



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL NUMBER 75 OF 2016

RACHAEL CHPENGENO KOMEN.....1ST PLAINTIFF

BENARD KIPLANGAT BOWEN.....2ND PLAINTIFF

PATRICK TOROITICH BOWEN.....3RD PLAINTIFF

VERSUS

MOUNT KENYA UNIVERSITY.....DEFENDANT

RULING

1. The plaintiffs are the registered owners of land **Parcel No. Kabarnet Municipality/60**. By a lease agreement executed between themselves and the defendant and registered on the 2nd September 2015, they leased their property to the defendant for a period of five (5) years and one (1) month commencing 1st January 2013 upon agreed terms.

2. On the 19th February 2016 the defendant informed the plaintiffs of its intention to terminate the lease. A dispute arose as the plaintiff insisted on the defendant paying rent for the term of the lease in the sum of Kshs.11,395,468/80 whereas the defendant were of a different view. This led to the filing of the suit by its **plaint dated 8th August 2016** alleging a breach of contract and sought the following reliefs:

(a) Payment of rent income upto the end of the lease term (31st January 2018) amounting to Kshs.11,395,468.80/=

(b) General damages for breach of contract

(c) Costs of the suit

(d) Interest

3. In its statement of defence filed on the 8th September 2016, the defendant admits existence of the Lease agreement of the suit premises but denied any breach of the lease agreement and the sum claimed.

4. By an application dated the **6th September 2016** brought under the provisions of **Order 2 rule 15 (b) (c) and (d), Order 51 Rule 1 of the Civil Procedure Rules and Articles 160 and 162 (2) (b) (c) and (d) of the Constitution**, the Defendant sought an order that:

(a) The plaint herein dated 8th August 2016 be struck out with costs to the defendant

Upon grounds that:

(i) this court lacks the requisite jurisdiction to entertain hear and determine the suit herein as set out in the plaint.

It is supported by and affidavit sworn by Prof. Evans Kerosi, the Deputy Vice- Chancellor Administrative Planning and Institutional Advance of the Defendant.

5. He acknowledges the existence of the lease and the occupation and use of the suit property.

6. The Respondents (plaintiffs) in opposing the application filed a Replying affidavit sworn by the 1st plaintiff Rachael Chepngeno Komen on the 21st October 2016.

It is deposed that the dispute for the courts determination in the suit is a claim arising from a breach of the term is of the lease as the defendant vacated before lapse of the term lease, and that by its nature is a commercial dispute and not a land dispute as envisaged under the Environment and Land Act.

7. I have considered written submissions by the Defendant and Oral submissions by the plaintiff, highlights and authorities cited.

The only issue that the court is invited to determine as stated in the application under consideration is whether this court (High Court) has jurisdiction to hear and determine the suit. Determination thereof will conclude the application by the defendant.

8. In its written submissions, the defendant vehemently supports its assertion that the subject of the suit is a dispute on the use of land and the plaintiff has used the two words “**Land and Premises**” and citing **the Kenya Constitution 2010, Article 260 defines “land” to include:**

- (a) the surface of the earth and the subsurface rock***
- (b) anybody on water or under the surface***
- (c) marine waters in the territorial sea and exclusive economic***
- (d) natural resources completely contained on or under the surface and***
- (e) The airspace above the surface.***

9. This definition of land is replicated under the **Land Act, 2012** which states “**land**” has meaning assigned to it under **Article 260 of the Constitution.**

“**Lease**” under the **Land Act 2012** is given the meaning as:

- (a) a lease or sublease, whether registered or unregistered of land or***
- (b) a short term lease or agreement to lease.***

10. The application of **The Land Act 2012** is given in **Section 3** that is

- (a) registration of interests in all public land as declared by Article 62 of the Constitution***
- (b) Registration of interests in all private and as declared by Article 64 of the Constitution.***

Further Section 36(1) of the Said Act states that:

- (1) a Lease charge or interest in land shall not be disposed off or dealt with except in***

accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not extinguish transfer vary or affect any right or interest in that land or in the land lease or charge.

11. Against the backdrop of the above legal provisions it is important to determine the basis of a court's jurisdiction.

In the Supreme Court decision in **Samuel Kamau Macharia & Another -vs- KCB & 2 Others application No. 2 of 2011** the Supreme Court held that:

“a court's jurisdiction flows from either the Constitution or Legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or both or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

See also **In the matter of the IEBC, Supreme Court of Kenya Constitutional Application No. 2 of 2011.**

12. The Jurisdiction of the High Court is stated under **Article 165(3) of the Constitution** thus subject to **Clause 5** the High Court shall have :

(a) Unlimited original jurisdiction in criminal and civil matters.

Section 65(5) States that:

The high court shall not have jurisdiction in respect of matters

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

The court's contemplated under the said **Article 162(2)** are **(a) the Employment and Labour Relations (b) the Environment** and the use and occupation of, and title to land.

