



REPUBLIC OF KENYA



**Cheluget v Maritim (Miscellaneous Application 17 of 2020)
[2023] KEHC 22857 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
MISCELLANEOUS APPLICATION 17 OF 2020**

**RL KORIR, J
SEPTEMBER 28, 2023**

BETWEEN

SAMWEL CHELUGET APPLICANT

AND

THOMAS KIPRUTO MARITIM RESPONDENT

RULING

1. The Applicant (Samwel Cheluget) filed a Notice of Motion dated 29th September 2020 seeking the following Orders:-
 - I. That the Honourable Court be pleased to withdraw Sotik Principal Magistrate's Court ELC Cause No. 14 of 2019 and the pending proceedings from the said court and thereafter try and dispose off the same.
 - II. That directions be taken in this Honourable Court afresh after the said Sotik ELC Cause No. 14 of 2020 had been transferred to this court because of new developments making it necessary for the case to be heard in the E & L High Court.
2. The Application was brought pursuant to Articles 10 (1) (a) & (b), 27(1), 40(1)(a), 50 (1)(2)(a)(b) (c)(h), 162, 165 of *the Constitution* of Kenya, sections 1A, 1B, 3, 3A, 18(b)(1) of the *Civil Procedure Act* and the Environmental and Land Court Act 2011 and relied on the grounds contained in the supporting affidavit sworn by Samwel Cheluget on 29th September 2020.
3. The Respondent (Thomas Kipruto Maritim) filed his Replying Affidavit sworn on 9th February 2020 in response to the Application.
4. The Respondent further filed a Notice of Preliminary Objection dated 22nd February 2023 where he relied on the following grounds:-
 - I. That the entire Application is incompetent, misconceived and an abuse of the court process.



- II. That this court does not have jurisdiction to entertain this Application as the suit Sotik MELC No. 14 of 2019 is a land dispute and as such the court which should entertain the Application is the Environment and Land Court.
 - III. That this court cannot transfer a case from a court of no jurisdiction to another court.
5. The Applicant (Samwel Cheluget) filed Grounds of Opposition in response to the Respondent's Preliminary Objection and he relied on the following grounds:-
- I. That pursuant to Article 165(2) of *the Constitution* of Kenya, the High Court has unlimited jurisdiction in civil and criminal matters.
 - II. That pursuant to Article 165(6) of *the Constitution* of Kenya, the High court exercises supervisory jurisdiction over subordinate courts.
 - III. That pursuant to Article 165(7) of *the Constitution* of Kenya, the High Court may call for the record of any proceedings before any subordinate court and may make any order or give any directions it considers appropriate to ensure fair administration of justice.
 - IV. That the Preliminary Objection is misconceived and ought to be dismissed with costs.
6. On 29th March 2023, I directed that both the Notice of Motion dated 29th September 2020 and the Preliminary Objection be heard by way of written submissions.

The Respondent's submissions on the Preliminary Objection.

7. In his submissions dated 25th April 2023, the Respondent submitted that he raised an objection on the ground that the issue was a land dispute and thus this court was divested of the jurisdiction to entertain or determine the matter. That the objection was based on a point of law therefore it was properly raised as it addressed a point of law. He relied on *Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696*.
8. It was the Respondent's submission that the power to transfer a suit was discretionary and it ought to be exercised judiciously and not capriciously. That this court could only exercise such power donated to it by section 18 of the *Civil Procedure Act* when it was clothed with such jurisdiction. It was the Respondent's further submission that the suit could not be transferred when the court in which it was filed did not have the jurisdiction to determine it.
9. The Respondent submitted that the dispute in the lower court revolved around land which fell under the jurisdiction of the Environmental and Land Court. That the High Court was divested of jurisdiction to handle matters which were purely land matters and as such this court could not arrogate itself jurisdiction. He relied on *Samuel Kamau Macharia & another vs Kenya Commercial Bank limited & 2 others (2012) eKLR* and *Republic vs Karisa Chengo & 2 others (2017) eKLR*.
10. It was the Respondent's submission that where a suit was filed in a court that did not have jurisdiction then that suit was incompetent and a non-starter. He relied on *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR* and *Boniface Waweru Mbiyu vs Mary Njeri & another (2005) eKLR*.
11. The Respondent submitted that this court lacked the requisite jurisdiction and therefore had to down its tools. That the only remedy available to the Applicant was to withdraw the suit and file a compliant suit in a court with jurisdiction.



The Applicant's submissions on the Preliminary Objection.

