



**Salim v Petro Soko (K) Ltd (Environment & Land Case 85 of 2024)  
[2024] KEELC 13268 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13268 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 85 OF 2024  
FM NJOROGE, J  
NOVEMBER 19, 2024**

**BETWEEN**

**ASHA KAMENE SALIM ..... PETITIONER**

**AND**

**PETRO SOKO (K) LTD ..... DEFENDANT**

**RULING**

1. The preliminary objection dated 12<sup>th</sup> September, 2024 has been placed before me for determination. Its grounds are as follows:
  - 1) That on the applicant’s own pleadings and filings it is clear that the arbitration clause that is the basis of these proceedings has been rendered inoperative by subsequent events especially the charge over the suit property in favour of Eco Bank K Limited in so far as arbitration clause is not binding on the said chargee and any deliberations before the arbitrator can not override the rights now vested in the chargee;
  - 2) That to the extent that the chargee’s rights flowing from the charge supersede or remain independent of any orders as may emanate from the arbitrator the intended arbitral process would be academic and inconclusive of the dispute between the parties;
  - 3) That to the foregoing extent, this suit and the orders sought are frivolous and vexatious and constitute an abuse of the court process.
2. The objection was disposed of by way of written submissions.
3. The background to the preliminary objection is as follows: the plaintiff filed a plaint dated 20/8/24. In it she pleaded that he owns the suit land known as LR NO 9122/401 and LR 9122/402. She has developed the suit land with apartments for rent. She lives in the premises. In 2023 while she was financially distressed she transferred the suit titles to the defendant as collateral to secure a loan on



behalf of the plaintiff from Eco Bank Ltd. The transfer was to facilitate the defendant to secure the loan and was not a sale and the plaintiff was to pay the defendant a commission of Kshs 9,000,000/= in consideration therefor. The plaintiff would repay the loan within 60 days of obtaining the same. After that the defendant would effect a retransfer back to the plaintiff and return the titles within 7 days. She was to be made a signatory to the loan account to monitor it. The defendant breached this condition by refusing to make her signatory and she was thus unable to submit monthly instalments towards repayment. The defendant gave her tenants notice to vacate in July 2024 purporting to have bought the property and also attempted to evict the plaintiff. The plaintiff has written to the defendant declaring a dispute under the terms of the agreement. The plaintiff prays for orders declaring that the dispute between the plaintiff and the defendant should be subjected to dispute resolution procedures set out in clause 12 of their agreement; an order referring the dispute between the plaintiff and the defendant to resolution in accordance with the procedures set out in clause 12 of the agreement; an order of inhibition of further dealings registration and transactions over the suit land pending dispute resolution procedures set out in clause 12, and an injunction restraining the defendant or its agents from interfering with the suit property in a way that may change ownership before the dispute between the parties has been subjected to and been conclusively resolved on its merits through the dispute resolution procedures set out in clause no 12.

4. The plaintiff lodged a motion dated 20/8/2024 simultaneously with the plaint. She sought in that motion interim orders inter alia barring by inhibition further dealings registration and transactions over the suit property, an injunction restraining the defendant or its agents from trespassing on or disposing of the suit property pending hearing thereof and of the main suit. This court granted a status quo order on 21/8/2024. Not long after that order the defendant applied for an order restoring the status quo obtaining as at 21/8/2024 and to prevent the plaintiff from among others collecting rent on the suit premises. I have noted that the defendant filed a replying affidavit to the motion filed by the plaintiff and a further affidavit in response to the response of the plaintiff to his motion. The two motions are thus ripe for hearing save for the preliminary objection which this court found fit to dispose of first.

#### **Determination.**

5. The sole issue for determination is whether the preliminary objection meets the definition of a preliminary objection and whether it has merit.
6. A look at the preliminary objection shows that it is based on facts. It requires this court for instance to scour through the documents filed in this case to establish for example, the subsequent events that the defendant urges have rendered the arbitration clause inoperative. This court lacks any insight into the contents of the charge document executed in favour of the Eco Bank Kenya limited and therefore cannot establish if it is the truth as the defendant states in the preliminary objection, that the chargee is not bound by the arbitration clause. Perchance the said charges were available to the court at the instance of the parties, it would still require perusal and construction of the terms thereof, of which each party may be holding their own divergent version which is contrary to the law relating to preliminary objections.
7. In the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* the court of appeal held as follows regarding preliminary objections:

“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.”

8. Further in the same case, Sir Charles Nebbold, JA 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

9. For that reason, it is impossible to agree with the defendant that the objection he raises is a proper preliminary objection as it requires much canvassing of evidence, or that at this juncture this court can on the material before it and without a hearing of applications or the mains suit hold that the chargee’s rights supersede or remain independent of any orders that may emanate from the arbitrator, or that the arbitral process would be academic and inconclusive of the dispute between the parties.

10. The upshot of the foregoing is that this court finds that it is not the plaintiff’s suit that is frivolous and vexatious and an abuse of the court process but the defendant’s needless preliminary objection which should have been incorporated more aptly in the material in the two applications pending before court for determination on the basis of available evidence. For those reasons I hereby dismiss the preliminary objection dated 12/9/2024 and I order as follows:

- a. The present status quo regarding the suit land and suit title shall be observed by all the parties pending the hearing and determination of the two applications;
- b. The applicants shall file separate skeleton submissions in support of or against each application and exchange them within 14 days from the date of this order;
- c. The two pending applications shall be mentioned on 3/12/2024 for issuance of a ruling date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

