



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL CASE NO 47 OF 2007**

NAFTALY MEME.....  
.....PLAINTIFF

Versus

STANLEY MWITHIMBU..... 1<sup>ST</sup>  
DEFENDANT

M/S ISAKGOTONGA&ELIPHELETMUGAMBI T/A VIEWLINE AUCTIONEERS...2<sup>ND</sup>  
DEFENDANT

O.C.S MERU POLICE STATION.....3<sup>RD</sup>  
DEFENDANT

**RULING**

**Jurisdiction of Environment and Land Court**

[1] I have been called upon to determine two issues, namely:-

- (a) **Whether this matter falls within the jurisdiction of Environment and Land Court; and**
- (b) **Whether the subordinate court has jurisdiction to hear this suit.**

These issues were to be canvassed as a matter of preliminary significance and upon written submissions of parties. Accordingly, counsels duly filed their respective submissions on these issues which I will consider in my decision thereto.

**Arguments by Mr. Kioga**

[2] The Plaintiff argued that, according to paragraph 15 of the plaint, the plaintiff’s claim is for loss suffered as a result of destruction of his goods, business sales, profit and goodwill thereto. Therefore, such claim does not fall within the jurisdiction of the Environment and Land Court under article 162(2) of the Constitution, to wit; disputes relating to environment, use and occupation of, and title to land. According to the Plaintiff, land has been defined in the Act establishing Environment and Land Court to bear the same meaning assigned by article 260 of the Constitution. Based on the foregoing persuasion, Mr. Kioga contended that land as defined in the Constitution does not include a shop or a dwelling house or commercial premises.He went further to submit that the jurisdiction of business premises is vested upon the Business Premises Tribunal under Cap 301 because the law deems such premises is owned by

the landlord and the lessee is merely a tenant. On that basis, Mr. Kioga dismissed the submissions by counsel for the Defendant as being irrelevant and of no use because they do not show how damage inflicted by the landlord upon the tenant on an illegal eviction would become a "land matter".

[3] Counsel did not stop there. He submitted that, according to the decision of **MWANIKI GATURU & OTHERS vs. A-G & THE CHIEF JUSTICE NBI PET NO 72 OF 2013**, (Lenaola J), the subordinate court had jurisdiction over environment and land matters. Counsel was of the view that this matter is not even within the jurisdiction of the BPRT but the subordinate courts. Therefore, to Mr. Kioga the constitutional provisions as well as section 13 of the Environment and Land Court Act which was cited by counsel for the Defendants prove nothing. He stated that the case of **NDEREBAs. GIKUNJUTHINWA** is totally irrelevant. In the premises, Mr. Kioga asked the court to dismiss the objection and transfer the matter to the subordinate court for hearing and disposal.

### **Defendants' view of the matter**

[4] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants took a different view of the matter. They submitted that this case arises from eviction done on 18<sup>th</sup> May 2007 of the plaintiff from a commercial premises number MERU MUNICIPALITY BLOCK 11/173 following an order by BPRT issued on 26<sup>th</sup> January 2006. The relief sought in the amended plaint include damages for trespass which is a matter falling within the jurisdiction of Environment and Land Court. They further stated that section 13 of the Environment and Land Court Act grants the Environment and Land Court original and appellate jurisdiction on matters covered under article 162(2) of the Constitution. After all, the relief which the court can grant under section 13(17) of the Environment and Land Court Act include award of damages and compensation. They urged that, according to Direction No. 4 of the Practice Directions by the Chief Justice Gazette Notice No. 16268 of November 2012 all matters filed in the High Court of which hearing is yet to commence should be transferred to the Environment and Land Court. Therefore, since the relief sought herein arises from use and or occupation of land, this case should be transferred to Environment and Land Court for hearing and disposal. They cited and filed in court some judicial authorities.

