



**Mulongo & another v Njuguna (Environment & Land Case E126 of 2023)
[2023] KEELC 21662 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E126 OF 2023
MD MWANGI, J
NOVEMBER 14, 2023**

BETWEEN

GODFREY WANYONYI MULONGO 1ST PLAINTIFF

AGNETTA MUENI MUTUNGE 2ND PLAINTIFF

AND

JAMES KIMANI NJUGUNA DEFENDANT

RULING

Background

1. This Ruling is in respect of the Defendant's Preliminary Objection seeking the striking out of this suit on the grounds:-
 - a. That this Honourable Court lacks jurisdiction to entertain and determine the suit herein pursuant to the provisions of Article 162(2)(b) and 162(3) of the *Constitution* as read with the provisions of Section 128 and 150 of the *Land Act*, No.6 of 2012.
 - b. That the nature of the claim and reliefs sought in the Plaint arise from a commercial dispute for recovery of money which is the remit of the High Court of Kenya and does not relate to the environment, use and occupation of the title to land.
 - c. The suit is therefore incompetent, an abuse of this Honourable Court's process and ought to be struck out with costs.
2. The Court directed that the Preliminary Objection to be canvassed by way of written submissions. Both parties complied.



Defendant/Objector's Submissions

3. The Defendant's submissions are dated 10th October, 2023. The Defendant submits that this court lacks the jurisdiction to hear and determine this matter.
4. The Defendant asserts that the jurisdiction of the Environment and Land Court is anchored in Article 162(2)(b) of the Constitution of Kenya, 2010 as read together with Section 13 of the ELC Act, 2011. He refers to the Court of Appeal decision in Cooperative Bank of Kenya -vs- Patrick Kangethe Njuguna & Others (2017) eKLR which defined land use to mean:

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.....

.....Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”
5. The Defendant submits that it is not enough to assert the jurisdiction of the Environment and Land court merely because a sale agreement confers an interest in land. Given that the basis of the Plaintiff's suit is breach of a Sale Agreement dated 7th May 2021 and recovery of costs incurred, this cannot be deemed to fall within the ambit of the Environment and Land Court jurisdiction. At best, the instant dispute is a commercial matter that should be heard and determined by the High Court.

Plaintiffs' Submissions

6. The Plaintiffs in their Submissions dated 23rd October, 2023 aver that the instant Preliminary Objection invites the Court to make reference to facts that are disputed by both parties. The Preliminary Objection cannot be sustained. They cite the decision in Mukhisa Biscuit Manufacturing Co. Limited -vs- West End Distributors Limited (1969) EA 696, to the effect that a preliminary objection can only be premised on a pure point of law.
7. On whether this Court has jurisdiction to entertain this suit, the Plaintiffs cite Article 162(b) of the Constitution which creates the Environment and Land Court. They further point to the preamble of the Environment and Land Court Act which defines the jurisdiction of this court as:

“.... a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes....”
8. The Plaintiffs further cite Section 13(2)d of the Environment and Land Court Act.
9. The Plaintiffs rely on the case of Suzanne Achieng' Butler & 4 Others -vs- Redhill Heights Investments Limited & Another (2016) eKLR in which the Learned Judge Ngugi J (as he then was) discussed the “pre-dominant purpose test”.
10. The Plaintiffs' however submit, on a without prejudice basis, that if the court deems that it lacks jurisdiction, the matter be transferred to the High Court for determination.



Issues for Determination

11. Having considered the pleadings, Preliminary Objection, rival submissions and the authorities cited to me, the following issues arise for determination
 - a. Whether the Preliminary Objection raises pure points of law.
 - b. Whether the Court has jurisdiction to hear and determine this suit.

Analysis and Determination

A. Whether The Preliminary Objection Raises Pure Points Of Law

12. On what constitutes a Preliminary Objection, in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 others SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A where the Court of Appeal said that:

“...a Preliminary Objection is in the nature of what used to be a demurrer. 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 needs to be ascertained or if what is sought is the exercise of judicial discretion.”

13. The Supreme Court gain 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.”

14. It is therefore my finding that the Preliminary Objection raised by Defendant is one on pure points of law that that this court needs to determine right away on the materials before it.

B. Whether The Court Has Jurisdiction To Hear And Determine This Suit

15. It is common ground that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use, occupation and title to land.
16. Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, I note that the said provisions are less clear on what “land-related” means.



17. In order to make a determination as to whether the issues before are land related my attention has been drawn to the decision in the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR, which decision I agree with. In the said case the court stated that:

“In all honesty, it would not be possible for such direction to come from the *Constitution* or statute; it would have to be supplied by the Courts in a case by case basis. Such is our task here.

When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract;
- b. The nature of the business of the vendor;
- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and the remedies sought by the Plaintiff” (emphasis mine).

18. The Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, while determining the issue of jurisdiction for the Environment and Land Court stated that:

‘As for land use, the Black’s Law Dictionary, 9th Edn; gives the basic definition of the word ‘use’ as being: - ‘the application or employment of something; esp. a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.

.... the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”



19. From the foregoing, the Court of Appeal clearly settled for the ‘pre-dominant purpose test’ as opposed to the ‘predominant issue before the court test.’
20. The Plaintiffs’ case is that they entered into an Agreement for Sale of all that piece of land known as Land Reference Number 1160/1034 within Nairobi County on the 7th May, 2021. The purchase was agreed as Kshs. 27,000,000/=. The said Agreement was however varied vide the Deeds of Variation dated 3rd September, 2021 and that of 21st April, 2022. It however emerged that the Defendant, despite having received the claimed sum of Kshs. 27,139 381.20 is not the registered owner of the subject property. The Plaintiffs are therefore seeking a refund of said sums.
21. It is evident that the contract was for the purchase of land. Guided by the decision in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (Supra) and the decision by the Learned Judge Ngugi J Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another (Supra) and applying the predominant purpose test, my finding is that this court has the jurisdiction to hear and determine this matter.
22. Accordingly, the Defendant’s Preliminary Objection is dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2023

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Seko for the Defendant

Ms Mwenja for the Plaintiffs

COURT ASSISTANT: YVETTE

