



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMITALTY DIVISION
CIVIL CASE NO. 505 OF 2008

MUIRI COFFEE ESTATE LIMITED PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

BENJOH AMALGAMATED LIMITED..... 2ND DEFENDANT

DAVIG G. KARIUKI t/a WATTS ENTERPRISES3RD DEFENDANT

BIDII KENYA LIMITED4TH DEFENDANT

RULING

1. This Ruling relates a Preliminary Objection dated 16th December, 2016, filed in Court on the same date by the Plaintiff/Respondent. It is raised in relation to Notice of Motion Application dated 15th September, 2016, filed by the 4th Defendant/Applicant. The objection raised is to the effect that the Honourable Court has no jurisdiction to determine the matters raised in the Application for reasons inter-alia that:-

(i) Pursuant to Article 162(2) of the Constitution of Kenya, this Honourable court is bereft of Jurisdiction to determine or adjudicate any matter on the use and occupation of, and title to land as that is the sole constitutional mandate of the Environment and Land Court.

(ii) Vide its decision of 26th April, 2013, the Court of Appeal dismissed the present suit HCCC 505 of 2008 of Muiri Coffee Estate Limited Vs Kenya Commercial Bank Limited & 3 Others and since the said there is no suit upon which any Application can be sustained by this Honourable Court.

(iii) The Applicant has deliberately suppressed, concealed and not disclosed to this Honourable Court that the suit HCCC 505 of 2008 of Muiri Coffee Estate Limited Vs. Kenya Commercial Bank Limited & 3 Others upon which the Application is premised was dismissed by the Court of Appeal on 26th April, 2013 and this Court is therefore functus officio.

(iv) The Applicant seeks orders against a Public Officer in a Civil Dispute in which the said Public Officer is not and has indeed never been a party, as contemplated by inter alia the Government Proceedings Act.

(v) The Application offends Article 244 of the Constitution of Kenya on the objects and functions of

the National Police Service.

2. The background facts of this matter are that, the Plaintiff commenced this suit vide a Plaint dated 8th September, 2008 in which it sought various injunctive and declaratory reliefs as follows:-

(i) A permanent injunction to restrain the fourth Defendant, its servants and/or employees from charging, encroaching upon, taking possession, leasing, trespassing, selling, disposing, wasting away, alienating and/or interfering in any manner whatsoever with the Plaintiff's occupation, user and possession of the suit premises known as Land Reference No. 10075, Thika.

(ii) A declaration that the transfer and sale of the Plaintiff's suit premises known as Land Reference No. 10075, Thika, is illegal, unlawful and therefore null and void and of no effect and an order for the re-conveyance thereof to the Plaintiff in the register at Lands office and a further declaration that the Plaintiff stands discharged of any claims from the first Defendant due to the material departure by the said from the original agreement.

(iii) Cancellation of the said transfer (i.e. Conveyance in favour of the 4th Defendant) dated 6th August 2008, in respect of the said premises known as Land Reference No. 10075, Thika and cancellation of all entries in the Title relating to the sale of the said suit premises known as Land Reference No. 10075, Thika in favour of the fourth Defendant.

(iv) A declaration that the charges enumerated in paragraph 10, 11 and 12 herein are null and void and of no effect or enforceable against the Plaintiff and that the Plaintiff is released and discharged from the said charges and from any liability there under, that the property purportedly to be charged thereby be discharged from the Charge and that the Plaintiff is entitled to the delivery up of its documents of title relating to L.R No. 10075, Thika (the said property) freed, released and discharged from the said Charges.

(v) A declaration that the first Defendants remedy and/or recourse is against the second Defendant.

(vi) Damages for fraud as against the first, third and fourth Defendants.

(vii) Costs of the suit.

(viii) Such other and/or further relief as this Honorable Court might deem fit and just to grant in the unique circumstances of this matter.

3. The Plaint was filed alongside an interlocutory Application also seeking for similar injunctive reliefs. Subsequently, both the 1st and 4th Defendants filed Notices of Preliminary Objections against the Plaintiff's suit and Application. Among the Preliminary Objections taken was that the suit was Res-judicata and sub judice. That the Plaintiff/Respondent lacked locus standi, was guilty of material non-disclosure and that the Application was an abuse of the Court process. The Preliminary Objections were heard by the late Hon. Lady Justice Joyce Khaminwa and the Ruling delivered on 18th November 2008. The Court found that there were issues in the Suit and Application which were not res judicata, as between the Plaintiff and the 1st Defendant. As a result, it was ordered that the Suit should proceed in respect of the claims for damages, fraud, collusion and other irregularities that had not been adjudicated upon. Eventually, the main application was heard and a Ruling was delivered by this Honourable Court on 2nd November, 2009.

4. Being dissatisfied with both decisions of the Court delivered on 18th November, 2008, & 2nd November, 2009, the 1st and 4th Defendants filed Civil Appeals No. 100 and 106 of 2010, which were consolidated.

5. In determining the Appeals, the Court of Appeal dealt with the following issues:-

(i) Whether the suit was *res judicata*

(ii) Whether the Learned Judge made final conclusions in the suit at an interlocutory stage; and

(iii) Whether the Plaintiff/Respondent's suit was *sub judice*

6. On 26th April 2013, the Court made the following findings:-

“...this suit was res judicata, it was also sub judice. The Preliminary Objection was meritorious and ought to have been sustained. In the result, we allow both appeals and set aside the rulings of Joyce Khaminwa J delivered on 18th November 2008 and on 2nd November 2009. The Appellant's Preliminary Objection dated 18th September 2008 is hereby allowed in its entirety with the result that Milimani HCCC NO. 505 of 2008 be and is hereby dismissed with costs to the Appellants herein”.

7. Therefore, effectively the suit was “dismissed with costs”. However, subsequently the 4th Defendant filed an Application dated 26th September 2013, to enforce the order of the Court of Appeal and seek vacant possession of the suit property as the Plaintiff was still in possession of the property despite the determination by the Court of Appeal and was allegedly engaged in the wanton destruction and wastage of the suit property by felling and carting away priceless indigenous trees. The Application was heard, whereupon Honourable Justice Havelock (Rtd.) made an order on 3rd December 2013 for status quo to be maintained on the suit property pending hearing and determination of the Application dated 26th September 2013.

9. The application was eventually heard and allowed in a ruling delivered by Justice Havelock on 12th February 2014. The decision of the Court endorsed the judgment of the Court of Appeal striking out the suit and further required the Plaintiff to deliver vacant possession of the suit property to the 4th Defendant, in default of which, an order of eviction was to issue against the Plaintiff, its employees, servants and/or agents and be supervised by the County Police Commander, Kiambu County.

10. That the eviction was delayed pending the determination of a Petition and appeal filed by the Plaintiff in the Supreme Court. By a Ruling delivered on 19th May 2016, the Supreme Court set aside the Certification order granted by the Court of Appeal and struck out the Petition of Appeal filed by the Plaintiffs in Supreme Court Applications No. 42 and 43 of 2016.

11. The Parties agreed to dispose of the Preliminary Objection by filing submissions which were orally highlighted. After considering the arguments and the submissions by the respective Learned counsels, I find that the following issues arise for determination:-

(i) Was this case dismissed *vide* the orders given by the Court of Appeal in the matter 100/2010 and 106/2010.

(ii) Are the orders given by Justice Havelock (Rtd) on 12th February, 2014 null and void for want of jurisdiction.

(iii) Does this Court have jurisdiction to entertain this matter in view of Article 162(2) of the Constitution of Kenya.

(iv) Is the Plaintiff/Respondent asking the Court to sit on appeal over the decision of Justice Havelock (Rtd).

(v) Is the issue of Jurisdiction raised by the Plaintiff/Respondent *functus officio*?

