



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. E003 OF 2021

FRANCIS NG'ANG'A KARANJA.....PLAINTIF

VERSUS

HILLARY KIPKOECH KIBOINET

(T/a Sweetland Consultant Limited).....1ST DEFENDANT

SMB BANK KENYA LIMITED.....2ND DEFENDANT

WHITE SILVER AUCTIONEERS.....3RD DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection raised by **Mr. Mathai**, counsel for the 1st defendant, vide the Notice of Preliminary Objection dated **23 March 2021**. Counsel thereby contended that:

a. This Court lacks the jurisdiction to hear and determine this suit pursuant to Section 13 of the Environment and Land Court Act, No. 19 of 2011;

b. The suit is statutorily barred pursuant to Section 4 (1) (a) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

2. The brief background of the matter is that, vide a Plaint dated **18 January 2021**, the plaintiff sued the three defendants, praying for the following reliefs:

a. A declaration of the rights of the plaintiff to sanctity of private property and that the plaintiff has legal and beneficial interest over the suit land;

b. A declaration that the 1st defendant violated the plaintiff's right to sanctity of property;

c. A declaration that the 1st defendant is in breach of contract;

d. A permanent injunction restraining the defendants from interfering with the plaintiff's rights to quiet possession and enjoyment of the suit property;

e. A permanent injunction restraining the defendants from dealing with the suit property in any manner whatsoever through sale, public auction or any other manner whatsoever;

f. Costs of the suit; and,

g. Any other relief the Court may deem fit and just to grant.

3. The plaintiff thereafter filed an Amended Plaint on **1 February 2021**, presumably pursuant to **Order 8 Rule 1 (1)** of the **Civil Procedure Rules**, thereby making a few amendments to the original Plaint. For instance, in terms of the reliefs prayed for, the plaintiff added the following prayers:

- a. An order of specific performance to compel the 1st defendant to transfer the suit property to the plaintiff;
- b. General damages against the 1st defendant for breach of contract in lieu or in addition to the order of specific performance;
- c. Exemplary and aggravated damages against the 1st and 2nd defendants; and,
- d. An order for valuation of the suit property by an independent valuer.

4. Accordingly, in his written submissions dated **16 April 2021**, **Mr. Mathai** took the view that this is a case that ought to have been filed before the Environment and Land Court. He particularly made reference to paragraph 7 of the Amended Plaintiff, wherein it is averred that the deceased **David Karanja Ng'ang'a** is the legal and equitable owner of the suit property, known as **ELDORET MUNICIPALITY BLOCK 12/342** measuring 0.083 where the deceased had built about 12 rental units during the mid-2000 with the knowledge and consent of the 1st defendant. Counsel further drew the attention of the Court to paragraphs 8 and 9 of the Amended Plaintiff for the assertion that the deceased entered into an agreement of sale with the 1st defendant on **30 October 2009**; and that he made the final payment of the purchase price in the year **2013**.

5. Consequently, counsel submitted that, since the aforementioned assertions in the plaintiff's Amended Plaintiff place the dispute within the jurisdiction of the Environment and Land Court, this Court lacks the jurisdiction to hear and determine the suit. **Mr. Mathai** relied on **Articles 162 (2) (b) of the Constitution of Kenya; Section 13 (2) of the Environment and Land Court Act**, and the cases of **Mukisa Biscuit vs. West End Distributors Ltd** [1969] EA 696; **Quick Enterprises Ltd vs. Kenya Railways Corporation; Oraro vs. Mbaja** [2005] 1 KLR 141; **Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd** [1983] KLR 1 and **Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others** to buttress his submissions on jurisdiction.

6. The second limb of the preliminary objection was hinged on **Section 4 (1) (a) of the Limitation of Actions Act**. In this regard, **Mr. Mathai** submitted that, this being a suit founded on contract, it ought to have been filed within 6 years from the date when the cause of action accrued. In his posturing, the cause of action accrued in **2013** when the final payment was made and lapsed in **2019**. He consequently submitted that the plaintiff's cause of action is statute-barred and therefore cannot be entertained by this Court.

7. In response to **Mr. Mathai's** submissions, **Ms. Ayugi** for the plaintiff relied on her written submissions filed herein on **10 May 2021**. She took the view that this Court does have the requisite jurisdiction to hear and determine this dispute, from the standpoint of **Article 165 (1) and (3) of the Constitution**. She submitted that the claim is neither wholly about land nor about contract, but at amalgam of the two aspects. She pointed out that the trigger for the suit is the notification of sale arising out of the 1st defendant's failure to repay the loan advanced by the 2nd defendant. Counsel further urged the view that the plaintiff's case is based on the fact that there is a contract for sale of land that has not been honoured by the 1st defendant, leading to breach of contract. Thus, she posited that this Court has jurisdiction to handle the dispute.

