



**Casuarina Limited v Kenya Railways Corporation (Environment & Land Case 78 of 2021) [2024] KEELC 13430 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13430 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 78 OF 2021  
A OMBWAYO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**CASUARINA LIMITED ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Defendant’s preliminary objection dated 5th July, 2024 on the following grounds:
  1. The Plaintiff’s suit is time barred by dint of Section 87(b) of the [Kenya Railways Corporation Act](#), Cap 397 Laws of Kenya.
  2. This court lacks the jurisdiction to hear and determine the suit as it offends the mandatory provisions of Section 83(1) of the [Kenya Railways Corporation Act](#), Cap 397 Laws of Kenya.
  3. The Plaintiff’s suit is premature for failing to exhaust the dispute resolution mechanism contained in clause 21 of the Lease Agreement dated 6th February, 2013 which provides for arbitration as the mode of dispute resolution.
  4. That the Plaint dated 11th October, 2021 is an abuse of the court process and the same should be struck out with costs of the Defendant.

**Response**

2. The Plaintiff did not file any response.



## Submissions

3. The Plaintiff's submissions are dated 14th November, 2024 where he gave a background of the case and identified two issues for determination, the first one being whether the preliminary objection is merited. He relied on the Supreme Court case of *Hassan Ali Joho & Another V Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd*. 9691 EA 696 and submitted that the Defendants did not raise points of law.
4. On the suit being time-barred by dint of Section 87(b) of the *Kenya Railways Corporation Act* he argued that Section 87 of the *Kenya Railways Corporation Act* was declared unconstitutional in the case of *Railways Workers Union (K) V Kenya Railways Corporation* [2023] KEELRC 3444 (KLR). He submits that the Defendant cannot rely on a law that has been declared a nullity. On the issue of jurisdiction, he relied on the case of *Ubah Ismail Mohamed V Gapco Kenya Limited & Kenya Railways Corporation* [2019] KEHC 7057 (KLR), and submits that the instant suit is not for compensation but the claim arises from the Defendant's interference of the Plaintiff's right to quiet possession of the leased land. He argues that the said section does not apply in the present case. It was his submission that despite the Plaintiff's demand letter dated 17th September, 2021, the Defendant never reached out in an effort to settle the matter prompting the Plaintiff to file this suit. The ground of the Plaintiff's suit being premature for failing to exhaust the dispute resolution mechanism contained in clause 21 of the Lease Agreement dated 6th February, 2013 he relied on Article 48 of the *Constitution*.
5. He submits that an arbitration clause in an agreement does not entail that the suit filed should be struck out. He added that where a party seeks to rely on an arbitration clause to have the matter referred to arbitration, the available remedy is a stay of proceedings under Section 6 of the *Arbitration Act*. He submits that the Defendant's remedy was to apply for a stay of legal proceedings as provided under the said section but it failed to do so. He cited that case of *Later Limited V Wanini* (Cause E750 of 2023) [2023] KEELRC 3193 KLR) (4 December 2023) (Ruling). He submits that the Defendant's Preliminary Objection 5th dated July 2024 lacks merit.
6. The final issue on costs, he relied on the case of *Hussein Muhumed Sirat V Attorney General & Another* 120171 eKLR and urged the court to grant them costs.
7. The Defendant's submissions dated 22nd October, 2024 were filed by the firm of McKay & Company Advocates. They gave a background of the case and identified three issues for determination first issue being whether the preliminary objection is sustainable. They relied on the case of *Mukisa Biscuit Manufacturing Company Limited V West End Distributors Limited* [1969] EA 696 and the Supreme Court case of *Aviation & Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others* [2015] eKLR. They submit that from paragraph 6 of the plaint was clear that the suit was time barred and added that the court lacks the jurisdiction to hear and determine the suit. It was their argument that the suit offends the doctrine of exhaustion as provided for under Section 83(1) of the *Kenya Railways Corporation Act* and clause 21.3 of the lease agreement.
8. They submit that the issues raised are purely points of law thus fit the definition of a preliminary objection.
9. The second issue is whether the preliminary objection is merited. Counsel for the Defendant while submitting in the affirmative relied on Section 87 of *Kenya Railways Corporation Act*. They argue that the Plaintiff filed the suit on 15th October, 2021 while the cause of action arose on 11th October, 2020 when it was unlawfully evicted as alleged. They submit that the period to which a party should seek redress against the Corporation is limited to a period of 12 months. They went on to submit that the



- Plaintiff ought to have filed the instant suit before 11th October, 2021. They cited the Court of Appeal case of *Joseph Nyambamba & 4 Others V Kenya Railways Corporation* [2015] eKLR and *Anaclet Kalia Musau V Attorney General & 2 Others* [2020] eKLR.
10. They further relied on Section 83(1) *Kenya Railways Corporation Act* and the case of *Geoffrey Muthiga Kabiru & 2 Others V Samuel Munga Henry & 1756 Others* [2015] eKLR. It was their submission that the said section provides for the procedure for seeking compensation from the Corporation which the Plaintiff failed to exhaust before filing this suit. They submit that the dispute was based on the terms of the lease agreement which contained an arbitration clause under clause  
    - 21.3. They relied on Section 6 of the *Arbitration Act* and the case of *County Government of Kirinyaga V African Banking Corporation Ltd* [2020] eKLR and submitted that where parties to a contract agree on arbitration as their dispute resolution forum, the courts are obliged to give effect to the same.
  11. On the final issue, they relied on Section 27 of the *Civil Procedure Act* and urged the court to award the Defendant costs. Analysis and Determination
  12. This court has considered the preliminary objection and submissions and is of the view that the main issue for determination is whether the preliminary objection is merited.
  13. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] E.A the court held as follows:

“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.” “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 on 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.”
  14. In the case of *George Oraro V Barak Eston Mbaja* (Civil Suit 85 of 1992) [2005] KEHC 731 (KLR) (Civ) (6 July 2005) (Ruling) the court held as follows:

“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 therefore imperative for this court to establish whether the preliminary objection as raised by the Defendant meets the threshold as enumerated in the decision in *Mukisa Biscuits (supra)*. The first ground on the Plaintiff’s being time barred, the Defendant argues that the Plaintiff filed the suit on 15th October, 2021 while the cause of action arose on 11th October, 2020. It was their contention that the Plaintiff ought to have sought redress against the Defendant before 11th October, 2020 before the limitation period of 12 months. The Plaintiff on the other hand argues that Section 87 of the *Kenya Railways Corporation Act* that set the limitation period to 12 months was declared unconstitutional and therefore the Defendant could not rely on a law that had been declared a nullity.
  15. In the case of *Tony Obare Ogolla & Terry Muthoni Maina v Jacob Olang Ajero* (Suing as the administrator of the Estate of Jeremiah Olang – deceased) & District Land Registrar, Nyando (Environment and Land Appeal 22 of 2018) [2020] KEELC 3345 (KLR) (5 March 2020) (Judgment) the learned Judge cited with approval the decision in *Sichuan Huashi Enterprises Corp. Limited*



*v Micheal Misiko Mubindi* (Civil Appeal 491 of 2017) [2019] KEHC 2521 (KLR) (Civ) (28 October 2019) (Judgment) where it was held that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection. In addition, the conflicting positions advanced by the Plaintiff and Defendant are questions of fact which can only be determined after hearing evidence from both parties. It is therefore this court's view that the said ground does not raise a pure point of law.

16. On the third and fourth ground in the preliminary objection, it is this court's view that the same are factual and contentious issues that could only be determined on merit.
17. I do find that the second ground on lack of jurisdiction to hear and determine the suit as it offends the mandatory provisions of Section 83(1) of the *Kenya Railways Corporation Act* jurisdiction falls within the definition of a Preliminary point of law. The said section provides as follows:
  - “(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.
  - (2) Nothing in this section shall be construed as entitling any person to compensation-
    - (a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or (b) for any damage suffered as a result of the user of any works authorized under this *Act* unless such damage results from negligence in such user.”
18. The Defendant contends that the Plaintiff seeks compensation for loss incurred due to the acts by the Defendant. It argues that the above section provides for the procedure for compensation relating to loss incurred as a result of the Defendant's actions. The Plaintiff on the other hand contends that the suit does not seek compensation for damage by the Defendant. It argues that the same arises from the Defendant's interference of the Plaintiff's right to quiet possession of the leased land being the former Krc Siow Yard (part B) in Nakuru County. The Plaintiff also contends that despite serving the Defendant their demand letter dated 17th September, 2021, the Defendant never reached out in an effort to settle the matter.
19. I have keenly perused the plaint dated 10th October, 2021 and in as much as the exhaustion doctrine mandates the use of internally laid down procedures for dispute resolution before having recourse to the courts, the claim is that of breach of contract and alleged violations of rights not within the scope of matters stipulated under the above section. The upshot of the foregoing is that the preliminary objection dated 5th July, 2024 is dismissed with costs. It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024**

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

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