



REPUBLIC OF KENYA



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**Lake Basin Development Authority v Dominion Farms Limited & another
(Civil Suit 1 of 2020) [2023] KEHC 2855 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 1 OF 2020
JN KAMAU, J
MARCH 30, 2023**

BETWEEN

LAKE BASIN DEVELOPMENT AUTHORITY PLAINTIFF

AND

DOMINION FARMS LIMITED 1ST DEFENDANT

LAKE AGRO LIMITED 2ND DEFENDANT

RULING

1. In its Notice of Motion dated 4th August 2020 and filed on 5th August 2020, the Plaintiff herein sought for an order of permanent injunction to restrain the Defendants by themselves, agents, servants and/or employees authorised by them and all trespassing persons from entering in its property Title Number Siaya Kadenge/899 (hereinafter referred to as “the subject property”). It also sought for an order for vacant possession and eviction of the Defendants from the large scale farm situated in Yala Swamp on the said subject property and that upon the said orders being granted, the Officer Commanding Station (OCS) in charge of Siaya Police Station to assist in the eviction forthwith of the Defendants who were in occupation of the subject property.
2. It also sought that pending the hearing and determination of this suit, this court do grant an order of security for the claim of provisions to be made by the Defendants for the liabilities in the nature of outstanding rent arrears owing to it by the 1st Defendant as per prayer (b) of the Plaint dated 3rd February, 2020.
3. In opposition to the said Plaintiff’s application, on 3rd November 2021, the 2nd Defendant filed a Notice of Preliminary Objection of even date. It averred that the orders the Plaintiff had sought pertained to the use and occupation of, and title to land and that although they were substantive and final in nature, they were not anchored in the Plaint thereby giving rise to an entirely new cause of action that was not contemplated in the Plaint.



4. It contended that this court had no jurisdiction to entertain the Plaintiff's application as the same was exclusively vested in the Environment and Land Court as was envisaged in the Constitution of Kenya, 2010 and the Environment and Land Court Act 2011. It averred that this court ought not to entertain the said application, which it termed as mischievous and a gross abuse of court process.
5. Its undated Written Submissions were filed on 28th April 2022 while those of the Plaintiff were dated 11th June 2020 and were filed on 13th June 2022. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

6. It appeared to this court that the issues that had been placed before it were:-
 - a. whether or not this court had jurisdiction to deal with this matter;
 - b. whether or not the present application was competent as drawn.
7. This court found it prudent to deal with the said issues under the distinct and separate heads shown hereinbelow.

I. Jurisdiction

8. The 2nd Defendant invoked Article 162(2) and (3) and 165(5) of the Constitution of Kenya 2010 and Section 13 (2) of the Environment and Land Court Act of 2011 and argued that orders against the trespass to land, the granting of vacant possession to property and/or eviction from the same are all matters that related to the environment, use, or occupation of and title to the subject property vesting the Environment and Land Court the jurisdiction to hear and determine the same.
9. It submitted that a court of law could not take any step without jurisdiction. In that regard, it placed reliance on the case of Interim Independent Electoral Commission [2011] eKLR and Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 where the common thread was that jurisdiction was everything and without it a court had no power to make one more step.
10. It further relied on the case of Republic v Karisa Chengo & 2 Others [2017] eKLR where it was held that the Environment and Land Court, the Employment and Labour Relations Court and the High Court were different and autonomous courts that exercised different and distinct jurisdiction.
11. On its part, the Plaintiff cited the cases of Nandla Jivraj Shah & 2 Others [2015] eKLR and Risper Kerubo Onsare v Vijay Kumar Saidha & 2 Others [2021] eKLR where the common thread was that the High Court had jurisdiction to seek vacant possession where there was no landlord/tenant relationship and/or tenancy agreement between the parties.
12. It was its contention that filing another suit in the Environment and Land Court where the substance of that suit was similar to the instant suit would amount to an abuse of the court. In that respect, it referred this court to the definition of abuse in the Black's Law Dictionary which was said to be "everything which is contrary to good order established by usage that is a complete departure from reasonable use."
13. To buttress its point, it placed reliance on the case of Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR where it was held that the multiplicity of actions on the same matter between the same parties even where a right existed to bring the action was regarded as an abuse.