12. The main issue therefore is jurisdiction of the Court to entertain this matter. It is contested on two

grounds:-

(i) *The suit herein was dismissed vide the orders of the Court of Appeal made on 26th April 2013 and*

(ii) *That this matter falls within the ambit and jurisdiction of the Environment and Land Court under Article 162(2) of the Constitution of Kenya.*

13. The issue of jurisdiction is now settled by the authorities of the Court. In the landmark case of:- **The Owners of Motor Vessel Lilian S. Vs Caltex Kenya Ltd. (1989) KLR** the Court held 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. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

14. Similarly in the case of:- **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited and 2 Others (2010) Eklr**, the 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 other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. we agree with counsel for the first and second respondents in his submissions that the issue as to whether a Court of Law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, in the matter of the Interim Independent Electoral Commission (Appellant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of Law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law”.

15. In the case of **Karisa Chengo, Jefferson Kengha & Kitsao Charo Ngati Vs Republic (2015) Eklr**, the Court considered the delineation of jurisdiction while acknowledging that whilst a judge’s competence is not in doubt, a Judge’s jurisdiction be it as High Court Judge or Judge of the Environment and Land Court is limited and in the context of the present matter found that a Judge in the High Court though competent is confined to matters in the jurisdiction of the High Court and cannot transcend into matters in the Jurisdiction of the Environment and Land Court.

16. In the same vein, Article 162 (2) of the Constitution provides:-

“Parliament shall establish Courts with the Status of the High Court to hear and determine disputes relating to:

(i) Spent

(ii) The environment and the use and occupation of, and title”

17. Whereas the provisions of section 13(1) Environment and Land Court Act states as follows:-

“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”.

18. As aforesaid, the Preliminary Objection was disposed of inter alia vide written submissions where the learned Counsel Mr. Kyalo representing the Plaintiff/Respondent submitted that once this case was dismissed with costs by the Court of Appeal as aforesaid, nothing remained for litigation save for the costs. That the dismissal order having been issued by the Court of Appeal, the order is binding on this Court. Reliance was placed on the case of **Wilson Ndolo Ayaa-incomplete**

19. It was therefore argued that in the given circumstances, the eviction proceeding subsequently filed by the 4th Defendant/Applicant, were preferred in a matter where the Court had no jurisdiction. As such the orders given by the Honourable Justice Havelock (Rtd), on 12th February 2014 were issued without jurisdiction and are therefore null and void. Reference was made to the case of “Lillian s’ (copy full citation from typed draft). Further reference was made to the case of **Graig Vs Kanseen ALL ER 1943 Volume 1**; where the Court held that,

“An order which is a nullity is something which the person affected by it is entitled to have it set aside ex debito justitiae. The Court, in its inherent jurisdiction, can set aside its own order and an appeal is not necessary”.

20. The case of; **Macfroy Vs United Africa Co. Ltd ALLER (1961) Volume 3** was also cited to support the argument that, a nullity act or order is a nullity and one cannot put something on nothing as herein where the Applicant is trying to put eviction proceedings on nothing.

21. However the 4th Defendant/Applicant responded to this submission, by stating that, what the Plaintiff/Respondent is doing is to ask the Court to sit on Appeal over the decision of Justice Havelock (Rtd), delivered on 12th April 2014. That the Court dealt with the issue of jurisdiction and “functus officio” in that decision, held that it had jurisdiction and proceeded to hear the matter, and allowed the Applicant’s application.

22. The Applicant argued that therefore the Plaintiff/Respondent can only Appeal against that decision as the jurisdiction of this Court is concurrent to the jurisdiction of the Court that rendered the decision dated 12th February 2014. This Court cannot uphold the Plaintiff/Respondent arguments. The Applicant argued that, the two authorities of Graig and Macfroy (supra) cited dealt with irregularities in steps taken to file an Appeal.

23. In reply to the Applicants submissions, the Plaintiff/Respondent submitted that, it filed a Notice of Appeal and requested for proceeding and that once the proceedings are availed, the Appeal will be prosecuted. Even then, the doctrine of functus officio proceeds on the basis and understanding that the matter is heard and determined on merit. In this matter, the Plaintiff/ Respondent case has never been heard on merit. It was disposed of through a consent order. Therefore, this Court has to satisfy itself as to whether it has jurisdiction to hear contempt proceedings. If the Court finds it has no jurisdiction it cannot be bound by the decision of Justice Havelock (Rtd).

