



**Mwandau & 2 others v Challa Hotel Limited (Environment & Land
Case 5 of 2023) [2023] KEELC 18994 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 5 OF 2023**

NA MATHEKA, J

JULY 27, 2023

BETWEEN

MATANO JOHN MWANDAU 1ST PLAINTIFF

JOSEPH KIMOJU MWAZO 2ND PLAINTIFF

DOMINIC JOHN MWAZO 3RD PLAINTIFF

AND

CHALLA HOTEL LIMITED DEFENDANT

RULING

1. Counsel for the Defendant herein raised a Preliminary Objection against the suit before this Honourable Court and seeks to have the entire suit struck out or dismissed with costs to the Defendants on the grounds *inter alia*;
 1. That the instant suit filed by way of Plaint dated January 30, 2023, is *ex facie* incompetent and an abuse of the court process and as such cannot stand and/or be ventilated before this Honourable Court.
 2. It does not comply with the mandatory requirements of Section 7 (1) and 9 (b) of the [Magistrates' Courts Act, 2015](#) (No 26 of 2015), Laws of Kenya). That Taita has Law Courts with requisite Pecuniary Jurisdiction to handle and competently determine the Plaintiff's claim.
 3. This suit is misconceived, malicious, offensive, frivolous, vexatious and/or is an abuse of this Court process and thereby ought not to be entertained by this Honourable Court.
 4. They humbly pray that the Plaintiff's claim be dismissed and/or struck out with costs to the Defendant.



2. The Defendant submits that the suit property herein is Taveta Town Block 1/123 approximate area 0.0777Ha. That the same falls within the Taveta Law Courts geographical and pecuniary jurisdiction being that the principal magistrate has jurisdiction to determine claims upto Kenya shillings ten million (Kshs 10,000,000/=).
3. The Plaintiffs oppose the same and state that the suit property exceeds Kshs 50,000,000/=. That the Defendant has not offered any valuation report and instated states that the value of the suit property does not exceed Kshs, 10,000,000/=.
4. 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.....”
5. The above legal preposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] E.A. 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”
6. In the case of *Attorney General & Another vs Andrew Mwaure Gitinji & 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.
7. 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 Defendant herein was properly brought before the court.
8. 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. Jurisdiction is everything and without Jurisdiction the Court has no option but to down its tools. See the case of *Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (Kenya) Ltd* (1989) 1 KLR, where the Court held that;

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”

10. In the case of *County Government of Migori vs I N B Management IT Consultant Limited* [2019] eKLR the Court held that;

“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 v 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 v 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.....”

11. This instant suit, the Defendants submits that based on the value of the suit property which does not exceed Kshs 10,000,000/= 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 Principal Magistrate’s Court that has jurisdiction of up to Kshs 10,000,000/ = and not the Environment and Land Court. However, the Plaintiffs insist the value is Kshs50,000,000/=. No valuation report has been produced to support either claim. Section 107 of the *Evidence Act* states that;

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



12. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See *Isca Adbiambo Okayo vs Kenya Women's Finance Trust* KSM CA Civil Appeal No 19 of 2015 [2016]eKLR). That is captured in sections 109 and 112 of the *Act* as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

13. It is trite law that, “he who asserts must prove” the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka* Nandi NYR CA Civil Appeal No 342 of 2010 [2013]eKLR held that;

“ We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

14. The only evidence this court has to go by is the certificate of lease which states that the land parcel is Taveta Town Block 1/123 approximate area 0.0777Ha, in Taveta Town. It is adjacent to the Defendants premises (which appears to be a hotel) and has some structures on it according to the plaint filed in court on the January 31, 2023. I find that the court cannot ascertain the value of the suit property in the absence of a valuation report. I find that the preliminary objection is unmerited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH JULY 2023.

N.A. MATHEKA

JUDGE