14. It was its case that a Preliminary Objection ought to raise pure points of law that would not call for evidence and that where it raised a matter of fact that was contested, it ceased to be valid as was held in the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd (Supra)* and *Oraro v Mbaja* (2005) KLR 141.
15. It was emphatic that its matter was properly before this court and the court had jurisdiction to hear and determine the said application and the Preliminary Objection should be dismissed.
16. In its Statement of Defence and Counter-Claim dated 23rd November 2017 and filed on 4th December 2017 in Kisumu HCCOM No 22 of 2018 *Dominion Farms Ltd v Lake Basin Development Authority & Victoria Blue Auctioneers Services* (formerly ELC No 156 of 2017), the Plaintiff herein had sought the following reliefs:-
 - a. A sum of Kshs 34,130,000/= together with interest thereupon at the prevailing commercial rates of interest from 1st July 2013 until payment in full.
 - b. Costs of the Counter-claim and interest thereon at such rate and for such period of time that this Honourable Court ay (sic) deem fit to grant; and
 - c. Such further or other reliefs as may be appropriate in the circumstances.
17. In Paragraph 11 of the Plaintiff's Plaint dated and filed on 3rd February 2020, it was indicated that the 1st Defendant's suit was dismissed for want of prosecution and the court proceeded with its Counter-claim whose decision was to be delivered on 6th February 2019.
18. In her decision of 6th February 2020, Cherere J dismissed the Plaintiff's Counter-claim in Kisumu HCCOM No 22 of 2018 *Dominion Farms Ltd v Lake Basin Development Authority & Victoria Blue Auctioneers Services* (formerly ELC No 156 of 2017) on the ground that the Plaintiff herein did not prove that there was a tenancy agreement.
19. According to the 1st Defendant herein, the Plaintiff appealed against the said decision in Kisumu Court of Appeal Case No 101 of 2020 *Lake Basin Development Authority v Dominion Farms Ltd & Lake Agro*. It asserted that the Court of Appeal was yet to give its decision.
20. There was no indication that the decision of Cherere J to the effect that there was no tenancy agreement had been challenged so as to bring this matter within the ambit of the Environment and Land Court. The decision was given by a court of equal and competent jurisdiction and consequently, this court could not pronounce itself on which court ought to hear the matter.
21. Notably, the matter was pending before the Court of Appeal which restrained this court further from making a determination on the said issue as its decision could either embarrass itself or the Court of Appeal if its determination was contrary to that of the Court of Appeal. This court therefore determined that it was most prudent to await the decision of the Court of Appeal which binds all other courts below it.

II. Competence of the Application

22. The 2nd Defendant pointed out that an application was not a suit by itself and as such the orders sought therein should be firmly anchored on the contents of the Plaint. It asserted that whereas the Plaintiff's Plaint dated 3rd January 2020 had sought injunctive orders to bar the transfer of business from the 1st Defendant to the 2nd Defendant, the present application pertained to trespass, vacant possession and eviction from the subject property and reiterated that it had raised an entirely new cause of action not contemplated in the Plaint.