13. The **Environment and Land Court Act Chapter 12A** was established to hear and determine the following matters:

13(2)(d) relating to public land, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land.

14. In the case **Karisa Chengo & 2 other -vs- Republic Court of Appeal at Malindi Criminal Appeal Nos. 44, 45 and 76 of 2014**, the Court rendered itself, while discussing the issue of jurisdiction of the High Court, that:

“It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the repealed constitution.

It cannot deal with matters set out under Section 12 of the ELRC Act and Section 13 of the ELC Act ---”

From the above legal and Constitutional provisions, it is clear that the High Court cannot deal with matters specifically preserved for the Environment and Land Court.

15. I have considered the authorities cited by the applicant. The thread running through all of them is that the High Court has no Jurisdiction to deal with matters, the presence of the Environment and Land Court, and that include a Lease which by its nature is a contract or agreement between a Landlord and a tenant, and **Section 13(2) (d)** of the said **Act**, which I have quoted above is also clear that it is the said Court that has jurisdiction to determine disputes relating to such contracts granting an enforceable interest in land. Both parties in their pleadings admitted the existence of the Lease Contract, and the enforceable

interest in the land parcel.

16. The plaintiff/respondents are of a difficult opinion.

Mr. Kairu advocate submitted that the question for determination in the suit is a breach of contract of the lease and whether the defendant should be ordered to pay rent for the balance of the lease period after they vacated before its expiry. It is the plaintiff's submission that the dispute is commercial in nature and therefore falls under the jurisdiction of the High Court. It is submitted that the striking out of the plaint would only prolong the dispute and citing the cases **D.T. Dobbie -vs- Joseph Mbaria Muchina & Another (1980) e KLR** and **Pradeep Kharamshi & Another -vs- Manjula Dhirajlal Ratilah & Another, (2014) e KLR**, urged that should the court find that it has no jurisdiction, it ought to transfer the case to the right court.

I have considered several other decisions to the effect that a court without jurisdiction cannot transfer the case to the right court, that it cannot confer jurisdiction to another court. Different courts have held different opinions on the matter.

17. In **Co-operative Merchant Bank Ltd -vs-George Fredrick Wekesa C.A No. 54 of 1999**, the Court of Appeal rendered that striking out a pleading is discretionary and is draconian and should be resulted to in very clear cases where no semblance of a course of action or defence is exhibited. In **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance -vs- Mara Conservancy & 5 Others (2014) e KLR, Anyara Emukule J** rendered that:

“--- unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial.”

18. I have considered that the High Court has general power under **Section 18** of the **Civil Procedure Act** to transfer a suit from itself to another court or from another court to itself.

It is debatable as I have stated, as to whether a court without jurisdiction may transfer the case to the court with jurisdiction. In the case **Prof Daniel Mugendi -vs- Kenyatta University & Others Civil Appeal No. 6 of 2012, of the Court of Appeal** stated thus:

“---In order to do justice in the event where the High Court, the Industrial court or the Environment land Court Division comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar and equal status should in the spirit of harmonization effect the necessary transfers among themselves...”

19. The above was quoted in the case **Kenya Power Lighting Co. Ltd -vs- Njumbi Residents Association & Another (2015) e KLR**.

I am not only bound but also persuaded by the above rationale. The court has also its inherent jurisdiction under **Section 3A, and the Oxygen principles**, coupled with **Article 159(2) of the Constitution** to **dispense** Justice without undue regard to procedural technicalities, but not undermining clear legal provisions of the law.

The end result of the above findings is that the High Court has no jurisdiction to hear and determine any suit touching on the occupation, use and title to land. It is also a finding that the plaintiff's suit, being based on a Lease contract/agreement between the plaintiff and defendant is a suit that falls for determination in the Environment and Land Court.

20. However, and to uphold the principles of fair administrative action and upon courts unlimited jurisdiction, I find it prudent not to strike out the plaint filed in this court but to order a transfer of the suit to the Court with jurisdiction, The Environment and Land Court which I hereby do. However, I shall not let the plaintiff go free of a penalty for filing the suit in the wrong court when clear provisions as to which

court a party ought to file its case more so after the Promulgation of the Kenya Constitution 2010.

21. I therefore direct that the plaintiff shall pay throw away costs to the defendant which I assess at Kshs.70,000/=.

This sum should be paid to the defendant within 30 days of this ruling failing which the Defendants application dated 6th September 2016 which is merited but for the ends of Justice and in exercise of my inherent jurisdiction I have declined to grant the prayers sought for the reasons I have stated in the body of this ruling, shall then be deemed to have been granted with costs.

22. Those are my orders.

Dated, Signed and Delivered this 18th Day of May 2017.

J.N. MULWA

JUDGE