



Bona Vacantia Properties (K) Limited v Mwanzia (Environment & Land Case 11 of 2021) [2023] KEELC 17964 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 11 OF 2021**

MD MWANGI, J

MAY 30, 2023

BETWEEN

BONA VACANTIA PROPERTIES (K) LIMITED PLAINTIFF

AND

VASCOLINE KATANU MWANZIA DEFENDANT

RULING

1. Jurisdiction is fundamental; indeed central in any matter before a court of law. It does not have to be raised by any party. The court may as well pick it out on its own motion.
2. In *Anaclet Kalia Musau vs Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

“..... {{em A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another vs Musalia Mudavadi & 6 others Ex Parte Petronila}}* Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied).

3. I have agonized over the issue of jurisdiction in this matter for a long time. This has forced me carefully re-look into the pleadings filed by the parties herein with, a view to identifying the real dispute between



the warring parties. I raised the issue of jurisdiction with the parties herein and invited them to file submissions on the issue. Both parties have complied.

Submissions By The Parties

4. The Plaintiff in its submissions dated May 2, 2023, submits that the contentious issue herein is commercial in nature. That the Defendant in her pleadings alleges that she used her separate funds to help in the development of the suit properties. She therefore claims to have an interest in the suit properties. To determine this, the Plaintiff avers that the Defendant has proven her actual contribution which makes the claim becomes commercial in nature. The Court therefore lacks the jurisdiction to grant the orders sought by the Defendant. That the Defence and Counterclaim should thus be struck out.
5. The Defendant's submissions on the other hand are dated May 12, 2023 and she submits that the Plaintiff is a limited liability company whose directors/shareholders are listed on the company's CR-12. That the parties herein are all dependants and beneficiaries of the Estate of the Deceased-Senator Boniface Mutinda. Further, that the suit properties herein all form part of the Estate of the deceased and are subject to the Succession Proceedings in Succession Cause No 185 of 2021, which is still ongoing in the High Court, Family Division. That once the Honourable Court confirms distribution of the Deceased's Estate, the distribution will settle the dispute herein. The Defendant prays that the Plaintiff's suit be dismissed with costs.

Analysis and Determination

6. It is not disputed that the Plaintiff Company is the registered owner of the suit properties herein. The Defendant is the personal representative of the estate of Boniface Mutinda Kabaka (deceased), who, according to the copy of the CR 12 attached to the application dated October 6, 2021 was the majority share-holder of the Plaintiff company holding 996 out of the 1000 ordinary shares of the Company.
7. The Defendant has further disclosed in her Statement of Defence and Counter-claim about the High Court Succession Cause E185 OF 2021 where matters of the estate of Boniface Mutinda Kabaka including the shares in the Plaintiff Company are to be determined and distributed according to the provisions of the *Law of Succession Act*, Cap 160, Laws of Kenya.
8. The real dispute here then is between the shareholders/directors of the Plaintiff Company over the company's properties which coincidentally include land (comprising the suit properties) and motor vehicles listed in the Plaint amongst others.
9. This brings to the fore the question whether this court then has the requisite jurisdiction to entertain and determine a dispute between shareholders/directors of a company. My answer is no.
10. I appreciate that this matter was transferred to this court from the High Court pursuant to an order by Lady Justice Meoli issued on October 21, 2021.
11. The Learned Judge then did not have the benefit of perusing the Defendant's Statement of Defence and the Counter-claim which was only filed in the month of March 2022, anyway.
12. The Jurisdiction of this court is provided for under Article 162 (2) (b) of the *Constitution* and the Environment and Land Court (ELC) Act. Section 13 of the *ELC Act* provides 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. [Emphasis supplied]
13. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated *In the Matter of Interim Independent Electoral Commission* [2011] eKLR as follows:
- (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.
14. In the case of *Benson Ambuti Adega & 2 others Vs Kibos Distillers Ltd & 5 others* (2020) eKLR, the Supreme Court of Kenya while citing its earlier decision in *R Vs Karisa Chengo* (2017) eKLR emphasized 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.”



15. The Supreme Court had in the case of *Samwel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 others* (2012) eKLR also 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.”

16. The Supreme Court went further to point out that a court must operate within the constitutional limits.

“It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

17. Guided by the provisions of law and the above cited authorities, I am convinced that this court lacks the requisite jurisdiction to entertain this matter. I must therefore lay down my tools at this juncture.

18. Accordingly, I respectfully return this matter to the High Court at Milimani- Commercial Division for hearing and determination.

19 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Karita for the Defendants (holding brief for C.N. Kihara)

No appearance by the Plaintiff.

Court Assistant – Yvette.

