



**Kinuthia & another v Wanyiri (Miscellaneous Civil Case
E026 of 2022) [2023] KEHC 1227 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL CASE E026 OF 2022
CM KARIUKI, J
FEBRUARY 23, 2023**

BETWEEN

DANIEL MACHARIA KINUTHIA 1ST APPLICANT

ENOCK KIHANGI NDIGIREGI 2ND APPLICANT

AND

AMOS WANGÓMBE WANYIRI RESPONDENT

RULING

1. By exparte application, the applicant seeks orders.
 - a. That this honourable court be pleased to extend the time and grant the applicants leave to institute a suit against the respondent out of time.
 - b. That the costs of this application be in the cause.
2. Same is based on grounds.
 - I. That the respondent misrepresented his identity to the applicants and on various dates sold to the 1st and 2nd applicants herein two (2) acres and one (1) acre parcels of land, respectively, which were to be exercised from all title known as LR; Nyandarua/Ndaragwa/522.
 - II. That the applicants paid to the respondent herein the agreed purchase price in the sum of Kenya Shillings six hundred and ten thousand (Kshs 610,000) by the 1st Applicant and Kenya Shillings Three Hundred and five (Kshs 305,000) by the 2nd applicant which amount the respondent acknowledged receipt of.
 - III. That contrary to the terms of the agreements, the respondent failed and/or refused to execute all the necessary documents for the completion of the said transactions and refused the applicants herein to take possession of the purchased parcels of land.



- IV. That the applicants tried entreating the respondent to honour the terms of the said agreements which he refused resulting them to report the matter at Nyahururu Police Station.
 - V. That subsequently, the respondent was charged in Criminal case No 2904 of 2015, *Republic v Amos Wang'ombe Wanyiri* with two counts of obtaining money by false pretence contrary to section 313 of the *Penal Code*.
 - VI. That the criminal litigation process took place to its conclusion and the matter was decided on merit where the respondent was found guilty as charged and sentenced to one (1) year and Six (6) months imprisonment on or about March, 2020.
 - VII. That the applicants now want to institute a suit against the respondent for an order for specific performance and/or recovery of all monies remitted to the respondent by them but the same have been caught up by the law of limitation.
 - VIII. That the applicants have plausible reasons for not filing the suit in time.
 - IX. That is, it is only just and in the interest of justice that the application be allowed.
3. The application is supported by an affidavit sworn by Daniel Macharia Kinuthia sworn on December 19, 2022.

Issues, Analysis, And Determination

4. The court discerns from what is deposed and set out in supporting grounds the issue is whether the application meets the threshold of being granted as prayed and the orders as to costs. However, there is also a collateral issue on whether this court grants leave to lodge a claim, which is predominately under the domain of the ELC, namely the specific performance of the sale of the land contract.
5. The matter was appealed to the Supreme Court in Petition No 5 of 2015 *Republic v Karisa Chengo & 2 Others* [2017] eKLR. The Supreme Court rendered itself as follows:
6. “[50] ... Article 162(1) categorizes the ELC and ELRC among the Superior Courts, and it may be inferred, then, that the drafters of the *Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of courts”
7. Concurring with this view, the learned judges of the Court of Appeal in the present matter observed that both the specialized courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other.” Thus, a decision of the ELC or the ELRC cannot be the subject of an appeal to the High Court; and none of these courts is subject to supervision or direction from another.[51][52] In addition to the above, we note that pursuant to article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.[79] It follows from the above analysis that, although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the judges appointed to



those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this constitution; or (b) falling within the jurisdiction of the courts contemplated in article 162(2).

8. The foregoing is the obtaining legal position. The matter, however, did not end there. A further problem arose. It was on the cases raising ‘cross-cutting’ or ‘cocktail’ or ‘mixed grill’ issues within either court. Initially, there were two schools of thought in the High Court on the matter. One school favored the ‘pre-dominant purpose test’ whereas the other school rooted for the ‘pre-dominant issue before court test.’

9. The proponents of the former include Ngugi, J, who rendered himself in Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another (2016) EKLK as follows: -

“When faced with a controversy, whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the courts utilize the pre-dominant purpose test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works”

10. The court must first determine whether the predominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

11. Munyao, J was for the other test, In Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eKLR the Learned Judge argued as follows: -

“..... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the charge, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then the such issue would fall for determination before the ELC.”

12. Thus, in view of the above-cited cases’ legal exposition, I find the predominant claim will be on specific performance which is within the domain of the ELC court; thus, this court cannot entertain the instant application but instead refers it to the ELC court at Nyahururu law courts for hearing and determination.



DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 23RD DAY OF FEBRUARY 2023.

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CHARLES KARIUKI

JUDGE

