



**Lake Basin Development Authority v Dominion Farms Limited & another
(Civil Suit 1 of 2020) [2023] KEHC 2840 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2840 (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, the Plaintiff herein sought 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 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. On 26th October 2021, the 1st Defendant filed Grounds of Opposition and a Notice of Preliminary Objection both dated 25th October 2021 in opposition to the aforesaid Plaintiff’s application. It sought that the same be struck out with costs on the grounds that this court had no jurisdiction to hear and determine this matter by dint of Article 162(2)(b) of *the Constitution* of Kenya as the jurisdiction of this suit under the said provisions lay with the Environment and Land Court (ELC).



4. It contended that this court further lacked jurisdiction to hear and determine the Plaintiff's application by dint of Section 13 of the *Environment and Land Court Act* which gave the ELC the original and appellate jurisdiction to determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provision of the said or any other law applicable in Kenya relating to environment and land.
5. It further stated that the court also lacked jurisdiction to hear and determine the issue of rent arrears allegedly owing and due from the 1st Defendant to the Plaintiff by dint of the principle of res judicata as the same had been determined on 6th February 2020 in Kisumu HCCOM No 22 of 2018 *Dominion Farms vs Lake Basin Development Authority & Another*.
6. It termed the said application as incompetent, frivolous, misconceived and a clear abuse of the court process which was intended to create a legal morass, frustrate and embarrass the 1st Defendant.
7. On 1st December 2021, the Plaintiff filed Grounds of Opposition dated 25th October 2021 in opposition to the 1st Defendant's Preliminary Objection. It averred that the aforesaid Preliminary Objection as presented was incurably defective, misconceived, misplaced and hinged on the wrong provisions of the law and procedure. It added that the same was scandalous, vexatious and an abuse of the court process. It pointed out that the said Preliminary Objection did not meet the legal and procedural threshold of granting the orders sought.
8. The 1st Defendant's Written Submissions were dated 17th January 2022 and filed on 18th January 2022 while those of the Plaintiff were dated 11th June 2020 and filed on 13th June 2022. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

Legal Analysis

9. 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 this matter was res judicata
10. This court found it prudent to deal with the issues under the distinct and separate heads shown hereinbelow.

I. Jurisdiction of the Court

11. Both the Plaintiff and the 1st Defendant relied on the celebrated case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Ltd* [1969] EA 696 where it was held that a preliminary objection consisted of a point of law which had been pleaded which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit.
12. The 1st Defendant invoked Section 3 of the *Judicature Act* and placed reliance on the case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR where it was held that jurisdiction was everything and without it a court had no power to make one more step but that it must down its tools. It also placed reliance on the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR where it was held that a court's jurisdiction flowed from either *the Constitution* or legislation or both and that a court of law could only exercise jurisdiction as conferred by *the Constitution* or other written law.
13. It further cited Article 2(1), 2(4), 162 (1) and (2) and 165(5)(b) and referred this court to the case of *Republic vs Karisa Chengo & 2 Others* [2017] eKLR where it was held that even though the High



- Court, the Employment and Labour Relations Court and the Environment and Land Court were courts of equal status, they were different courts standing in their distinct autonomies, each exercising a special dedicated jurisdiction.
14. It also relied on the case of *Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 Others* [2017] eKLR where it was held that Article 165(5) was clear that the High Court had no jurisdiction in respect of matters falling within the jurisdiction of specialised courts.
 15. It contended that the issues that were raised by the Plaintiff related to land which could only be exclusively dealt with by the Environment and Land Court and not this court. It further invoked Section 13(1), (2) and (3) of the *Environment and Land Court Act* and argued that the jurisdiction speciality of courts was so sacrosanct that even if the Plaintiff's application was dealing with issues of interpretation of *the Constitution* or infringement of rights and freedoms pertaining to land, this court would still not have jurisdiction.
 16. In that respect, it relied on the case of *Kenya Urban Roads Authority vs Ministry for Roads & Another* [2017] eKLR where the court held that the Environment and Land Court had jurisdiction to deal with issues relating to denial, violation or infringement of or threat to rights and fundamental freedoms. It pointed out that a judge of either courts could not sit in the other courts and be deemed as constitutionally constituted as was held in the case of *Republic vs Karisa Chengo & 2 Others* (Supra).
 17. It added that in any event, appeals from the subordinate courts which were conferred with jurisdiction to hear and determine environment and land matters under Section 26(3) and (4) of the *Environment and Land Court Act* lay with the Environment and Land Court and not with the High Court.
 18. On its part, the Plaintiff cited the cases of *Nandla Jivraj Shah & 2 Others* [2015] eKLR and *Risper Kerubo Onsare vs 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.
 19. 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."
 20. To buttress its point, it placed reliance on the case of *Republic vs 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.
 21. 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 vs West End Distributors Ltd* (Supra) and *Oraro vs Mbaja* (2005) KLR 141.
 22. 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.
 23. 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 vs 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.
24. In Paragraph 11 of the Plaintiff's Complaint 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.
 25. 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 vs 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.
 26. 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 vs Dominion Farms Ltd & Lake Agro*. It asserted that the Court of Appeal was yet to give its decision.
 27. 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.
 28. Notably, the matter was pending before the Court of Appeal which further restrained this court 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. Res Judicata

