



**Mohammed & another v Shimanyula & 3 others (Civil Case
1 of 2021) [2022] KEHC 14616 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE 1 OF 2021
PJO OTIENO, J
OCTOBER 31, 2022**

BETWEEN

ZENAH MAKOKHA MOHAMMED 1ST PLAINTIFF

MARTHA ATIENO ONYANGO 2ND PLAINTIFF

AND

JOYCE PACILISHA SHIMANYULA 1ST DEFENDANT

THOMAS SHIMANYULA LEVI 2ND DEFENDANT

FAMILY BANK LIMITED 3RD DEFENDANT

PAWABA AUCTIONEERS 4TH DEFENDANT

RULING

1. This suit was initially filed at the Environment and Land Court, Kakamega and when placed before the Judge, the Judge directed that it be heard by a High Court Judge because the matter basically revolves on a charge and payment of a loan by a husband of the Plaintiff hence it is a commercial dispute.
2. When the matter was mentioned by the High Court Judge, Counsel told the Court that his client wished to contest the order of transfer by the Environment and Land Court and cited to court the decision in *Albert Chaurembo Mumba –vs- Maurice Munyao* [2019] eKLR for the proposition that a suit is only capable of being transferred if it is filed in a court with competent jurisdiction. The Judge then directed that parties file submissions on the issue of jurisdiction.
3. Pursuant to such direction, the 3rd Defendant filed its submissions on 5.8.2022 while the Plaintiff did so on the 5.10.2021. Evidently the objection to jurisdiction was raised by the 3rd Defendant only and not the 1st and 2nd who seem not to have filed any papers in that regard.



4. In its submissions, the 3rd Defendant while relying on the said decision of Albert Chaurembo Mumba (Supra) which cited the Ugandan decision in *Kaganyi –vs- Musiramo* [1968] EALR 43, contends that the Environment and Land Court Judge fell into error when he ordered the matter be heard by the High Court on the principle that a suit filed in a court without jurisdiction is a nullity and incapable of transfer.
5. On the same basis, it is contended that having been transferred to this court by a court without jurisdiction to do so this Court has not been clothed with any jurisdiction to deal with the matter, its unlimited jurisdiction notwithstanding. Flowing from the foregoing assertions, it is added that even the interim orders issued by the Environment and Land Court were issued without jurisdiction and are null and void having been issued per incuriam.
6. In consequence, it was then argued that, this court must down its tools on account of jurisdiction irregularly acquired because, it cannot transfer back the matter to the Environment and Land Court which is on record for having said it lacks jurisdiction. The Court was thus urged that it must act so as to avoid being seen as abrogating to itself the jurisdiction it does not have.
7. For the Plaintiff, the question presented in the preliminary objection is simply whether or not this court has the jurisdiction to entertain the claim as pleaded in the suit. It then relies on the decision in *Co-operative Bank of Kenya Ltd –vs- Patrick Kangethe Njuguna* [2017] eKLR where the Court of Appeal laid the position that disputes around legal charges and payment of loan pursuant thereto are commercial dispute and not due for resolution by the Environment and Land Court. The Plaintiff thus contends that this court is being called upon to sit on appeal against the decision by the Environment and Land Court Judge, A. O. Ombwayo, J.
8. The Court has duly considered the submissions filed and discerns two issues to emerge as seeking determination by the Court. The issues are:-
 - Whether the Environment and Land Court had the jurisdiction to transfer the suit from itself to this Court?
 - Whether it is the transfer that conferred this court with jurisdiction and if the suit should be struck out?

Analysis and Determination

9. The concurrent and coordinate jurisdiction between the High Court and the Courts of equal status, created by article 165 of *the Constitution*, should now be a settled point but it appears that twelve years is not long enough to settle the question whether or not a brick wall as boundary between the three courts really exist and needs to be maintained.
10. In *Leisure Lodge Ltd –vs- Commissioner for Lands and Others* [2017] eKLR, a bench of three Judges it was held that there are instances where both High Court and Environment and Land Court have concurrent and or coordinate jurisdiction to determine constitutional questions when raised and touching on Environment and Land.
11. That position had earlier been expressed by the court in *Patrick Musimba –vs- National Land Commission* [2015] in the following words:-

“They were one indivisible whole save for respective jurisdictions We also say that it would be ridiculous and fundamentally wrong in our view for any court to adopt a separatist view or approach and insist on splitting issues between the courts where a court was properly



seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction was raised.”

