and an abuse of court process.*

THE NATURE OF THE CLAIMANT'S CASE

The cause of action giving rise to the claimant's case is the execution of the decree and warrants issued in Nairobi Employment and Labour Relations Cause No. 658 of 2011.

The parties in Nairobi ELRC No. 658 of 2011 were Kenya Tea Development Agency Ltd (as the claimant) and Lee Kimathi (as the respondent).

Paragraph 5 of the memorandum of claim states that Zasha Auctioneers (the 2nd respondent) and Meritad (the 1st respondent) were Lee Kimathi's Auctioneer and Advocate respectively in Nairobi ELRC No. 658 of 2011.

In paragraph 7 of the memorandum of claim, the claimant states that the execution steps taken by the respondents in Nairobi ELRC No. 658 of 2011 were all found and or declared to be invalid, illegal null and void."

It is therefore clear that the 2nd Respondent anchors the preliminary objection on paragraphs 32 and 33 of the defence which has not been admitted on record.

Be that as it may, the question this court ought to consider is whether a preliminary objection can be filed by a Respondent who has not filed a defence or response to claim, as in this case, the defence of the 2nd Respondent is clearly not properly on record and she can be deemed to have not filed any defence.

In my view, any party who has been sued has a right to participate in proceedings whether or not they have filed a defence to the proceedings. The only limitation is that their participation will be limited to raising matters of law only and/or making reference to pleadings of fact in records properly filed in court, in this case, to the Memorandum of Claim and the defence of the 1st and 3rd Claimants. The 2nd Respondent would thus not be allowed to raise any matters of fact, but can raise matters of law.

In the instant case, the preliminary objection as filed does not refer to the defence. It raises issues of jurisdiction which according to **Mukisa Biscuit case**, may be raised by way of a preliminary objection.

I have also taken into account the fact that this case has not yet been set down for hearing even though pre-trial directions have been taken. It is my view that a preliminary objection can be raised at any time before the hearing of the suit commences, or during the hearing of the suit, and that where a preliminary objection is raised, it behoves the court to hear and dispose of the preliminary objection as a preliminary point, in view of the fact that a preliminary objection, if successful, may dispose of the entire suit and thus save both the court and the parties time and money.

However, for the avoidance of doubt, the court wishes to clarify that the admission of the preliminary objection does not include the admission of the defence of the 2nd Respondent. As already pointed out above no leave has been sought by the 2nd Respondent to have her defence admitted out of time, nor reasons given for the delay in filing the defence out of time.

The second issue for determination is whether this court has jurisdiction to hear this suit. The 2nd Respondent has raised a two-pronged attack on this court's jurisdiction. The first is that the suit is not anchored on an employment matter and is thus outside the jurisdiction of this court as established under Article 162(2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act.

I agree with the 2nd Respondent in as far as the jurisdiction of this court as established under Article 162(2) is in employment and labour relations. However, as pleaded in the suit, the claim herein is anchored on execution in ELRC Cause No. 658 of 2011 which is an employment matter. Section 13 of the Employment and Labour Relations Court Act specifically provides that this court has jurisdiction to enforce its judgements, awards, orders and decrees, but the rules to apply in execution are those in the Civil Procedure Act. This of necessity means that any claims arising out of its execution powers under the Act must be determined by the same Court. The enactors of the law would not have intended that where a suit is filed exclusively on disputes arising out of the jurisdiction of this Court the same should be filed in another court just because the suit does not relate to employment and labour relations matters directly.

Section 12(1) of the Employment and Labour Relations Court Act provides that the jurisdiction of this court is as donated by this Act, and any other written law that extends jurisdiction to the court, including the matters listed in sub sections (a) to (j) of the Act. The Section by using the word "including" means the list is not conclusive, limited or exhaustive.

I therefore find that this Court has jurisdiction to hear disputes arising out of the execution of its orders. This is what was stated by the court in the case of **Celina Atieno Ogutu v Undugu Society of Kenya (supra)** which was cited by the 2nd Respondent. The court stated: -

"... the jurisdiction of this court is attracted by the reason of the fact that the factual background of the claims presented by the

Claimant arose out of his contract of employment Once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction."

Further that: -

"Jurisdiction will be determined from the most dominant issue and court will after determining the issue of jurisdiction based on the dominant subject be clothed with jurisdiction to determine all secondary issues."

In the instant case, the issues in dispute are consequential upon and secondary to the execution process in ELRC Cause No. 658 of 2011 and this court therefore has jurisdiction to determine the same.

The second prong of the 2nd Respondent's argument on jurisdiction is that under Section 34 of the Civil Procedure Rules provides that all questions arising out of or relating to execution shall be determined in the same suit and not by a separate suit. The Section is reproduced below.

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

***Explanation.* — For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.**

The 2nd Respondent relies on the case of **Governors Balloon Safaris Limited v Attorney General & 2 Others (supra)**. Unfortunately Counsel did not supply a copy of the Judgment to the Court and in my quest to retrieve it, I only came across **Petition No. 428 of 2014 Governors Balloon Safaris Limited v Attorney General & 2 Others (2014) eKLR and (not [2015] eKLR)** as cited by Counsel. I was also unable to trace the quotation by Counsel in the ruling delivered 9th September 2014. The ruling relates to abuse of court process by the Petitioner in filing a fresh petition to avoid a conditional stay granted in another suit between the same parties. I do not find the suit relevant to the instant suit or to the determination of the application before me.

On the application of Section 34 of the Civil Procedure Rules, the position has been well articulated in the cases cited by the Claimant which are all similar to the circumstances herein. As was held in **Kuronya Auctioneers v Maurice O. Odhoch & Another (supra)** –

"Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment — debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails."

Further, Section 26 of the Auctioneers Act is clear that a party who suffers any special or general damages out of the unlawful or improper exercise of any power by a licenced auctioneer is entitled to recover any damages directly suffered from the Auctioneer by **action**.

Action is defined in the Interpretation and General Provisions act to mean *"any civil proceedings in a court and includes any suit as defined in Section 2 of the Civil Procedure Act."*

This means that Section 26 of the Auctioneers Act contemplates a separate suit against the Auctioneer by the party who has suffered special or general damages as a consequence of the unlawful or improper exercise of the powers of an Auctioneer as granted in the Act.

Section 34 is further clear that it contemplates only situations where parties are the same as in the case of **Governors Balloon Safaris Limited (supra)** and not a case like the present one where the parties sued are different, the cause of action different and the prayers sought by the Claimant different from the earlier suit giving rise to the cause of action herein.

For the foregoing reasons, I find the preliminary objection to be without merit and dismiss the same with costs to the Claimant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE