



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NO. 12 OF 2021**

**IN THE MATTER OF THE COMPANIES ACT, 2015**

**AND**

**IN THE MATTER OF**

**REVOCAION OF IRREGULAR ALLOTMENT OF SHARES**

**AND**

**IN THE MATTER OF**

**REVOCAION OF IRREGULAR APPOINTMENT OF DIRECTOR**

**CAROLINE MUTWA MWENDE MWINZI.....1<sup>ST</sup> PLAINTIFF**

**KASYETHAU NOBLE TRADING LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**GEORGE NGUI KIMANZI.....1<sup>ST</sup> DEFENDANT**

**ANNAH MWALE KIMANZI.....2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF COMPANIES.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**FRANCIS GATHENYA GATHUKU.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling on **preliminary objection** dated **22<sup>nd</sup> day of July 2021** filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants. It was filed following the filing of amended plaint on 6<sup>th</sup> July 2021 which seeks the following payers:

- a. A declaration that the resolution of the general meeting purportedly held on 29<sup>th</sup> December, 2020 was a nullity.
- b. A declaration that the subsequent forfeiture of the 1<sup>st</sup> plaintiffs 400 shares in the company and allotment of the same to **Joseph Kamau Kimanzi, George Ngui Kimanzi and Annah Mwale Kimanzi** as well as appointment of **George Ngui Kimanzi and Annah Mwale Kimanzi** as directors was fraudulently and irregular and therefore illegal.
- c. A declaration that any subsequent acts by **George Ngui Kimanzi and Annah Mwale Kimanzi** as directors of **KASYE THAU NOBLE TRADING LIMITED** is null.
- d. Orders compelling the 3<sup>rd</sup> defendant to revoke the illegal forfeiture of 1<sup>st</sup> plaintiff's shares allotment of 200 shares to **Joseph Kamau Kimanzi**, 100 shares to **George Ngui Kimanzi** and 100 shares to **Annah Mwale Kimanzi** as well as illegal appointments of **George Ngui Kimanzi and Annah Mwale Kimanzi** as directors of **KASYE THAU NOBLE TRADING LIMITED**.

e. Orders compelling the sale and transfer of the company's house known as **Nakuru/Municipality Block 20/285/U8** to the 5<sup>th</sup> defendant and any amount so far paid by the 5<sup>th</sup> defendant be refunded by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

f. Orders cancelling the sale and transfer of motor vehicle registration Number KCE 658R transferred to the 1<sup>st</sup> defendant.

2. The ground's in support of plaintiff's case are set out as hereunder:-

a. The revocation of the irregular, fraudulent and unlawful allotment of shares and appointment of 2 directors made at a purported general meeting of which the 1<sup>st</sup> Plaintiff was not aware of.

b. The cancellation of all transactions, sale transfer, and any dispositions made on behalf of the 2<sup>nd</sup> Plaintiff pursuant to the irregular, fraudulent, and unlawful allotment of shares and appointment of 2 new directors.

c. The actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are oppressive, unfair, and prejudicial to the plaintiff and the company whose operations have been halted.

d. The forfeiture of the 1<sup>st</sup> Plaintiff shareholding in **KASYE THAU NOBLE TRADING LIMITED** to the tune of 400 shares was fraudulent and irregular thus illegal.

e. The allotment of 200 shares to **Joseph Kamau Kimanzi**, 100 shares to **George Ngui Kimanzi**, and 100 shares to **Annah Mwale Kimanzi** was fraudulent and irregular and therefore illegal.

f. The alleged meeting of 29<sup>th</sup> December 2020 never took place it is irregular and a nullity for lack of proper notice.

g. The sale of the Company's house known as **Nakuru Municipality Block 20/ 285/U8** and motor vehicle KCE 658R was fraudulent and irregular thus illegal.

3. The defendants contend that this court lacks jurisdiction to hear this matter and cited **Article 165 (5) (b) of the Constitution** which provide that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in **Article 162 (2)**.

4. The applicant further cited **Section 13 (1) (2) (d) and (7) (h)** of the **Environment Land Court Act No. 19 of 2011** which provide as follows:-

**Section 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.”**

**Section 13(2 )**

**“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have the power to hear and determine environmental planning and disputes:-**

**(a) relating to 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.”**

**Section 13(7) (h)**

**“In exercise of its jurisdiction under this Act, the Court shall have the power to make an order and grant any relief as the Court deems fit and just, including the declaration.”**

5. The defendants urged this Court to find that it has no jurisdiction to entertain and that the inevitable results should be that the plaintiffs' entire suit be struck out with costs to the 1<sup>st</sup> defendant.