8. **Ms. Ayugi** relied on **Suzanne Achieng Bulter & 7 Others vs. Redhill Heights Investment & Others**, High Court Commercial Case No. 2 of 2016, for the proposition that where a matter raises a mixture of land and commercial issues, then the Court with jurisdiction is the High Court. She also placed reliance on **Cooperative Bank of Kenya Ltd vs. Patrick Kangethe & Others** [2017] eKLR in urging the Court to find that the dominant issue in this matter is the commercial aspect of it. On whether the suit is time-barred, **Ms. Ayugi** simply urged the Court to ignore that aspect as it is premised on disputed facts. She, likewise, took issue with the fact that the Notice of Preliminary Objection was not filed as early as possible by **Mr. Mathai**; and that there was no justification for the fact that it was raised three months after **Mr. Mathai** came on record for the 1st defendant. For the foregoing reasons, **Ms. Ayugi** urged for the dismissal of the preliminary objection.

9. I have given careful consideration to the grounds raised in the Notice of Preliminary Objection dated **23 March 2021** in the light of the pleadings thus far filed. I have also considered the written submissions filed herein by learned counsel as well as the useful authorities cited by them. As was well-explicated in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd** [1969] E.A 696, a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

10. Accordingly, a preliminary objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. Hence, the expressions of **Sir Newbold, P. in the Mukisa Biscuits Case** are apt. Here is what he had to say:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised 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 is the exercise of judicial discretion.”

11. In the same vein, **Hon. Ojwang, J.** (as he then was) in **Oraro vs. Mbaja** [2005] 1 KLR 141 expressed the view, which I hereby adopt, that:

“...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for

proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

12. Accordingly, in so far as the issue of limitation is premised on disputed fact, particularly as to when the cause of action accrued, it is not a proper subject for determination at this stage. Accordingly, it is my finding that the only proper issue for determination in this ruling is that of jurisdiction, from the standpoint of **Article 162(2)(b)** of the **Constitution**; for without jurisdiction this Court would lack the power to make any further step in this suit.

(13) **Article 162 (2) (b)** of the **Constitution** stipulates that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

...

(b) the environment and the use and occupation of, and title to, land.”

14. **Section 13** of the **Environment and Land Court Act**, on the other hand provides thus with regard to the jurisdiction of the Environment and Land Court:

(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

15. In addition to the foregoing, **Article 165 (5)** is explicit 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).”

16. Hence, 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 by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the 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 on 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. In the premises, the single all important question of whether this Court has jurisdiction to entertain the suit turns on the nature of the plaintiff's case as pleaded in his Amended Complaint. I accordingly agree with the expressions of **Hon. Ngugi J. in Suzanne Acheng Bulter & 7 Others vs. Redhill Heights Investment & Others**, High Court Commercial Case No. 2 of 2016 that:

“...it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.”

18. A careful perusal of the Amended Plaintiff leads one to the conclusion that what the plaintiff seeks, on behalf of the estate of his deceased father, is the vindication of the right to ownership of the suit property. Hence, at paragraphs 7, 8, 9 and 10 of the Amended Plaintiff, it was averred that the deceased, **David Karanja Nganga**, is the legal and equitable owner of the suit property which he purchased for valuable consideration. It is for that reason that, in prayers (a) and (b) of the Amended Plaintiff, the plaintiff seeks a declaration as to the sanctity of private property and as to his legal and beneficial interest over the suit property. He has also asked for an order of specific performance, in prayer (d) of the Amended Plaintiff, to compel the 1st defendant to transfer the suit property to him.

19. In the premises, although the suit makes reference to the contract of sale and the subsequent charging of the suit property by the 1st defendant to the 2nd defendant, those are peripheral matters and are only intended as the building blocks for the plaintiff's claim to ownership. I therefore entertain no doubt that the predominant issue herein is in respect of ownership of suit land; and therefore that the court with jurisdiction is the Environment and Land Court. (see **Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others** [2017] eKLR).

20. The foregoing being my view of the matter, the preliminary objection by **Mr. Mathai** is hereby upheld. I must therefore down my tools and order, which I hereby do, that this suit be and is hereby transferred to the Environment and Land Court at Eldoret for hearing and determination.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF JULY, 2021

OLGA SEWE

JUDGE