



China Road & Bridge Corporation v Wambua & another (Environment and Land Appeal E001 of 2024) [2024] KEELC 13810 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E001 OF 2024
TW MURIGI, J
DECEMBER 11, 2024**

BETWEEN

CHINA ROAD & BRIDGE CORPORATION APPELLANT

AND

HENRY MUTUA WAMBUA 1ST RESPONDENT

BLEGIF AUCTIONEERS 2ND RESPONDENT

RULING

1. This ruling is in respect of the Notice of preliminary objection dated 11/06/2024 raised by the 1st Respondent on the following grounds:-
 - a. The honourable court lacks the requisite appellate jurisdiction to hear this matter which emanates from a civil suit in the subordinate court and not an environment and land case hence the appellate forum is the High Court as provided for under Section 65 of the [Civil Procedure Act](#).
 - b. The Honourable Court ought not to entertain the application dated 10/6/2024 herein under the doctrine of lis pendens as there are similar applications seeking similar orders and involving the same parties in the lower court dated 27/5/2024 and filed therein on 10/6/2024 and yet another dated 13/6/2024 which fact this court ought to take judicial notice of under Section 6 of the [Civil Procedure Act](#); and
 - c. Mr Edgar Alema who has purported to swear the supporting affidavit to the application dated 10/6/2024 lacks the requisite *locus standi* to do so as he is neither a director of the Appellant company nor has not exhibited any authority under the corporate seal in contravention of Order 9 Rule 2(c) of the [Civil Procedure Rules](#).
2. On the basis of the above, the Respondent urged the court to dismiss the application with costs.



3. The preliminary objection was canvassed by way of written submissions.

Respondent's Submissions

4. The Respondent filed his submissions dated 16th August 2024
5. On his behalf, Counsel submitted that this court lacks the requisite appellate jurisdiction to hear and determine this Appeal as it emanates from a civil claim for damages arising from a tort of negligence. Counsel submitted that at paragraph 8 of its defence the Applicant admitted the civil jurisdiction of the subordinate court. According to Counsel, the Appellant ought to have filed his appeal in the High court.
6. Counsel further submitted that this court should not entertain the application as there are similar applications pending in the lower court seeking similar orders and involving the same parties.
7. Counsel further submitted that the Applicant has not come to court with clean hands as it withdrew the applications which is akin to gambling with the court process.
8. Counsel further submitted that Mr Edgar Alema, has no *locus standi* to swear the affidavit in support of the application since he is not a director of the Appellant company. In addition, Counsel submitted that the deponent has not exhibited the required authority under the corporate seal to swear the affidavit on behalf of the Appellant. To buttress this point, Counsel relied on Order 9 Rule 2(c) of the [Civil Procedure Rules](#).
9. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

The Appellant's Submissions

10. The Appellant filed its submissions dated 4th October 2024.
11. On its behalf, Counsel identified the following issues for the court's determination:-
 - a) Whether the ELC has appellate jurisdiction in this matter.
 - b) Whether there are other pending similar applications in the lower court.
 - c) Whether Edgar Alema has authority of the company
12. On the first issue, Counsel submitted that this court has jurisdiction to hear and determine the appeal herein as the Plaintiff's suit was founded on the environment and use of a farm situated within Nduani village Kathekani Location Mtito Andei. Counsel further submitted that the matter was heard and determined by Hon Mbicha who is gazetted to preside over environment and land matters.
13. With regards to the second issue, Counsel submitted that the applications that were pending before the lower court were marked as withdrawn on 14/06/2024 in the presence of Counsel for the Respondent.
14. Counsel submitted that under Order 42 Rule 6(1) of the [Civil Procedure Rules](#) the court has concurrent jurisdiction to hear an application for stay of execution irrespective of whether a similar application was made and rejected in the court appealed from. To buttress this point, Counsel relied on the case of [Stanley Karanja Wainana & Another v Ridon Anyangu Mutubwa](#) (2016) eKLR
15. On the third issue, Counsel submitted that Edgar Alema was duly authorized to swear the affidavit in support of the application. Counsel argued that once a deponent states that he is 'duly authorized' the burden of proof shifts to the party challenging the statement to demonstrate by evidence that they are



not so authorized. To buttress this point Counsel relied on the case of *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* (2015) eKLR.