24. I have considered the issues raised by the respective parties herein and I find that there is no dispute that the Court of Appeal in its Ruling in Civil Appeal No.100 & 106 of 2010 delivered on 26th April 2013, dismissed the case HCCC No. 505 of 2008 with costs to the Appellant. However, subsequently Honourable Justice Havelock (Rtd) considered a Notice of Motion Application dated 26th September 2013 and rendered a decision dated 12th February 2014. I have had the benefit of reading that ruling and find that under paragraph 13, of the said ruling the Honourable Judge considered the issue of jurisdiction in relation to this matter as follows:

“As a result of the dismissal finding of the Court of Appeal, is this Court now entitled and has jurisdiction to entertain the fourth Defendant’s said Application of 26th September 2013” I have referred to and set out above, the relevant paragraphs in the authorities of Raila Odinga of our

Supreme Court and the Nigerian Supreme Court in the **Registered Trustees of the Apostolic Church** case. The **Raila Odinga** decision particularly emphasized the doctrine of finality, the relevant sentence (as above) reading:

“Once proceedings are finally concluded, the Court cannot review or alter its decision.”

*It would seem therefore that the Court of Appeal having dismissed this suit in its said Judgment dated 26th April 2013, there is nothing further that this Court may order in relation to this suit. However, such ignores the inherent powers of this Court to control its process for the ends of justice. As stated by the Court of Appeal way back in May 1985 in the case of **Wanguku v Kania (1986-1989) EA 589:***

“Section 3A of the Civil Procedure Act (Chapter 21) preserves the inherent powers when there are no rules. It is within the discretion of the Court to dismiss for want of prosecution and to reinstate the Application after receiving a satisfactory explanation.”

*That decision was followed by the Court Appeal in **Wanjiku v Esso Kenya Ltd (1995-1998) 1 EA 332**, where as regards inherent jurisdiction, the Court found that residual jurisdiction could be exercised only in special circumstances to avert injustice. **Gicheru, Akiwumi and Shah JJA** held:*

“As regards whether the learned Judge erred in invoking his jurisdiction under Section 3A of the Civil Procedure Act, which has been described by Hancox JA, as he then was, in **Wanguku v Kani (1982-1988) I KAR 780 at 785 as “residual jurisdiction which should only be exercised in special circumstances....in order to put right that which would otherwise be a clear injustice.”**

25. I therefore concur with the submissions of the 4th Defendant/Applicant that, the only recourse available to the Plaintiff/Respondent is to Appeal against that decision. Even then, the Plaintiff has clearly indicated they are in process of the Appealing against the decision of Hon Justice Havelock (Rtd).

26. The other issue raised in relation to jurisdiction is based on the provisions of Article 162(2) of the Constitution of Kenya, Section 13 of ELCA and the decision in the case of **Malindi Law Society Vs Attorney General & Attorney General & 4 others (2016) eKLR**. The Plaintiff/Respondent argues that the orders which are sought for eviction are within the jurisdiction of Environment and Land Court. That the said orders are resisted by the Plaintiff/Respondent. Therefore, this Court has no jurisdiction to entertain the Application herein. Similarly this Court is functus officio following the Court of Appeal decision.

27. In response thereto the 4th Defendant/Applicant submitted that, Article 162 (2) of the Court does not come into play. That the Hon The Chief Justice issued Practice Direction on all the pending proceedings on 2^{8th} September 2012 in Gazette Number 13573 and directed that all the proceedings in the Court of Appeal and all part heard cases in relating to the environment and the use and occupation of, and title to land, which had been hitherto filed at the High Court would continue being heard at the Court of Appeal and High Court respectively.

28. That the jurisdiction of the Environment and Land Court cannot be invoked as the 4th Defendant does not seek to institute any fresh suit for delivery of vacant possession of the suit property, rather the 4th Defendant seeks to enforce orders of delivery of vacant possession that had already been issued and that the Notice of Motion application dated 15th September 2016, filed by the 4th Defendant is seeking to enforce the Court orders made by Justice Havelock on 12th February 2014. Therefore the decision of **Malindi Law Society Vs Attorney General & Attorney General & 4 others (2016) eKLR** is not applicable

29. On the challenge that the Court is functus officio the Applicant the contention is without merit as the orders being enforced are consequential orders flowing from the judgment of the Court of Appeal. That Justice Havelock in his Ruling held that although the Court of Appeal struck out the suit, the sale of the suit property to the 4th Defendant had been confirmed as valid and the Court had the jurisdiction to put a stop to the wanton destruction of the suit property by the Plaintiff. The application by the 4th Defendant for vacant possession was therefore merited and allowed by the Court.