29. The 1st Defendant invoked Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya and relied on the case of *Nathaniel Ngure Kihiu vs Housing Finance* [2018] eKLR where it was held that the emphasised words in the definition of res judicata at Section 7 of Cap 21 were "suit" and "issue" and that the essentials of res judicata was a thing or matter that had been adjudged or a thing or matter that was settled by judgment.
30. It placed reliance on the cases of *J N & 5 Others vs Board of Management, St. G School Nairobi & Another* [2017] eKLR, *Maithene Malindi Enterprises Limited vs Kariuki Karisa Kariuki & 2 Others* [2018] eKLR and *Regina vs Hogan* [1974] 1QB 398 at 401 where the common thread was that a party was estopped from raising issues that had been finally determined in a previous litigation even if the cause of action and relief were different.
31. It further submitted that from the Complaint and the final prayers at prayer (a), (b) and (c) the suit herein solely depended on the determination in Kisumu HCCOM No 22 of 2018 *Dominion Farms Ltd vs Lake Basin Development Authority & Victoria Blue Auctioneers Services* in which it had claimed the sum of Kshs 34, 130, 000/= being rent in rent arrears.



32. It added that the Plaintiff preferred an appeal against the said decision vide Kisumu Court of Appeal Case No 101 of 2020 [*Lake Basin Development Authority vs Dominion Farms Ltd & Lake Agro*](#) but the same is yet to be heard.
33. It was its case that the issue of Kshs 34,130,000/= having been determined by Cherere J in Kisumu HCCOM No 22 of 2018 [*Dominion Farms Ltd vs Lake Basin Development Authority & Victoria Blue Auctioneers Services*](#), the cause was frowned upon by Sections 7 and 8 of the [*Civil Procedure Act*](#).
34. On its part, the Plaintiff cited the cases of *Nandla Jivraj Shah & 2 Others* [2015] eKLR and *Risper Kerubo Onsare vs 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.
35. It argued that its application sought to have the 2nd Defendant from its premises, the subject property, which was occupied by it under a Memorandum of Understanding and a periodic tenancy agreement and that pursuant to the transfer of business between the 1st Defendant and the 2nd Defendant, the 2nd Defendant had taken possession and occupation of the property. It pointed out that the same had occurred without a tenancy agreement between the Plaintiff and the 2nd Defendant and therefore in the absence of such tenancy agreement, this court had the jurisdiction to determine matters seeking vacant possession.
36. 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."
37. To buttress its point, it placed reliance on the case of [*Republic vs 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.
38. 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 vs West End Distributors Ltd* (Supra) and [*Oraro vs Mbaja*](#) (2005) KLR 141.
39. 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.
40. A perusal of the Plaintiff dated and filed on 3rd February 2020 showed that the Plaintiff 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.
41. Prayer (a) of the Plaintiff’s Plaint appeared to have been overtaken by events as the same had sought that an injunction be granted to restrain the business transfer between the 1st and 2nd Defendants pending Plaintiff’s Counter-claim in Kisumu High Court Commercial Suit No 22 of 2018 which in the understanding of this court was delivered by Cherere J on 6th February 2020.
42. The issue of provision of the debt the 2nd Defendant owed to the Plaintiff did not appear to have been addressed by the court although the subject matter appeared to be the same and being litigated by the same parties. To avoid pre-empting the Plaintiff’s case, this court was not persuaded to find that this matter was res judicata more so when there was a matter pending at the Court of Appeal whose outcome was presently unknown. There was a possibility that the Court of Appeal could also overturn the decision of Cherere J.
43. This court took the view that the Preliminary Objection relating to the issue of res judicata ought to be raised at the time of hearing the suit as courts ought to restrain themselves from dismissing their matters in limine.

Disposition

44. For the foregoing reasons, the upshot of this court’s decision was that the 1st Defendant’s Preliminary Objection dated 25th October 2021 and filed on 26th October 2021 was not merited and the same be and is hereby dismissed. Costs of the Preliminary Objection will be in the cause.
45. It is so ordered.

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

J. KAMAU
JUDGE

