



**Ali v Omar & 2 others (Environment & Land Case 27 of 2020)  
[2023] KEELC 18308 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18308 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 27 OF 2020  
NA MATHEKA, J  
JUNE 20, 2023**

**BETWEEN**

**HUSSEIN JUMA ALI ..... PLAINTIFF**

**AND**

**JUMA ALI OMAR ..... 1<sup>ST</sup> DEFENDANT**

**ALI ABDALLA JUMA ..... 2<sup>ND</sup> DEFENDANT**

**MOHAMED FAKHI MWINYIHAJI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

- 1 The 1<sup>st</sup> and 3<sup>rd</sup> Defendants raised a Preliminary Objection before hearing of the Plaintiff's suit on the following grounds;
  1. That this Honourable Court does not have jurisdiction to entertain this suit and thus exercise of jurisdiction will be contrary to Article 162 of The *Constitution* of Kenya 2010.  
That the suit is fatally and incurably defective and the same ought to be struck out.
  3. That the suit is incompetent and bad in law.
- 2 They submitted that the value of the suit property in question property known as Plot No Bububu 'A' Settlement Scheme/19 is Kshs 4,000,000/=the purchase price as per Agreement of Sale dated April 4, 2013 between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant. The agreement for sale is attached to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants list of documents dated May 31, 2022. That the jurisdiction of Environment and Land Courts is governed by Article 162 (2) and (3) of the *Constitution* of Kenya 2010 and Section 13 (2) of the *Environment and Land Court Act* No 19 of 2011.
- 3 That it is a well-known principle that jurisdiction is everything and where a Court lacks jurisdiction it has to down its tools. It is their submission that based on the value of the suit property of Kshs



4,000,000/= this Honourable Court lacks the relevant jurisdiction to hear and determine the suit before it. They submit that the same falls under the jurisdiction of Senior resident Magistrate's Court that has jurisdiction of up to Kshs 7,000,000/ = and not the Environment and Land Court. Thus the suit was filed before this Honourable Court without jurisdiction, the suit being in competent ought to be struck out with costs to the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. That the Plaintiff's suit before this Honourable Court is fatally defective, incurable before the law and an abuse of the Court process and it ought to be dismissed for want of jurisdiction.

4 The Plaintiff submitted that Article 162 of the Constitution allows this court to determine this suit as it pertains to a dispute that arose in regards to the administration and management of land. That however, in the event that the court finds that it lacks jurisdiction to determine this matter then Section 18 of the Civil Procedure Act should apply which allows this court to transfer the case to the subordinate court.

5 This court has considered the Appeal and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary,'

6 The above legal proposition has been made in the case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd. (1969) EA 696* where the court held that;

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop'

7 In the case of *Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR* the court outlined the scope and nature of preliminarily objection as;

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

8 It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein was properly brought before the court.

9 A Court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the Court, the said Court must down its tools. The Supreme Court in the *Matter of Interim Independent Electoral Commission (2011) eKLR* held as follows:



10 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 endeavors 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.'

11 In the case of County Government of Migori vs INB Management IT Consultant Limited ( 2019) eKLR the Court held that;

PARA 10-

The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme Court of Kenya Civil application No 11 of 2016- 'Hon (Lady ) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria supreme case No 11 of 2012- 'Ocheja Immanuel Dangama – Versus - Hon Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

'It is settled that jurisdiction is the life blood of any adjudication because a Court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a Court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.'

12 In the instant suit, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submit that based on the value of the suit property of Kshs 4,000,000/= this Honourable Court lacks the relevant jurisdiction to hear and determine the suit before it. They submit that the same falls under the jurisdiction of Senior Resident Magistrate's Court that has jurisdiction of up to Kshs 7,000,000/ = and not the Environment and Land Court. I find that whereas it is true the Magistrates Court would have jurisdiction to hear this matter the right remedy would not be to dismiss this suit all together. In the interest of justice I do order that this matter be transferred to the Chief Magistrates Court Mombasa under Section 18 of the Civil Procedure Act for hearing and determination. Costs to the Applicant.

13 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20<sup>TH</sup> JUNE 2023.**

**N.A. MATHEKA**

**JUDGE**

