



**Macharia v Muses & 2 others (Environment & Land Case
30 of 2014) [2023] KEELC 16385 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 30 OF 2014
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

SAMUEL KAMAU MACHARIA PLAINTIFF

AND

ALI KHAN ALI MUSES 1ST DEFENDANT

**ESTATE SONRISA LIMITED (SUED AS ESTATE OF SONRISA
LIMITED) 2ND DEFENDANT**

LAND REGISTRAR-KWALE 3RD DEFENDANT

RULING

1. The plaintiff filed in opposition to the case stated by the 2nd defendant/applicant dated September 5, 2022 a preliminary objection on the following grounds;
 1. That this honorable court is *functus officio* having heard and determined this matter and the matter having been appealed.
 2. That this suit was subject of an appeal in CA 14 of 2016 consolidated with 32 of 2016 where the report herein was requested from hence this court lacks Jurisdiction to entertain this suit.
 3. In the circumstances the suit is bad in law, incompetent and void ab initio. Same should be struck out/ dismissed with costs.
2. The plaintiff submits that the Court of Appeal delivered a conclusive judgement arising from a decree in this suit. The judgement and decree of this court was upheld by the Court of Appeal, save for order directing Land Registrar to establish encroachment and not boundary dispute as alleged in case stated. Having lodged a notice of appeal against ruling delivered in Kwale E001 of 2021 over the same subject matter (being case stated), this court cannot hear the case stated filed herein as same is subject to determination by the Court of Appeal. That the 2nd defendant ought to pursue its appeal in the Court



of Appeal in relation to orders issued in Kwale E001 of 2021 striking out the suit. This will amount to conducting parallel proceedings over the same subject matter before this court and Court of Appeal.

3. That the 2nd defendant has not disclosed to this court the existence of the notice of appeal filed from Kwale ELC 001 of 2021 (attached herein) hence amounting to abuse of court. In *Charter House Investment Limited v Simon K. Sang & 3 others* [2012] eKLR, Nyamu J held that both the concealment or non-disclosure and the filing of parallel proceedings seeking similar reliefs constitute an abuse of the court process. In the circumstances the 2nd defendant is guilty of concealment of material facts by failing to disclose to this court lodgment of the notice of appeal against the said ruling in which the main subject matter is same like the one before this court. Arising from the foregoing it is submitted that the current proceedings (which are substantive) by way of case stated are bad in law, incompetent and void hence should be struck out. That the decision of this court on case stated filed herein one way or the other will end up being in conflict with Court of Appeal findings in relation to Kwale E001 of 2021. The account of the foregoing submissions, the preliminary objection is well founded and should be upheld. That the case stated (suit) by 2nd defendant ought to be struck out accordingly.
4. The 2nd defendant submitted that the case stated has been filed in compliance with section 79(3A), 80, 86 and 91(9) of the *Land Registration Act* and in compliance with the judgement delivered by the Court of Appeal. That on May 18, 2021 the parties in compliance with the ruling and judgement of the Court of Appeal attended a survey exercise conducted by the 3rd defendant/respondent to determine encroachment between land parcels Galu/Kinondo/50 and Kwale/Galu/Kinondo/48. That on the July 2, 2021 the 3rd defendant/respondent served upon the plaintiff's advocate its report acknowledging that indeed the 2nd defendant/applicant's property is 1.9 ha in accordance with all available records except for the title which had an error showing that the plaintiff/applicant's property was 0.9ha. that being aggrieved by the 3rd defendant/respondent's decision they filed the case stated in Kwale Environment and Land Court which was dismissed hence they came to this court.
5. This court has considered the preliminary objection and submissions therein. The preliminary objection herein seeks to oust the suit/ case stated herein on the basis that this court lacks the jurisdiction to hear and determine the same as the court is functus officio. In order to arrive at an informed and just decision, the following salient issues come to mind;
 - a) Whether the preliminary objection dated October 21, 2022 by the plaintiff meets the fundamental threshold of a preliminary objection.
 - b) Whether this honorable court has jurisdiction to hear and determine the matter

Whether the preliminary objection dated October 21, 2022 by the plaintiff meets the fundamental threshold of a preliminary objection.

6. According to the *Black Law Dictionary* a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
7. The above legal proposition has been made in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 where the court held that;

“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 demurer 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 in 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”

8. In the case of *Attorney General & another v Andrew Mwaura Gitbinji & another* [2016] eKLR the court outlined the scope and nature of preliminary objection as;
 - (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
9. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the plaintiffs herein is properly brought before the court.

Whether this honorable court has jurisdiction to hear and determine the matter.

10. In the instant suit the plaintiff has based his preliminary objection on the ground that this court lacks jurisdiction to hear and determine the 2nd defendant’s case stated/ suit as it is functus officio. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the 2nd defendant’s case as outlined are true not because without jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the *Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:
11. Assumption of jurisdiction by courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p 14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and 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.”

[30] *The Lillian ‘S’ case* establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme



Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

12. Counsel for the plaintiff argued that the preliminary objection that this court is functus officio by virtue of the fact that this matter has already been heard and determined at the Court of Appeal. Jurisdiction is everything and without Jurisdiction the court has no option but to down its tools. See the case of Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Ltd [1989] 1 KLR, 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 pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

13. In the case of County Government of Migori v I N B Management IT Consultant Limited [2019] eKLR the court held that;

“10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme Court of Kenya Civil application No 11 of 2016-“*Hon (Lady) Justice Kalpana H Rawal v Judicial Service Commission and others* when in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria supreme case No 11 of 2012- “*Ocheja Immanuel Dangama v Hon Atoi Aidoko Aliaswan and 4 others* where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

14. This instant suit, the plaintiff stated that the Court of Appeal delivered a conclusive judgement arising from decree in this suit. The judgement and decree of this court was upheld by the Court of Appeal, save for order directing Land Registrar to establish encroachment and not boundary dispute as alleged in case stated.
15. The Supreme Court of Kenya expounding on the doctrine of *functus officio* in election petitions Nos 3, 4 & 5 Raila Odinga & others v IEBC & others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio doctrine, with Specific Reference to its Application in Administrative Law,” [2005] 122 SALJ 832:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”



16. The court also relied on the holding in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect that;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

17. Having discharged its duty in this case and the matter concluded in the Court of Appeal this court is therefore functus officio, defined in *Black's Law Dictionary*, ninth edition as;

“(having performed his or her office) (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

18. In the circumstances, the court is wary of the 2nd defendant’s invitation to re-engage with this dispute in a manner that necessarily involves wading into a new controversy between the parties of giving opinions on the order of the Court of Appeal. I find that the preliminary objection is merited and the case stated/suit is therefore struck out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

