



REPUBLIC OF KENYA



KENYA LAW
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**Patel v Kenya Railways Corporation (Civil Suit 72 of 2021)
[2023] KEHC 18539 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 72 OF 2021
DKN MAGARE, J
APRIL 28, 2023**

BETWEEN

ATULKUMAR RAMANBHAI PATEL PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

RULING

1. The plaintiff filed suit against the defendant on August 14, 2021 the same claiming damages given in HCC 202 of 2004. This said suit was dismissed on February 4, 2021 for want of prosecution. The earlier suit had been filed before the new constitution came into being.
2. The applicant made an application dated October 26, 2022 praying for;
 - a. That this honourable court be pleased to order to be struck out paragraphs 4,5,6,9,11,12and 13 of the defendant’s defence;
 - b. That in the alternative this honourable court be pleased to order that the defendants defence be amended so as to remove the above-mentioned impugned paragraphs 4,5,6,9,11,12, and 13 of the said defence
 - c. That the costs of this application n be proved for.
3. Before dealing with the application, I need to be satisfied that I have jurisdiction over the subject matter. This was the holding in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, by Nyarangi JA as then he was as doth: -

“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. Where a court has no jurisdiction, there would be no basis for



a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

4. There are two aspects of jurisdiction that I need to address. The first one is the issue of enforcement of an undertaking while giving an injunction in a suit. The second one is the material jurisdiction or the so-called subject matter jurisdiction, that is jurisdiction *ratione materiae*.
5. We start with the first. The undertaking was given in a suit. The suit in that case being HCC 202 of 2004. The Case herein related to enforcement of an undertaking arises from an order of injunction given in the former suit. Section 34 of the [Civil Procedure Rules](#) proves as follows;

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

6. This gains support in the case of [Nazir Jinnah v Asmahan Peterson & 2 others](#) [2013] eKLR, the court stated as doth: -

“I have considered the provisions of section 34 (1) of the Civil Procedure Act which are very clear. It reads: -

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”



To my mind therefore, any questions as to the value of the suit motor vehicle, the legality of the auction sale or the execution process should be addressed to the court executing the decree. In this instance, it is the Chief Magistrate’s Court at Milimani. As I read section 34 (1) this Court has no jurisdiction in relation to such matters and on that ground alone, I would dismiss the Plaintiff’s application dated 28 November 2012 and order that the suit herein be struck out.”

7. Therefore, if there is an undertaking to enforce the same should be done or should have been done in the former suit. The court in that suit should be satisfied that the undertaking was discharged.

8. Secondly, the claim is in relation to land parcel No Mombasa Block XIV/84. Article 165(5) of the [constitution](#) provides as follows: -

“The High Court shall not have jurisdiction in respect of matters—

- (a) 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).

9. Article 162 (2) of the [constitution](#) provides as follows; -

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.

10. In the plaint, filed herein, the plaintiff is seeking damages arising from an injunction against construction and use over land parcel No Mombasa Block XIV/84 measuring 1.125 acres devised to the plaintiff.

11. The matters in issue fall within the provision of Section 13 of the [Environment and Land Court Act](#). Section 13 (2) of the said act states as doth: -

“2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.

12. The said court has jurisdiction under Section 13(7) of the [Environment and Land Court Act](#) to award: -



- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- (i) costs.

13. The suit that is HCC202 of 2004 was also a land matter. In [*Mohamed Ali Baadi and others v Attorney General & 11 others*](#) [2018] eKLR, the court stated as doth: -

“100. The Supreme Court in *Republic vs Karisa Chengo & 2 Others*^[47] amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status Courts under Article 162(2) (b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case

14. This court cannot handle matters in the courts of equal status. This is directly forbidden by the [*constitution*](#). I cannot arrogate myself power not allocated to me. In [*Republic v Karisa Chengo & 2 others*](#) [2017] eKLR, the supreme court posited as doth: -

“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).”

15. This is reiterated in an earlier case where the supreme court decided on the issue of jurisdiction. [*In Re- Interim Election Commission*](#) Petition No 2 of 2011, the Supreme Court rendered itself as doth: -

“(29) 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 endeavours 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."

16. The question is whether, I should transfer the case, once I find tat it is a Lnd matter. The opinion is divided. In *Pamoja Women Developed Programmed and 3 Others Vs Jackson Kihuba Wangombe & Another* (2016)eKLR, Justice Prof, Ngugi Judge, as then he was, held as doth;-

“in my view, this indicated concurred jurisdiction includes the ability of both the High Court and the Equal states Court to deal with certain procedure of administrative questions that present quasi-judicial issues where the Court in question is requested to acts in the interest of justice or due administration of justice. That is where I would locate the ability of the three Superior Courts or cognate jurisdiction to transfer to the counterpart Superior Court any case filed before it that would more appropriately be adjudicated in the cognate Superior Court under the inspected and concurrent jurisdiction, the High Court was able for example to transfer certain matters to the environment and Environment and labour relations Court mutually.

I also held in Nairobi Petition No 343 Of 2019 Between *Afrison Export Import Limited and Another Versus National Land Commission and 10 others* as doth: -

“Now turn to the rest of the claim. The same is predominantly a land matter with a sprinkling of claims that relate to breach international treaties by forcible take over by government of private property. These claims are quasi-independent from the claim of land. Further, the claim of levying of rates to third parties on land they do not own is strictly no land. However, it is an appendage to the main claim.

Further, I note there are several interests noted in the register of the suit land. It is therefore necessary that the matter be transferred to the land court so that all these clams can be dealt with, if the suit survives or such part of the suit that survives Res judicata.

I do not wish to delve into the issue of res judicata, as this may unduly tie down the court dealing with the question and the question 2nd Respondent's Application. However, given that the predominant question is land, exercise my discretion transfer the entire claim, including execution for the struck out portion, as they are inseparable, to the environment and land court.”



17. The defence filed a Preliminary Objection raising 3 questions but I think on 2 are sufficient. Objection c and d have merit. However, I need not address them.
18. From the totality of the forgoing I am satisfied of the claim herein can only be raised in the former suit and in the land court. Having been made in a court without jurisdiction. I do not need to address the applicant dated October 26, 2022.
19. I do not find any predominant matters. All the issues raised relate to land matters. The issue of undertaking was given in a specific case. It cannot be transferred. The only order commending itself is that the entire suit is filed in a court without jurisdiction. I have not power to transfer the same.
20. Consequently, I hereby strike out the entire suit with costs. This is informed by section 27 of the *civil procedure Act*. Section 27 of the *Civil Procedure Act* provides;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

Determination

21. This court lacks jurisdiction to entertain the claim the court having no power to transfer a case filed in a court without jurisdiction. The entire suit together with the application dated October 26, 2023 are struck out in limine. Costs to the defendant.
22. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Miss Olwe for the Plaintiff

Nzamsa for Ms Omote for the Defendant

Court Assistant - Brian