12. In his submissions dated 14th April 2023, the Applicant submitted that this court had the requisite jurisdiction as this court's jurisdiction was provided under Article 165(3) of *the Constitution* of Kenya.
13. It was the Applicant's submission that based on Article 165(6) of *the Constitution* of Kenya, this court was clothed with supervisory jurisdiction over subordinate courts and in the instant case, the Sotik Magistrate's Court fell under the supervisory jurisdiction of this court. That this court was empowered to call for the record of the proceedings in Sotik MELC No. 14 of 2019.
14. The Applicant submitted that if the court finds that the Application ought to be heard by a specialized court, then it exercises its inherent jurisdiction and issue orders transferring the matter to the relevant court. He relied on *Allan Mupe Bakari vs Diani Sea Lodge (2020)* eKLR and *Daniel Mugendi vs Kenyatta University & 3 others (2013)* eKLR.
15. I have gone through and considered the Notice of Preliminary Objection dated 22nd February 2023, the Grounds of Objection dated 4th April 2023, the Respondent's Written Submissions dated 25th April 2023 and the Applicant's Written Submissions dated 14th April 2023 and the only issue for determination was whether this court has jurisdiction to determine the Application dated 29th September 2020.
16. It is trite law that a court must have jurisdiction to hear and determine a suit or an Application from the very beginning. Without it, the court has no option other than to down its tools. The Supreme Court in the case of *R vs Karisa Chengo (2017)* eKLR, held that:-

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance 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 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 cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... 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. Further, in *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012)* eKLR, the Supreme Court held that:-

“A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
18. The Applicant wanted Sotik ELC No. 14 of 2019 transferred from the Sotik Magistrate's Court to this court. The subject land in the aforementioned suit was LR No. 7288/644 Sotik Township and what necessitated the Application for the transfer of the suit was that according to the Applicant, the said land was valued at Kshs 22,000,000/= which was beyond the pecuniary jurisdiction of the Magistrate's Court. The Respondent on the other hand stated that the subject land was valued at Kshs 4,200,000/=. Without doubt, the dispute between the two parties is the subject land.



19. Article 162 (2) (b) of *the Constitution* of Kenya provides that:-

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

20. The *Environment and Land Court Act* No. 19 of 2011 is defined as an Act of Parliament to give effect to Article 162(2)(b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes Section 13 of the Act stipulates the jurisdiction of the Environment and Land Court as follows:-

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (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.....

21. Article 165 (5) of *the Constitution* of Kenya provides that:-

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)
(Emphasis mine)

22. This position was aptly expounded on by the Supreme Court in *Albert Chaurembo Mumba & 7 others* (supra) where it stated:-

“It is clear to us that Article 165(5) of *the Constitution* ousts certain questions from the jurisdiction of the High Court on matters of employment and labour relations, and matters of environment, use, occupation and title to land by providing thus:

- “(5) 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).”



The clear wording of the debarment of the High Court by *the Constitution* is that “shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts under Article 162(2).....”

23. Similarly, the Supreme Court in *Republic vs Karisa Chengo* (supra) addressed itself on the issue of distinct jurisdiction of the High Court and the specialized courts established under Article 162(2)(3). It stated:-

“It is against the above background, that Article 162(1) categorises 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.

Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from *the Constitution*, or legislation (see *In Re the Matter of the Interim Independent Electoral Commission*, at paras. 29 and 30; and *Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others*, Sup.Ct. Civil Application No. 2 of 2011 [para. 68]). In this instance, the jurisdiction of the specialized Courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and the ELRC.

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.”

24. It is patently clear to me from the above authorities and from the provisions of *the Constitution* stated above that the High Court and the Environmental and Land Court, though of the same hierarchical status, exercise different and distinct jurisdictions. As already stated above, the dispute between the Applicant and the Respondent revolved around L.R No. 7288/644 Sotik Township and as such, the dispute fell under the exclusive jurisdiction of the Environmental and Land Court and not this court. It is my finding therefore that this court does not have the jurisdiction to determine the Notice of Motion Application dated 29th September 2020.
25. Having found that this court has no jurisdiction to hear the present matter, the question then becomes whether this court should strike out the Application or whether it should transfer the suit to the Environmental and Land Court. Recent practice has dictated that in the interest of justice and with the aim of expedient disposal of cases, this court transfers the suit to the Environmental and Land Court for



determination. I am persuaded by Otieno J. in *Allan Mupe Bakari vs Diani Sea Lodge* (2020) eKLR, where he held that:-

“However study of what actually happens when a court finds that it has no jurisdiction in a matter, has not been a dismissal or striking out. The courts have taken the purposive approach to let the matter be heard where it belongs. That is achieved by regular transfer of suits between the courts of equal status almost on a daily basis. Suits have not been routinely defeated merely on the basis that it was filed in a court which lack jurisdiction. I am persuaded and fully convinced that this is the proportionate and robustly just approach to the administration of justice so that, ultimately, parties have their day in court.”

26. In the end, I make the following orders: -

- I. The Preliminary Objection dated 22nd February 2023 succeeds to the extent that this court does not have jurisdiction to hear and determine Sotik MELC No. 14 Of 2019.
- II. That Sotik MELC No. 14 of 2019 is transferred to the Environment and Land Court in Kericho.
- III. As both parties have partially succeeded, each party shall bear their costs.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF SEPTEMBER, 2023

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of

Mr. Sang for the Applicant/ Defendant,

N/A for the Respondent