23. It added that the Plaintiff did not pray for any relief in the nature of a permanent injunction in its Plaintiff yet it had sought for temporary injunctive reliefs in its said application.
24. In that respect, it relied on the case *D.T Dobie & Co (K) Ltd v Muchina* (1982) KLR where the court defined a cause of action as an act on the part of the defendant which gave the plaintiff a cause of complaint. It was its case that the Plaintiff's application was incurably defective and an abuse of the court process.
25. It also placed reliance on the case of *Morris & Co Ltd v Kenya Commercial Bank Ltd & Others* [2003] 2 EA 605 where a plaintiff's prayer for injunction was held to be incompetent and was struck out as there was no prayer for a permanent injunction that had been sought in its plaint.
26. It further contended that a court should not grant interim relief which amounted to final orders unless in very special circumstances. It asserted that the Plaintiff had sought final mandatory orders in its application which ought not to be granted an interlocutory stage. It was its contention that if the same was granted, it would pre-empt the hearing of the main suit as there was a likelihood of determining the matter with finality without any evidence having been heard or a suit having been determined on its merits.
27. In this regard, it relied on the case of *Kenya Power & Lighting Co. Ltd v Sherrif Molana Habib* [2018] eKLR where it was held that a permanent injunction was granted upon the hearing of the suit and fully determined the rights of parties and was thus a decree of the court.
28. It also referred this court to the cases of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 Others* [2015] eKLR and *Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola* [2009]eKLR where the common thread was that an order which resulted in granting of a major relief ought not to be granted at an interlocutory stage.
29. It further relied on the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another* [2016] eKLR wherein the court outlined grounds which could form the basis of a preliminary objection as comprising lack of jurisdiction over the subject matter, failure of a pleading to conform to law or rule of court, insufficient specificity in a pleading, legal insufficiency of a pleading, lack of capacity to sue, non-joinder of a necessary party or a mis-joinder of a cause of action or pendency of a prior action or agreement for alternative dispute resolution.
30. The Plaintiff did not specifically address itself to the issue of competence of its application. A perusal of the Plaintiff dated and filed on 3rd February 2020 showed that it sought the following reliefs:-
 - a. An injunction to restrain the business transfer between the 1st and 2nd Defendants pending the judgment on the Plaintiff's Counter-claim in Kisumu High Court Commercial Suit No 22 of 2018 is determined (sic).
 - b. Provisions to be made by the Defendants for the liabilities owed by the 1st Defendant to the Plaintiff.
 - c. The 2nd Defendant to offset the debt owed to the Plaintiff by the 1st Defendant.
 - d. An order restraining the Registrar General from effecting any transfer of the said business either in whole, in part or fraction from the 1st Defendant to the 2nd Defendant and effecting any transfer of shares, (sic) and/or taking over any existing contracts that bestows on the 2nd Defendant until and unless provision is made for the settlement of the debts owed by the 1st Defendant to the Plaintiffs'.



- e. Costs of the suit and interest thereon at court rates of 14% p.a. from the date of filing suit.
- f. Any other relief that this Honourable Court may deem just and expedient to grant.
31. In Prayer No (5)(sic) of its present application, it had sought orders to restrain the Registrar of Companies from transferring the 1st Defendant's Business to the 2nd Defendant, shares of the 1st Defendant to the 2nd Defendant and/or effecting any change in particulars of the 1st Defendant in favour of the 2nd Defendant pending the hearing and determination of the present application.
32. Notably, this prayer was spent as it was pending the hearing and determination of the application. However, assuming that the same was intended to be pending the hearing and determination of the suit, this court took the view that it did not mirror the main prayer in the Plaintiff. The prayers in the suit had sought to restrain the Registrar General while the application had sought to restrain the Registrar of Companies.
33. Going further, Prayer Nos (3) and (4) of the said application were the same prayer. They were seeking to restrain the Defendants, their servants, agents and/or legal representatives from transferring, alienating and/or interfering with the ownership and/or shares to the 1st Defendant. This prayer did not also mirror the prayers in the application.
34. In the case of *Shirin Jiwa v Ismailia Co-operative Society Limited* [2015] eKLR, this very court rendered itself as follows:-
- “...It was evident that although the Plaintiff had argued that her application was in line with the prayers that she had sought in her Plaintiff, the orders sought in the application herein had no relation to the reliefs sought in the Plaintiff. The prayers were distinct. It is irrespective that the matters at issue arose out of the same transactions as had been contended by the Plaintiff for the reason that they purported to create a totally new cause of action. They had no relationship whatsoever with the subject matter of the suit as had been rightly pointed out by the Defendant...the court did not see the nexus of that prayer to the reliefs that the Plaintiff had sought in her Plaintiff.”
35. In addition, as Kisumu Court of Appeal Case No 101 of 2020 *Lake Basin Development Authority v Dominion Farms Ltd & Lake Agro* does not appear to have been determined, this court took the view that granting interlocutory orders as the Plaintiff had sought had the potential of different courts rendering different decisions that could cause confusion.

Disposition

36. For the foregoing reasons, the upshot of this court's decision was that the 2nd Defendant's Preliminary Objection dated and filed on 3rd November 2021 was merited and the same be and is hereby upheld. The effect of this decision is that the Plaintiff's Notice of Motion dated 4th August 2020 and filed on 5th August 2020 be and is hereby dismissed. Costs of the application will be in the cause.
37. It is so ordered.

DATED AND DELIVERED AT KISUMU ON THIS 30TH DAY OF MARCH 2023

J. KAMAU
JUDGE

