



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 26 OF 2014

JOHN ROBERT WAIGANJO.....PLAINTIFF/APPLICANT

-VERSUS-

THERESA WAMBUI KAGO.....DEFENDANTRESPONDENT

RULING

On 5 December, 2014, the applicant instituted a suit in this Honourable Court against the defendant for a declaration that a notice by the defendant to terminate his tenancy in the defendant's premises described as Plot D 294 Sagana and her action to dispose of construction materials at the entrance of those rental premises amounted to a fundamental breach of the lease agreement executed between themselves on 1 July, 2011; he also sought for a permanent injunction against defendant restraining her from trespassing on the leased premises and also damages for trespass.

Alongside his suit, the plaintiff filed a motion seeking interim orders seeking to restrain the defendant from interfering with the applicant's quiet possession of the leased premises pending the determination of the suit; he also sought for a mandatory injunction compelling her to remove construction materials she had unloaded at the entrance of the demised premises.

The defendant entered appearance but rather than file a defence in tow, he filed a summons in which she sought to have the applicant's suit stayed pending the referral of the dispute to arbitration. No doubt, the defendant was invoking clause 6(i) of the lease agreement which provided, inter alia, that in the event of a dispute over any issue arising out of the tenancy, the dispute shall be resolved by a single arbitrator. Indeed, when parties appeared before me on 19 December, 2014, I directed them to consider appointment of an arbitrator pursuant to the arbitration clause in the lease agreement. I also ordered that the status quo be maintained pending the outcome of the arbitration; meanwhile, I directed that the suit be mentioned before the Environment and Land Court for further directions on 20 March, 2015.

It would appear no arbitrator was appointed and the suit was never mentioned before the Environment and Land Court as directed. At some point, parties appeared before me again; they were then heard by Justice Mativo who moved from the station before he could make a determination; Hon. Lady Justice Matheka who took over from Mr Justice Mativo also heard them but opted to refer the matter to me in her ruling on an application by the applicant to, inter alia, have the defendant committed to civil jail for disobedience of an order made by this Court. I understand this order to be the one made for parties to maintain the status quo pending the outcome of the arbitration proceedings or pending such order that would have been made by the Land Court had parties appeared before it as directed.

Thus, the application found its way back before me for determination; the learned counsel informed me that they would not submit any further but would rather rely on submissions they had made before Lady Justice Matheka in support of the respective positions they had adopted on the application for committal to civil jail for contempt of court.

My first instinct when this matter was first brought to my attention was that being a dispute over tenancy, it fell squarely within the jurisdiction of the Environment and Land Court and it is solely for this reason that I directed the parties to that court for further directions when the application first came up for inter parte hearing; in the meantime, I asked them to consider invoking the arbitration clause in the lease agreement and appoint an arbitrator for determination of their dispute before escalating it to the Court. If they had done so, they would have informed the Environment and Land Court of this development had the matter been mentioned before that court as directed. It turns out that neither was the arbitrator appointed nor was the matter ever mentioned before the Land Court.

Now that the matter has been referred back to me, perhaps it is time for me to put the record straight why I think the Land Court is the only appropriate forum where the present dispute can be resolved if, for one reason or another, it cannot be determined by an arbitrator as envisaged in the lease agreement itself.

Article 162 of the Constitution establishes superior courts as part of the system of courts in Kenya; these courts are named as the Supreme Court, the Court of Appeal, the High Court and the Courts with the status of the High Court; these latter courts are established to determine, first, the disputes relating to employment and labour; and, second, such disputes as relate to the environment, use of, occupation and title to land. That provision of the law states as follows:

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) *employment and labour relations; and*

(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).*

(4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

Pursuant to the provisions of Article 162 (2), and for purposes of resolving the issue at hand, Parliament enacted the Environment and Land Act, 2011 whose section 13 delineates the extent of the jurisdiction of the Environment and Land Court; it states as follows:

Jurisdiction of the Court

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 written law 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 relating to environment and land, including disputes?*

(a) *relating to environmental planning and protection, trade, 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.*

(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 the environment and land under Articles 42, 69 and 70 of the Constitution.*

(4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

(5) *The Court shall have supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.*

(6) *For the purposes of subsection (7)(b), the Court may call for the record of any proceedings before any subordinate court, body, authority or local tribunal exercising judicial or quasi-judicial functions, or a decision of any person exercising executive authority referred to in subsection (7)(b), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.*

(7) *In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?*

(a) *interim or permanent preservation orders including injunctions;*

(b) *prerogative orders;*

(c) *award of damages;*

(d) *compensation;*

(e) *specific performance;*

(g) *restitution;*

(h) declaration; or

(i) costs.

The dispute between the parties arises from a tenancy or a lease agreement and to this extent, it is the kind of dispute that is envisaged in section 13 (2) (a) of the Act. That section confers jurisdiction on the Land Court to hear and determine, among other disputes, disputes on land tenure, which in my humble view, is the sort of dispute between the parties. For avoidance of doubt, all the prayers that the applicant is seeking are catered for in section 13(7) of the Act. If the Land Court is seized of jurisdiction to hear and determine that category of disputes, it follows, by necessary implication, that the High Court is divested of that jurisdiction.

If I am right, all the proceedings before this court with respect to this dispute including any order that this court may have issued may, arguably, be deficient of legal force for want of jurisdiction. Taking this argument further, I would argue that without jurisdiction, I cannot proceed any further and purport to resolve any outstanding issue in this matter; it should be obvious that, in the absence of the requisite authority, whatever I do will be rendered inconsequential. I need not say more save to reiterate that pursuant to Article 162 (2) (b) of the Constitution and section 13 (2) (a) of the Environment and Land Act, 2011, this dispute should be handled by the Land and Environment Court. I therefore direct that this file to be transferred to that court for disposal of the dispute forthwith.

Signed, dated and delivered in open court this 12th day of April, 2019

Ngaah Jairus

JUDGE