



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 199 OF 2017

PETRO SOMONI MOTOKI.....PLAINTIFF

VERSUS

JEREMIAH MATOKE NYANG'WARA.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF KISII.....2ND DEFENDANT

THE NATIONAL CONSTRUCTION AUTHORITY.....3RD DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Preliminary Objection raised by the 3rd Defendant in its Notice of Preliminary Objection dated 8th February 2021 in which the following points of law were raised:

1. The Honourable Court has no jurisdiction to hear or continue to entertain the Plaintiff's Complaint dated 3rd October 2017 (the said Complaint) on the grounds that:

a) The Plaintiff's cause of action is for compensation for alleged damage to property arising from a collapsed building. The action is thus civil in nature and does not relate to environment, use occupation or title to land.

b) The matters in issue do not fall within the jurisdiction of the Environment and Land Court given the court's jurisdiction under article 162 (2) of the Constitution and section 13 of the Environment and Land Court Act 2011. See also the Court of Appeal's decision in **Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others (2017) eKLR**

2. The court thus lacks jurisdiction and on this ground alone should down its tools in line with the principles set out in **The Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited (1989) eKLR** by striking out the suit with costs.

3. The Complaint dated 3rd October 2017 is incurably bad and defective and should be struck out *in limine* with costs to the 3rd Defendant.

2. Before delving into the Preliminary Objection, it is important to give a background of this matter. The Plaintiff is the registered owner of L.R NO. KISII MUNICIPALITY BLOCK 111/235. In his Complaint, the Plaintiff avers that on 10th November 2016 the 1st Defendant's property erected on parcel No. KISII MUNICIPALITY/BLOCK 111/236 collapsed and the stones, concrete and debris escaped and landed on the Plaintiff's building erected on land parcel number KISII MUNICIPALITY BLOCK 111/235 thereby causing damage to the said buildings. It is the Plaintiff's case that the said damage was caused by the Defendants' negligence and breach of duty of care.

3. The Plaintiff's claim against the Defendants is for special damages amounting to Kshs. 23,926,779.60 being the value of the building erected on land parcel no. KISII MUNICIPALITY/ BLOCK 111/235. The Plaintiff also claims loss of rental income at the rate of Kshs. 103,000 per month from November 2016 until completion of reconstruction of the damaged building as well as general damages for the inconvenience, trauma and anxiety inflicted on the Plaintiff, Kshs. 25,000 per month in respect of the residential bungalows on the suit property until completion of reconstruction or restoration of the building to the condition before the damage and general damages for anxiety, trauma and disruption.

4. The 1st Defendant filed his Statement of Defence on 8.5.2017 denying the Plaintiff's claim. He denied the particulars of negligence and breach of duty attributed to him. The 2nd Defendant filed its Statement of Defence on 31.8.2017 denying the Plaintiff's claim. The 2nd Defendant blamed the Plaintiff and the 1st Defendant for flouting the National Construction Authority Regulations among other aspects of negligence. On its part, the 3rd Defendant filed its Statement of Defence dated 31.8.2021 denying the Plaintiff's claim. The 3rd Defendant

blames the 1st Defendant for failing to comply with the provisions of the National Construction Authority Act 2011.

5. Before the suit could be set down for hearing, the Defendant filed the Preliminary Objection which is the subject of this ruling.

The court directed that the Preliminary Objection be canvassed by way of written submissions and both parties complied by filing their submissions accordingly.

ISSUES FOR DETERMINATION

6. Having considered the pleadings, Preliminary Objection, rival submissions and the authorities cited to me, the following issues arise for determination

I. Whether the Preliminary Objection raises pure points of law.

II. Whether the Court has jurisdiction to hear and determine this suit.

ANALYSIS AND DETERMINATION

Whether the Preliminary Objection raises pure points of law.

7. The starting point is to define what a preliminary objection is.

The case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point 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 ...

Justice Newbold in the said suit argues that

A Preliminary Objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

8. In the instant suit the 3rd Defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff’s suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. 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:

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.

9. Counsel for the Plaintiff argued that the Preliminary Objection is an afterthought, since the 3rd Defendant before filing the same submitted to the jurisdiction of the Court and fully participated in the process of this court culminating into the matter being certified for hearing. He further argued that the 3rd Defendant had in fact filed a statement of Defense in which he did not raise the issue of the court not having jurisdiction.

10. The question that strikes my mind is whether this court can proceed to entertain a matter in which it has no jurisdiction for reasons that the Defendant did not raise it at the inception of this court. Without any doubt the answer to this question is in the negative. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. The court cannot assume it has jurisdiction in a matter just because the Defendant did not challenge its jurisdiction in his Defense as this would be absurd. I am of the considered view that since this matter is yet to be heard, the 3rd Defendant is within the law to raise his Preliminary Objection challenging the jurisdiction of this court. It is therefore my finding that the Preliminary Objection raised by 3rd Defendant is one on pure points of law that that this court needs to determine.

