Kenya Petroleum Refineries Ltd v Municipal Council of Mombasa & another (Civil Suit 259 of 2008) [2023] KEHC 21034 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21034 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 259 OF 2008

DKN MAGARE, J

JULY 25, 2023

BETWEEN

KENYA PETROLEUM REFINERIES LTD ..... PLAINTIFF

AND

MUNICIPAL COUNCIL OF MOMBASA ..... 1ST DEFENDANT

MAKURI ENTERPRISES ..... 2ND DEFENDANT

JUDGMENT

1. This suit was filed before the onset of the new constitution, that is on September 10, 2008. What is it doing in court 15 years later is a mystery. This matter should never have been in court in first place. The matter came for hearing on July 5, 2023 when, without any sense of shame, the defendant sought an adjournment. I declined for the reason that the reasons given for seeking the adjournment were flimsy.

2. I heard the plaintiff and they were cross examined. For the Defence hearing, I requested that the defence call its witness. The Advocate informed me that the witness, though informed, had gone to Taita Taveta for official business. I noted that the official is a rating officer who has no business being outside the County. I found the request for adjournment cavalier and undeserved.

3. I Ordered the defence case closed and gave a date for submissions. At first I thought this was a land matter. I then noted, it is a dispute that the publication in its ordinary and full context means that;

    a. The plaint did not honour its financial obligations

    b. The plaintiff is dishonest in its activities.

4. The publication was injurious to the reputation of the plaintiff.

5. There was no dispute that the named parcels of land belonged to the plaintiff. The only question was on what basis was the same being advertised for sale.

6. The plaintiff pleaded that letters had been issued on August 7, 2008 and August 12, 2008 on the issue of purported rules.

7. The defendant filed Amended defence dated August 24, 2012 and stated that the plaintiffs have no reasonable course of action.

Analysis

8. There is no question that the suit land consists of Kenya's old and only surviving Oil Refinery. There is no dispute related to rates of rating. Had such a dispute abounded then the same should be addressed by the EACC Court on the basis of Mohamed Ali Badi case, the matter is always what is the predominant question. The court in that case stated as follows: -

> " In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the court stated as doth: -
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> > 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."

9. The court continued that in cases of maze issues or denial of rights, then the high court has jurisdiction as well as the courts of equal status, the court stated: -

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> " 103. After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3), and section 13 of the *Environment and Land Court Act*, and the amendments thereto, the five Judge Bench of the High Court held as follows: –
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> "In its strict sense the "jurisdiction" of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.
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> The jurisdiction of the High Court was unlimited save only as provided by the Constitution. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the *Constitution*. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the *Constitution* further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example, the *Judicature Act* which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limited the High Court's jurisdiction in that respect ....

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents."

10. In *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR,

> "Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

11. Jurisdiction is the authority to decide therefore, where the Court has jurisdiction it must take, jurisdiction while where it has no jurisdiction it must down its tools. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA (as then he was) stated 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:
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> "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"

12. The Supreme Court has had an opportunity in numerous occasions and it has never squandered such to clarify the extent of jurisdiction of this Court and Courts of equal status. 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
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> 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)."

13. *In Re-Interim Election Commission* Petition No 2 of 2011, the Supreme Court rendered itself as doth: -

> "
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> " (29) [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 p14):
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> "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."
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> [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."

14. The supreme court succinctly continued to require, nay demand that the constitution be interpreted in Manner that promotes the rule of law and holistic interpretation of the constitution. In the case of *in the Matter of Interim Independent Electoral Commission* [2011] eKLR. The supreme court posited as doth: -

> " 86] In common with other final Courts in The Commonwealth, Kenya's Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical,

economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."

15. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court, the Court was particular that there must be jurisdiction and the same cannot be conferred by consent by connivance or by craft. The Court was precise and held as doth: -

> "As held in the matter of Advisory opinion of the Court under Article 163 of the Constitutional Petition No 2 of 2011 at para 30, the Court stated, "A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern of interpret the intentions of Parliament where legislation is clear and there is no ambiguity."

