



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 24 OF 2018**

**MIDLAND PROPERTIES INVESTMENT LTD.....PLAINTIFF**

**VERSUS**

**MASINDE MULIRO UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY.....DEFENDANT**

**RULING**

1. The suit herein was initiated by way of a plaint dated 11<sup>th</sup> September 2017, on 17<sup>th</sup> November 2017, at the Environment and Land Court at Kakamega, in ELC No. 363 of 2017. According to the plaint, the plaintiff is the registered proprietor of a property known as Kakamega Municipality/Block II/254, on which stands premises that it leased out to the defendant for use as lecture rooms and hostels, through tenancy agreements executed in 2013 and 2014. The suit is for recovery of accrued rent, for repairs to or renovation of the premises, and for vacant possession. In its defence statement, the defendant concedes the lease agreement, but avers that it had handed over possession of the premises to the plaintiff.

2. The matter was placed before Matheka J. at the Environment and Land Court on 26<sup>th</sup> September 2018. It was directed that the matter be transferred to the High court as it was before the wrong court. It was transferred to the High Court and was assigned its current cause number, Kakamega HCCC No. 24 of 2018. It came up several times for mentions and hearings. The hearing eventually commenced on 19<sup>th</sup> September 2019 before me. Mr. Kotecha Divyesh Kumar Ramesh, a director of the plaintiff took to the witness stand, and was taken through examination-in-chief by the advocate for the plaintiff, Mr. Fwaya. He was stood down at 3.10 PM for cross-examination on 26<sup>th</sup> November 2019. Come 26<sup>th</sup> November 2019, the matter did not take off. The parties indicated that there were preliminary issues relating to jurisdiction that they felt the court should address first before the matter proceeded further. They opted not to make any submissions and left it to me to evaluate the position and thereafter give them directions. This ruling is on the direction that the matter should take.

3. As stated above, the suit relates to premises standing within Kakamega municipality that the plaintiff had leased out to the defendant. The plaintiff alleges breach of terms of the lease agreements and seeks to recover vacant possession of the premises, payment of the rent so far accrued and restoration of the premises to the position it was at as at the time the defendant took possession. The defendant takes the position that it does not have possession of the subject property, since it had since handed possession over to the plaintiff. Flowing from that is the argument that there is no rent in arrears and there is no basis for it to repair the premises.

4. I have seen a certificate of official search relating to Kakamega Municipality/Block II/254, dated 29th September 2017. It indicates that the plaintiff was registered as proprietor of that property under the Registered Land Act, Cap 300, Laws of Kenya, on 22<sup>nd</sup> December 2009, and a land certificate was duly issued on 23<sup>rd</sup> December 2009. The Registered Land Act was repealed by the coming into force of the Land Registration Act, No. 3 of 2012, through section 109 of the said Act. The effect of it is that Kakamega Municipality/Block II/254 is now deemed to be registered under the Land Registration Act.

5. The Land Registration Act provides for, among other things, registration of land and registration of leases created over properties registered under the Act. The provisions on registration of leases are set out in Part IV of the Land Registration Act, sections 54 and 55. Leases that are created over property registered under Land Registration Act, and Kakamega Municipality/Block II/254 is one such property, are registrable under the Act.

6. All land in Kenya is subject to the Land Act, No. 6 of 2012. The said legislation deals with administration and management of both public and private land. It carries elaborate provisions on leases at Part VI, running from sections 55 to 77, both inclusive. The provisions cover such matters as the power to lease land, the various types of leases, termination of leases, possession under the lease, covenants and conditions, transfer and assignments of leases, remedies and reliefs. The effect of this is that Kakamega Municipality/Block II/254, being private land, is subject to the Land Act, inclusive of Part VI thereof, relating to leases.

7. The fact that Kakamega Municipality/Block II/254 is a property registered under the Land registration Act and regulated or managed

under the Land Act, naturally raises questions about jurisdiction over disputes that may arise over the registration and management of Kakamega Municipality/Block II/254 and any transactions relating to it. I have serious misgivings as to whether I have any jurisdiction to handle a dispute that would revolve around a lease created over land that is registered under the Land Registration Act and managed or administered under the Land Act. I say so bearing in mind the provisions in sections 2 and 101 of the Land Registration Act, and sections 2 and 150 of the Land Act.

8. The provisions under the Land Registration Act state as follows:

*“Interpretation.*

*2. In this Act, unless the context otherwise requires— “Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011.*

*Jurisdiction of court.*

*101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

9. The provisions under the Land Act, on the other hand, say:

*“2. Interpretation*

*In this Act, unless the context otherwise requires— “Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011).*

*150. Jurisdiction of the Environment and Land Court*

*The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

10. The dispute before me is on land. The principal prayer in the suit is for an order of vacant possession on grounds that the terms of the lease have been breached. Flowing from the surrender of the lease, or vacant possession or surrender of the premises, is payment of rent arrears and renovation of the premises before vacant possession to restore them to the position they were at before they were leased out. The matter also dwells on the application of the Land Act, especially on the provisions governing the power to lease land, covenants and conditions, termination, remedies, among others. The dispute that has arisen is over possession and use of premises, it is not about rent, for the rent issue is at the core of possession and use of property. The High Court has no jurisdiction over the dispute since it turns on leases that are created under and regulated or administered by the Land Act.

11. The Court of Appeal in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, expressly stated, on the matter of jurisdiction, that jurisdiction is everything, and a court without jurisdiction should go no further. The exact words of the court were:

*“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 the moment it holds the opinion that it is without jurisdiction.”*

12. Jurisdiction is conferred by the Constitution and by legislation. With regard to land matters, the Constitution, at Article 162(2) (b), assigns jurisdiction over land matters to a court, with status equal to the High Court, to be established through an Act of Parliament. Article 162 states:

*“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).*

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(a) ...*

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

*(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”*

13. Parliament has passed legislation, the Environment and Land Court Act, No. 19 of 2011, in response to the command by the Constitution through Article 162(2)(3) of the Constitution, to establish the court envisaged in Article 162(2) (b), and to set out the jurisdiction of the said court as required by Article 162(3). The preamble to the said Act states its objective to be:-

*“... 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, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”*

14. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

*“13. Jurisdiction of the 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 the 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. Section 13(d) of the Environment and Land Court Act, no doubt, covers disputes relating to leases, being contracts or instruments that grant enforceable interests in land. A lease creates an interest in favour of the lessee in the property of a lessor, which is registrable and enforceable. Any disputes that arise with respect to leases also fall within section 13(e) of the Environment and Land Court Act, and, therefore, within the jurisdiction exercisable by the Environment and Land Court, by virtue of sections 2 and 150 of the Land Act.

16. Article 165 of the Constitution establishes the High Court and sets out the scope of its jurisdiction. Article 165(5) specifies areas in which the High Court has no jurisdiction, and these include matters that fall under Article 162(2) of the Constitution. The relevant portions of Article 165 state as follows:

*“(5) The High Court shall not have jurisdiction in respect of matters—*

*(a) ...*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”*

17. The plain effect of these provisions is that the High Court has no jurisdiction to handle matters that fall under the jurisdiction of the Environment and Land Court. The dispute that has been placed before me relates to a lease, which is an instrument which confers an enforceable interest in land. The creation of a lease and the process of its termination are governed by the Land Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the Land Act. A lease confers a right to occupy property for a particular use.

18. The Constitution is emphatic that the High Court shall not superintend over disputes that fall within the jurisdiction of the courts contemplated by Article 162(2) of the Constitution. The dispute before me in this cause is about use and possession of land and I have no jurisdiction over those matters. Hearing the matter would amount, for me, to be acting contrary to the Constitution by assuming jurisdiction over a matter in respect of which I have no jurisdiction, and usurping jurisdiction that the Constitution has vested in another court. That would be against the oath I took to uphold the Constitution.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24<sup>th</sup> DAY OF January, 2020**

**W MUSYOKA**

**JUDGE**