Whether this court has jurisdiction to hear and determine this suit

11. Having determined that the Preliminary Objection by the 3rd Defendant is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this suit.

12. Learned counsel for the 3rd Defendant submitted that the broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court 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. Counsel went on to submit that Parliament indeed enacted the Environment and Land Court Act, 2011.

13. He argued that the said Act gives this court its jurisdiction under Section 13 which elaborates on the issues which the court should deal with in relation to the environment use, occupation and title to land.

1. Section 13, the Environment and Land Court Act provides that:

13. (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.

14. Counsel postulated that the alleged collapse of the building erected on the 1st Defendant's property and the escape of debris and concrete blocks which caused damage to the Plaintiff's property erected on KISII MUNICIPALITY/BLOCK III/571 does not relate to or constitute use or occupation of land and thus does not bring the dispute within article 162 (2) (b) and section 13 of the Environment and Land Court Act.

15. He submitted that although section 13 (2) (e) provides that jurisdiction of the court extends to '**any other dispute relating to the environment and land**' the same ought to be understood within the context of the court's jurisdiction to deal with disputes connected to **environment and the use and occupation of and title to land** as captured under article 162 (2) (b) as well as the preamble to the Environment and Land Court Act which reads as follows:-

*"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 **environment and the use and occupation of and title to land**, and to make provisions for its jurisdiction functions and powers and for connected purposes."*

16. Counsel submitted that there was need to consider the definition of the word use and to that extent he referred the court to the Black's Law Dictionary where the word 'use' is defined as being;

*"The application or employment of something especially. a long continued possession of a thing **for the purpose for which it is adapted**, as distinguished from possession or enjoyment that is merely temporary or occasional."*

Counsel has submitted that from the said definition, for land use to occur, the land must be utilized for purposes for which the surface of the land, air above it or ground below it is adapted. To qualify his understanding of land use, counsel considered the definition of land under article 260 of the constitution as follows;

"Unless the context requires otherwise, 'land' includes-

a) The surface of the earth and the subsurface rock;

b) Anybody of the water on or under the territorial surface

c) Marine waters in the territorial sea and exclusive economic zones;

d) Natural resources completely contained on or under the surface; and

e) The airspace above the surface “

17. It is common ground that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use occupation and title to land. However, what is in dispute is whether the cause of action in this suit which the Plaintiff has stated to be breach of duty or negligence on the part of the the 1st Defendant that led to the collapse of his building have any relation to use, occupation and title to land.

18. Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, I note that the said provisions are less clear on what “**land-related**” means. The determination on what land related means has been left for courts to interpret. In order to make a determination as to whether the issues before are land related my attention has been drawn to the decision in the case of **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR**, which decision I agree with. In the said case the court stated that;

“In all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the **Pre-dominant Purpose Test**: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

26. In my view, the following factors are significant in determining the nature of the contract:

a. The language of the contract;

b. The nature of the business of the vendor;

c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;

d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff” (emphasis mine).

19. From the above case and using the *Predominant Purpose Test*, it will be paramount for me to determine the gravamen of the dispute between the parties herein and determine whether the same is rooted in contests about ownership, deficiency in title, occupation or use of the land or something else. It is clear from my analysis of the plaint filed by the Plaintiff that there is no dispute as to the ownership, occupation or use of the Plaintiff land. Instead, the dispute is that a building constructed on the land of the 1st Defendant collapsed and its debris escaped and destroyed a building constructed by the Plaintiff on his land and as such the Plaintiff is claiming damages from the Defendants whom he accuses of negligence. It is also clear that the remedies sought are based on the alleged breach of duty of care that resulted from the alleged negligence of the Defendants. As rightfully submitted by counsel for the 3rd Defendant, this claim is an ordinary civil claim for the tort of negligence that ought to be handled by the High court as it is not related to land. This court therefore has no jurisdiction and henceforth it must down its tools.

20. Counsel for the Plaintiff has in the alternative submitted that in the event that the court determines that it has no jurisdiction, it should transfer this matter to the High Court. However, I find that it would be futile for this Court to transfer the said suit to the High Court. I am of the view that jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured by Sections 1A, 1B and 18 of the Civil Procedure Act.

21. In the case of **Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR** the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”

22. Further the Court of Appeal in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** stated as follows;

‘In numerous decided cases, courts, including this Court has held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.....’

23. This position was reinforced by the Supreme Court in the case of **Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others (2019)eKLR** where the Court restated the position in in the case of **Kagenyi v Musiramo & Another** (1968) EALR 43, that an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it.

This Court is bound by the above-cited decisions.

24. Accordingly, the Preliminary Objection is merited and I uphold it and strike out the suit with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE