



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 11 OF 2021

IN THE MATTER OF THE REGISTRATION OF BUSINESS ACT CAP 499, LAWS OF KENYA

AND

IN THE MATTER OF REVOCATION OF IRREGULAR APPOINTMENT OF A PARTNER

AND

IN THE MATTER OF REVOCATION AND CESSATION OF BUSINESS NAME

AND

IN THE MATTER OF REVOCATION OF IRREGULAR AND ILLEGAL TRANSFER OF BUSINESS PROPERTY

CAROLINE MUTWA MWENDE MWINZI

T/A KIBERITI APARTMENTS.....PLAINTIFF

VERSUS

GEORGE NGUI KIMANZI.....1ST DEFENDANT

THE REGISTRAR OF COMPANIES.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

AND

KIBERITI MERCHANTS LIMITED.....INTERESTED PARTY

RULING

1. This is a ruling on preliminary objection dated 22nd September 2021. The preliminary objection was filed following filing of this suit through plaint dated 4th May 2021. The plaint was amended and filed on 7th July 2021. The plaintiff seeks **revocation of appointment of the 1st Defendant** as a partner for being irregular, fraudulent and unlawful and subsequent application for cessation of the business for the purpose of conversion from a partnership into a private limited liability company.
2. The plaintiffs contention is that there no notice to the applicant/plaintiff on the proposed appointment of **George Ngui Kimanzi** a new partner; that she was not aware and did not attend any meeting that ratified the appointment of a new partner, and the signature was placed against her name on the notice of the change is a forgery.
3. The applicant further avers that the sale and transfer of business property including but not limited to all that property known as NJORO/NGATA/ BLOCK 1/4514 MWINGI KANZANZU/2883 motor vehicle registration numbers KCA 828V and KCL 996M was fraudulent and irregular and therefore illegal.
4. The applicant/plaintiff urged the court to issue a declaration that the resolution to appoint **George Ngui Kimanzi** as a partner was a nullity and the subsequent application to convert the business into a Private Liability Company was fraudulent and irregular and therefore, illegal.

5. The applicant also urges this court to issue compelling orders to the 2nd defendant to revoke the Certificate of Registration of Change of Particulars issued on 5th January 2021 and the Notice of Cessation of Business name KIBERITI APARTMENTS issued on 1st March 2021.

6. And further cancellation of all transactions signed off by the deceased, 1st defendant and the interested party purporting to sell and transfer plaintiff's property including but not limited to all that property known as NJIORO/NGATA/ BLOCK 1/4514 MWINGI KANZAN, vehicle registration numbers KCA828V and KCL996M.

7. The 1st defendant filed preliminary objection on the following grounds:-

a. That this court lacks jurisdiction to hear or even entertain the plaintiff's case on the basis of the following express provisions of the constitution and the law:-

*Under Article 165 (5) (b) of the Constitution:-
"The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2)."*

Under section, 13 (1) (2) (d) and (7) (h) of the Environment Land Court Act No. 19 of 2011 which provisions states:-

*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, chose 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.*

8. The 1st defendant urged that this court to find that it has no jurisdiction in this case and strike out the entire suit with costs to the 1st defendant.

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

1ST DEFENDANT'S SUBMISSIONS

10. Through submissions dated 4th October 2021, the 1st defendant submitted that 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."

11. The 1st defendant further cited the case of **Vuyile Jackson Gcaba-Vs-Minister for Safety & Security First & Others CCT 64/08 [2009] Zacc 26** where **South African Constitutional 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 lack jurisdiction..."

12. The 1st defendant submitted that **Article 165 (1) of the Constitution** vests powers of the High Court and the provision is clear and mandatory 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.**

13. The defendant further submitted that the preamble of the Environment Land Act states that it was enacted to give effect to **Article 162 (2) (b) of the Constitution** to establish a superior court to hear and determine disputes relating to the Environment and the use and occupation of land, title to land and to make provisions for its jurisdiction functions and powers and connected purposes and cited the case of **Republic - Vs-National Land Commission Ex-Parte Cecilia Chepkoech Leting**, the court stated:-

“Where, however, it is clear that the court has no jurisdiction, it would be improper for the court to give itself jurisdiction based on convenience.”