12. It remains that the High Court and the Environment and Land Court and even the Employment and Labour Relations Court, do have points where their jurisdictions converge and in manners that at times it is difficult to clearly say whose obvious jurisdiction is invoked by the dispute. In such situations and being of concurrent or coordinated jurisdictions while the bell mounted upon article 159 of *the Constitution* must keep ringing in every ear of a judicial officer, it save time and judicial resources to effect transfer of disputes between the three Courts.

13. Examples of when the concurrence of jurisdiction do arise are not very rare. For instant where a charged property is sold pursuant to the statutory power of sale and its chargor challenges the sale against the chargee and the purchaser. While it may be indubitable that the dispute between the chargor and the chargee is a dispute over the commercial transaction disclosed in the charge instrument, the claim by the buyer may be more of a claim over title to the land. In this court’s opinion, such a claim may be handled by the court whose jurisdiction is dominantly invoked by the claim. To facilitate the determination of the matter expeditiously and cost effectively as a means to achieve access to justice, the Court before which the matter has been filed, if it find that the substantial and foundational cause of action falls for determination within the jurisdiction of a court of equal status ought to be free to have it transferred to that other court. That is the approach taken by the Court of Appeal in *Daniel W. Mugendi –vs- Kenyatta University* [2013] eKLR where it was held:-

“..... and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters... And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”

14. The same position was followed by the Court of Appeal in *TSS Investment Ltd –vs- NIC Bank Ltd* [2019] eKLR where the Court said:-

“Our view on the issue of jurisdiction is that the matter was rightly transferred to the High Court, (by the Environment and Land Court) sic, since the substantive dispute was about creation of security over land, which does not constitute land use”

15. Based on the pronouncements and practice of the three courts in transferring suits between selves and such actions being routinely upheld by the Court of Appeal, this court’s approach has been, and yet to change, 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 court¹.”

16. It follows, inevitably, that the decision by the Environment and Land Court, A. O. Ombwayo, J. made on 5/5/2021 was properly made and the challenge against it by the 3rd defendant is grounded upon misapprehension of the law. It cannot succeed but must fail. The Preliminary Objection is dismissed on that ground.
17. There is then the assertion by the 3rd defendant that this court lack jurisdiction because it was the order of transfer which conferred it with jurisdiction to entertain the matter.
18. The Court considers this not to be a serious contention. The jurisdiction of any court must be conferred by the law and not otherwise. Not even the parties can by consent confer jurisdiction upon a Court or Tribunal when the law does not. In *S. K. Macharia – Vs- KCB* [2012] eKLR the Apex Court reiterated the now trite position of the law that jurisdiction is only conferrable by Constitution or Statute and said:-

“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.”
19. It is not debatable that in the architecture of *the Constitution* under article 165, the jurisdiction of the High Court is unlimited and only subject to sub article 5 thereof. All *the constitution* excludes from the Court jurisdiction of this court are the matters reserved for the exclusive jurisdiction of the Environment and Land Court as well as Employment and Labour Relations Court. In the context of this matter the cause as pleaded is that the security given by the 1st and 2nd Defendants to the 3rd Defendant was procured by fraud in that the Plaintiff consent, as spouse to the 2nd Defendant, was never sought nor obtained. I discern the cause to not to be one on environment and the use and occupation of, and title to land. It rightly belong and will belong to the High Court and not elsewhere. When it belong here by *the Constitution*, it would be defeatist to accede to the Preliminary Objection.
20. In sum the Preliminary Objection fails and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 31ST DAY OF OCTOBER 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Kimathi for Onsare for 3rd Defendant

No appearance for Namatsi & Co. Advocates

Court Assistant: Polycap Mukabwa

¹ [Allan Mupe Bakari –vs- Diani Sea Lodge](#) [2020] eKLR