16. Counsel contended that the allegations that Mr. Edgar Alemo lacks *locus standi* to swear the affidavit in support of the application is misconceived as Order 9 Rule 2(c) of the *Civil Procedure Rules* provides for recognized agents in respect of a corporation as opposed to a deponent in an affidavit.
17. Counsel contended that there is no requirement that the authority should be filed at the time of filing the suit and added that it may be filed before a suit is fixed for hearing. Concluding his submissions, Counsel urged the court to dismiss the preliminary objection with costs.

Analysis and Determination

18. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
19. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

20. Further on Sir Charles Newbold JA stated;

“The first matter relates to the 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 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

21. In *Oraro v Mbaja* (2005) eKLR Ojwang J (as he then was), described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified 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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

22. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another* (1995) eKLR also captured the legal principle as follows;

“A preliminary objection 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.”



23. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the 1st Respondent's Preliminary Objection is based on a pure point of law. Having considered the preliminary objection and the rival submissions, the following issues fall for determination:-
- a. Whether this court has jurisdiction to hear and determine the appeal.
 - b. Whether the application offends the provisions of Section 6 of the [Civil Procedure Act](#).
 - c. Whether the affidavit offends the provisions of Order 9 Rule 2(c) of the [Civil Procedure Rules](#).
24. On the first issue, Counsel submitted that the court has no appellate jurisdiction to hear and determine the appeal herein as it emanates from a claim for damages arising from a tort of negligence. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of [Owners of Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Limited](#) (1989) eKLR where the Court held that:-
- “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...”
25. Similarly, the Supreme Court in the case of [Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others](#) [2012] eKLR pronounced itself thus;
- “A Court's jurisdiction flows from either the [Constitution](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the [Constitution](#) exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”
26. A court derives its jurisdiction from the [Constitution](#) or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#). It was alleged that the Defendant diverted water thereby causing damage to the Plaintiff's land. None of the parties produced the pleadings from the lower court or the record of the appeal. However, it is clear from the submissions by the parties herein that the suit in the lower court relates to the use and occupation of land.
27. From the foregoing, it is crystal clear that this Court has jurisdiction to determine the Appeal herein as it relates to the use and occupation to land.
28. The 1st Respondent lamented that that the Applicant has filed similar applications in the lower court seeking for similar orders and involving the same parties.

Section 6 of the [Civil Procedure Act](#) provides as follows:-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.

29. It is obvious that the sub judice rule applies where another suit or proceeding is pending in another Court relating to the same parties or their privies over the same subject matter. The rationale behind



sub judice rule is to prevent conflicting orders emanating from two or more different courts over the same matter.

30. The 1st Respondent alleged that the applications dated 27/05/2024 and 13/06/2024 are similar to the present application as the prayers sought are similar and involve the same parties. The Applicant averred that the applications in the lower court were withdrawn in the presence of Counsel for the Respondent. The 1st Respondent admitted as much. From the foregoing, it is crystal clear that the application herein does not offend the provisions of Section 6 of the Civil Procedure Act. Moreover, Section 6 provides that where it is found that the suit is sub judice, the other suit should be stayed.
31. On the third issue, the Respondent contended that Mr Edgar Alema has no *locus standi* to swear the affidavit in support of the application as he is not a director of the Appellant company and has not exhibited the required authority given to swear the affidavit on behalf of the Appellant.

Order 9 Rule 2 of the Civil Procedure Rules provides as follows:-

“The recognised agents of parties whom such acts, appearances, applications and acts may be made or done are:-

- a. persons holding powers of attorneys authorizing them to make such appearances and applications and to do such acts on behalf of parties
 - b. persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts,
 - c. In respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”
32. In my view, the acts envisaged by these provisions include making applications, filing pleadings and appearing in court. The affidavit in support of the application was sworn by Edgar Alema, the legal Counsel of the Appellant Company who was duly authorized by the Appellant Company to swear the affidavit on its behalf. From the foregoing, I find that the deponent is a duly recognized agent of the Appellant Company and therefore has capacity to swear the affidavit on its behalf.
33. In the end, I find that the preliminary objection dated 11th June 2024 is devoid of merit and the same is hereby dismissed with costs.

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HON.T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11TH DAY OF DECEMBER, 2024.

In the presence of:

Kituku present for the Respondent

Masila for the Appellant

Court assistant Alfred