6. The preliminary objection was canvassed by way of written submissions.

### **1<sup>ST</sup>, 2<sup>ND</sup> AND 5<sup>TH</sup> DEFENDANT'S SUBMISSIONS**

7. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants submitted that the jurisdiction of any court stems from the Constitution and the statute law or judicial precedents and cited the case of **Owners of Motor Vessel "Lilian S" -Vs-Caltex Oil (Kenya) Ltd** where the court stated as follows:

**"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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

8. They further cited the case of **South African Constitutional Court in Vuyile Jackson Gcaba-Vs-Minister for Safety & Security First & Others CCT 64/08[2009] Zacc 26** where the court held as follows: -

**"Jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings- including in motion proceedings, not only the formal terminology of the notice of motion but also the contents of the supporting affidavits —must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would Jack jurisdiction..."**

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants submitted that **Article 165 (5)** provide that the High Court shall not have jurisdiction in respect of matters (a) **Reserved for the exclusive jurisdiction of the Supreme Court under the constitution** (b) **Falling within the jurisdiction in Article 162(2) (a) and (b) of the constitution.**

10. They urged this court to uphold the preliminary objection dated 22<sup>nd</sup> September 2021, and dismiss the suit with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendants.

### **PLAINTIFF'S SUBMISSION**

11. Counsel for the plaintiffs submitted that the preliminary objection is a craft hatched by the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Defendants so that they can continue to enjoy the rental proceeds and urged the court to dismiss it with costs.

12. She submitted that this court is seized with the jurisdiction to determine this matter as the issue is a commercial dispute governed by **Section 2 of the Act**; that the predominant issues in the suit are the allotment of shares and appointment of new directors. She cited the case of **Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others (2017) eKLR** where the Court of Appeal applied the test of pre-dominant issues to determine the question of jurisdiction; and submitted that in the above case, the Court of Appeal found that a question of charge/mortgage should be determined by the High Court and not the Environment Land Court; and test was used with approval in the subsequent decision of the High Court.

13. She further submitted that in the case of **Thomas Mutuku Kasue vs Housing Finance Company Limited (HFC) & Anor (2021) eKLR** the court held as follows:-

**" The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit"**

14. Counsel reproduced the averments in the amended plaint to prove that the dispute involves a commercial dispute and urged this court to be guided by the decision in **Joyce Cherop Kaspondoy & 609 others v Kenya Power and Lighting Company (2019) eKLR** where the court held that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case.

15. The plaintiff's counsel submitted that preliminary objection was necessitated by the amended plaint yet additional prayers which included cancellation of all transactions, sale, transfer, and any dispositions made on behalf of the 2<sup>nd</sup> plaintiff are pursuant to the irregular, fraudulent and unlawful allotment of shares and appointment of the 2 new directors on the grounds that the 1<sup>st</sup> plaintiff as a director/shareholder of the 2<sup>nd</sup> plaintiff never sanctioned any sale of the company's property and was not aware nor was she a party to any such transaction and that any such is a forgery.

16. She submitted that issues relating to ownership and directorship of the company fall within the jurisdiction of the High Court and added that the jurisdiction of the Environment and Land Court is limited to the dispute contemplated under **Article 162 (2) (b) of the Constitution and Section 13 of the Environment Land Act** but the issue of cancellation of title of the property known as **Nakuru Municipality/Block 20/285/U8** may be referred to the Environment Court; the rest of the orders sought include the rectification of the register as provided under **Sections 103 and 118 of the Companies Act**, thus this court is clothed with the jurisdiction to determine. She urged this court to dismiss the preliminary objection with costs.

## **ANALYSIS AND DETERMINATION**

17. I have perused pleadings herein and considered submissions by parties.

18. It is trite law that a preliminary objection should be based on pure points of law as was held in the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

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

19. The issue before me is whether the court has jurisdiction to deal with this matter. Jurisdiction of the High Court is conferred by **Article 165(3)** which provide as follows:-

**“3) Subject to clause (5), the High Court shall have— (a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (c) jurisdiction to hear an appeal from a decision of a tribunal Court of Appeal. High Court. 100 The Constitution of Kenya appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.’**

20. **Article 165 (5) of the constitution of Kenya 2010** provide that the High Court shall not have jurisdiction in respect of matters:-

**(a) Reserved for the exclusive jurisdiction of the Supreme Court under the constitution**

**(b) Falling within the jurisdiction in Article 162(2) (a) and (b) of the constitution.**

21. **Section 13 of the Environment and Land Court Act** provide as follows:-

**“(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 the 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, chooses inaction or other instruments granting any enforceable interests in land; and**

**e. Any other dispute relating to the environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69, and 70 of the Constitution.”**

22. The dispute in this matter relate to transfer of shares from **Kasye Thau Noble Trading Limited** to **Joseph Kamau Kimanzi, George Ngui Kimanzi, and Annah Mwale Kimanzi** which were termed as fraudulent and irregular and therefore illegal. The other prayer relates to actions after the transfer of shares which in my view the trial will decide whether to refer to the Environment and Land Court after the dominant issues have been disposed of.

23. The dominant issue being commercial dispute, this matter fall within the ambit of the High Court. In my view, the preliminary objection lacks merit.

## **24. FINAL ORDERS**

1) Preliminary objection dated 22<sup>nd</sup> September 2021 is dismissed.

2) Costs to the respondent.

**RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 16TH DAY OF  
DECEMBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jenifer - Court Assistant

Mr. Karanja Mbugua for defendant

No appearance for plaintiff