16. On the other hand, also the Court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In support of that contention, Justice Nyarangi quoted in *Motor Vessel*,1989eKLR Lilian S Justice Nyarangi JA laid with approval words and phrases legally defined – Vol 3: I to N page 113.

> "By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or 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 which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction is 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 the power to determine conclusively whether the facts exist. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given."

17. The question to ask in this matter is whether the defendant was entitled to advertise for the sale of a commercial entity over non-existent dues. The Plaintiff's uncontroverted position is that it has paid rates. However, the Defendant has added other charges and refused to clear the entity. As a result the plaintiff cannot develop its properties.

18. The Plaintiff produced exhibits 1 – 27 being the evidence of rate payment from 1985 to 2023. They also produced a letter showing that by 2006, they had cleared rates. They had a rates clearance certificate for 2007. There are other charges which were introduced with the system and as a result, the advertisement was done.

19. I have painstakingly gone through all the documents and note that demand for rent is pure and has no accumulation. There are purported penalties and other charges that were introduced into the system but are not reflationary open rates.

20. I have seen that plot No VI/Mainland 244 has an annual rate of Ksh 28, 980. They are all paid. What is surprising is that only penalties are being bills despite payment. In respect of plot No VI/Mainland North/1223 rates were Kshs. 483,440 in 1985, changed to until 2009. It was 1,351,490.

21. These rates were changed to the current 2,702,980. There are receipts for payment of these rates.

22. For plot No VI/Mainland North /2586, rates were initially 13,880 but increased to 57,750 in 2009. The current rate is 115,500/=. The penalties have all been paid but not updated. In respect of plot VI/ Mainland North 2587, land rates and penalties were raised and paid.

23. The receipts do not show arrears. It is a matter of addition. The question then is why did the Defendant advertise the 4 parcels of land for sale? The two entities, the plaintiff and defendant are government bodies. They need to relate in a way that creates mutuality. I am satisfied that the advertisement was meant to embarrass or coerce the Defendant into submission. There is no legal basis for barring development for all these years.

24. In the case of *Peter Umbuku Muyaka v Henry Sitati Mmbasu* [2018] eKLR, the court stated as doth; -

> "
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> "29. A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the Anson's Law of Contract, 28th Edition at pg 589 and 590 the law is stated to be that:-
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> "Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".
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> 30. The Halsbury's Laws of England, Third Edition vol II, defines nominal damages as follows:
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> "388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom , or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant's wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss , but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".

25. I have perused the plaintiff's submission as filed. It is not for lack of merit that I have not referred to them. I will subsume the same herein given that the defendant did not file submissions. I find the plaintiff's suit is merited. However, given the circumstances of the case, the court will give orders with circumspection. The plaintiff will have costs of the suit.

Determination

26. The upshot of the foregoing is that I have found the plaintiffs suit merited. I make the following orders: -

a. I make a declaration that the advertisement for sale of the plaintiff's parcel of Land No Plots, VI/Mainland North/244, VI /Mainland North 12223, VI/Mainland North 2586, VI mainland north 2587 is unlawful and has no basis in law.

b. The Plaintiff suffered nominal damages to its reputation. I therefore award Kshs. 2,000,000/ = as damages.

c. The Defendant is barred from advertising or otherwise offering the said parcels on basis of any purported debt before June 30, 2023.

d. The Defendant is directed to delete any entries purporting to show that land parcel Nos Parcel Nos Plots, VI/Mainland North/244, VI /Mainland North 12223, VI/Mainland North 2586, VI mainland north 2587 are in rates arrears as at June 30, 2023.

e. The defendant is directed to issue them with clearance certificates for 2023 and update its record to remove all charges other than rates and record all the payments from 1985 to 2023 in respect of Plot Nos Plots, VI/Mainland North/244, VI /Mainland North 12223, VI/ Mainland North 2586, VI mainland north 2587.

f. The Plaintiff to have cost of Ksh 550,000/=

g. Stay 30 days.

h. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25TH DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms Osewe for plaintiff

No appearance for Defendant

Court Assistant - Brian