14. The 1st defendant urged this court to uphold the preliminary objection dated 22nd September 2021, and dismiss the suit property with costs to the 1st defendant.

PLAINTIFF'S SUBMISSION

15. The plaintiff submitted that this court is properly seized of with the jurisdiction to handle this matter and the preliminary objection is a craft hatched by the 1st defendant so as to continue enjoying the rental proceeds.

16. The plaintiff submitted that this is a commercial dispute, and the predominant issues in the suit are the appointment of a new partner and cessation of a business name.

17. The plaintiff 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 the Court of Appeal found that a question of charge/mortgage should be determined by the High Court and not the Environment Land Court.

18. The plaintiff submitted that the above test was used with approval in the subsequent decision of the High Court in **Thomas Mutuku Kasue vs Housing Finance Company Limited (HFC) & Anor (2021) eKLR** where 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”

19. The plaintiff submitted that the cause of action as drawn in the pleadings puts the questions for determination squarely within the ambit of the High Court and reproduced the averments in the amended plaint being commercial disputes.

20. The plaintiff 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 and that **the South African Constitutional Court** held: -

i. “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 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 lack jurisdiction...”

21. The plaintiff submitted that this court is clothed with unlimited, original jurisdiction in criminal and civil matters as provided under **Article 165 (1), (3), a, & e of the Constitution of Kenya 2010.**

22. The plaintiff further submitted that the preliminary objection was necessitated by the amended plaint yet the additional prayers included cancellation of irregular, fraudulent and unlawful sale of the business property including but not limited to all that property known as NJORO/NGATA BLOCK 1/4514, MWINGI KANZAU/2883, and Motor Vehicle Registration No. KCA 828V and KCL 996M to the interested party.

23. That issues relating to ownership and directorship of the company are vested within the jurisdiction of the High Court.

24. The plaintiff submitted 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**; that the issue in dispute that may be referred to the Environment Court is the cancellation of the title of the property known as NJORO/NGATA/BLOCK 1/4514, MWINGI KANZANZU/2883 and urged

this court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

25. I have considered the pleadings herein and submissions filed. What is in issue is whether this court has jurisdiction over the matter. 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”.

26. The question 1st defendant’s preliminary objection raises the issue of jurisdiction of this court in determining the matter and therefore satisfies the above requirement.

27. The jurisdiction of the High Court is vested by **Article 165 (3) of the constitution.**

28. **Section 13 of the Environment and Land Court Act** on jurisdiction of the Environment Court 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, leases, mortgages 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.”

Article 165 (5) of the Constitution of Kenya 2010 provide as follows:-

“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.”

29. From the pleadings herein, the dispute in this matter emanates from the appointment of the 1st defendant as a partner and conversion of the company from a partnership into a private limited liability company. The applicant challenges validity of the meeting which authorized the changes and authenticity of signature purported to be for the plaintiff and the transfer of property known as NJORO/NGATA/BLOCK 1/4514, MWINGI KANZANZU/2883.

30. Prayers in the amended plaint include (a) a declaration that the appointment of **George Ngui Kimanzi** is a nullity, (b) A declaration that the subsequent application to convert the business into a private limited liability company was fraudulent and irregular, (c) an order compelling the 2nd defendant to revoke the certificate of registration of change of particulars issued on 5th January 2021 and the Notice of cessation of business name **KIBERITI APARTMENTS** issued on 1st March 2021.

31. There is no doubt that that the dominant issues raised in the amended plaint fall within the ambit of a commercial dispute and therefore falls within the jurisdiction of the High Court and not disputes to be referred in the Environment and Land Court as provided by Environment and Land Act. This court is therefore seized with the jurisdiction to hear and determine the matter.

32. From the foregoing, I find that the Preliminary Objection dated 22nd September 2021 lacks merit.

33. FINAL ORDERS

1) The preliminary objection dated 22nd September 2021 is hereby dismissed.

2) Costs to the plaintiff

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

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Karanja Mbugua for Respondent

No appearance for Plaintiff