30. The Applicant cited the case of **Registered Trustee of the Apostolic Church Vs Ololweni (1990) 6NWLR** where the supreme Court of Nigeria held as follows:

“It is a misconception to submit that consequential orders made by a Court must of necessity be based on the reliefs claimed. The basis for an order made by the Court must be looked for from the evidence before the Court. It is trite Law that a Court cannot award more than is claimed. It is equally misconceived that an order cannot be made in favour of a Defendant simply because he has not filed a counterclaim. An order made in favour of the Defendant even where he has not counterclaimed must flow from the evidence and more so if the justice of the case demands.”

31. That in the case of **Judicial Service Commission Vs Speaker of the National Assembly & Another (2013) eKLR** the Court held that:

“The natural consequences of disobedience of Court orders is to commence contempt of the Court proceedings in which case the Court will determine whether a contempt of Court has in actual fact been committed and will thereafter mete out the appropriate punishment to the contemnor in accordance with the Law, Article 10(1) of the Constitution binds all state organs, State Officers, Public Officers and all persons when applying and interpreting the Constitution, enacting; or making or implementing any public policy decision. The said principles under Article 10(2) include the Rule of Law. Respect of Court orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular Court Orders are left to the whims of the Parties public disorder and chaos are likely to reign supreme yet under the Preamble to our Constitution we do recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the Rule of Law.

32. I note that the Preliminary Objection was premised on several grounds. Grounds (a), (b), (c) are on jurisdiction of the Court. That is indeed an issue of law which then forms a subject of a Preliminary Objection. However, I find that grounds (d) and (e) are not based purely on issues of law. Ground (d) is on the prayers sought for in the Notice of Motion Application dated 15th September, 2016 and ground (e) will come into play if the Applicant is allowed to canvass and/or prosecute the subject Notice of Motion

33. I have considered the Notice of motion Application dated 15th September 2017 and find it seeks for orders that:

(a) The Application be certified urgent and proceed ex parte in the first instance.

(b) The County Police Commander, Kiambu County be committed to Civil jail for six (6) months for disobedience of the Ruling of this Honourable Court delivered on 12th February 2014 and the Order of this Court issued on 13th February 2014.

(c) The 4th Defendant/Applicant's costs be provided for.

34. These orders are not on the use and or ownership of land. They are consequential to the orders of Hon Justice Havelock and which as aforesaid are still in force. I therefore uphold the submissions of the

Applicant.

35. Even then, a Preliminary Objection is always on matters of law. As held by Hon. **Justice Onyancha** in ***El-Busaidy v. Commissioner of Lands & 2 others*** [2002] 1KLR 508 stated that:

“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff’s pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff’s facts as pleaded. Clearly therefore, the Defendant’s preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

36. It is therefore clear from the foregoing that, Preliminary objections relate to points of law, raised at the outset of a case by the Defence without going into the merits of the case. Preliminary objections do not take into account the validity the plaintiff’s claim. I will first address the issue as what constitutes a Preliminary Objection.

37. In the Court of Appeal decision of ***Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd*** [1969] E.A. 696, Law, JA (as he then was) stated as follows:

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”(Emphasis mine)

Newbold P, in the same matter observed 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

38. In the circumstances, the Preliminary Objection has no merit and I dismiss it. The costs to await the outcome of the main Application.

Dated, delivered and signed in an open Court on this 21st day of September 2017 at Nairobi

GRACE L. NZIOKA

JUDGE

In the presence of

Ms. Mugo for Issa for the 4th Defendant/Applicant

Mr. Wachira for Kyalo for the Plaintiff/Respondent

Teresia – Court Assistant