### **DETERMINATION**

#### **Measured language**

[5] Before I delve into the substance of this ruling, I wish to state some obvious things, that, legal practitioners are colleagues in this noble legal profession. Similarly, legal counsels are ministers of justice and therefore officers of the court; thus, they occupy the eminent chairs of society to do such noble task in the administration of justice; and must therefore, whether old or young, accord one another mutual respect in their undertakings; this include use of appropriate and measured language in their address to court and to one another within and without the court. When I say these things, I remember with appreciation the wise words of late CJ of Kenya, Madan JA on quality of judges which should apply to legal practitioners. In this light thereof, I fail to understand what Mr. Kioga, who is by all means an advocate of considerable experience, hoped to achieve when he made the following submissions:-

**"With due respect to the learned counsel, what the submission have succeeded in exposing to the court and the world at large, is more of egocentricity than his depth in exposition of the law"**.

And:-

**"...while I commend the learned counsel's enthusiasm and industry, I. (sic) on the other hand, deplore the counsel's lack of focus and direction in his exposition of the law"**.

Mr. Kioga made other submissions of the type above but I need not reproduce all of them. It suffices to say, that the above submissions are most unfortunate, inappropriate and unproductive arrogance. I will now proceed to evaluate the more serious arguments herein.

[6] Should I transfer this case to the Environment and Land Court (ELC) or to the subordinate court for hearing and disposal? The scenario emerging from the arguments coming through is: on the one hand, the Plaintiff states that it is the subordinate court which has jurisdiction to hear this suit; whilst on the other hand; the Defendants say it is the Environment and Land Court which has jurisdiction. The broad jurisdiction of Environment and Land Court is encapsulated in article 162(2) of the Constitution, that is, to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. But the Constitution in article 162(3) donated power to Parliament to determine the specific jurisdiction and functions of the Environment and Land Court; which it did in section 13 of the Environment and Land Court Act. Under that law, the jurisdiction of Environment and Land Court is both original and appellate. The latter debate is raging in a case in Malindi High Court but I do not wish to enter the foray as the issue is not directly in controversy in these proceedings. I will not pretend to resolve it here. Mine is simple; as I have set out above.

### **Does Environment and Land Court have jurisdiction?**

[7] The major question here and which must be asked properly is whether Environment and Land Court has jurisdiction to try this suit. Mr. Kioga submitted that the Environment and Land Court will not have jurisdiction over this matter which is for damages for wrongful eviction from commercial premises of, and destruction of property belonging to the tenant. His reason is that the definition of land in article 260 of the Constitution does not include a shop or a dwelling house or commercial premises. I am not, with respect, in agreement with the said submissions by Mr. Kioga. The correct position is that a shop, a dwelling house and commercial premises affixed to, are land in law. The said submissions force me to go back to the rules of interpretation and construction of a Constitution. First, I must admit that the Constitution did not intend to be interpreted narrowly; in fact it carefully prescribed a purposive interpretation of the Constitution which will, inter alia, develop the law and give life to its provisions. See article 259 of the Constitution. I will come back to this point later. Second, the Constitution of Kenya, 2010 is self-reinforcing; it must, therefore, be read as a whole as a living document- always speaking. On more specific platform, I wish to refer to article 259(4)(b) of the Constitution which clearly provides that:-

#### **In this Constitution, unless the context otherwise requires-**

- (a) .....; and**
- (b) the word “includes” means “includes, but is not limited to”**

Article 260 of the Constitution uses the words; “land” includes....Therefore, according to article 259(4) (b) land includes but is not limited to the descriptions and prescriptions provided thereunder. Thus, in honouring the constitutional command in article 259 on development of the law, the words used in article 162(2), that is to say, **use and occupation of land** carry and convey a particular meaning which should be given effect when developing the law on what land entails. And, within the constitutional structure of our nation, and borrowing from a long string of judicial precedents, renowned literary works and opinions of eminent jurists, in addition to the prescriptions provided in article 260 of the Constitution, land includes but not limited to; everything growing on or permanently affixed to it. It also includes estate or interest in real property. There are many landmark cases on this subject which I need not multiply. But see Black’s Law Dictionary, 8<sup>th</sup> Edition on meaning of land, use, occupation and development of land. The legal significance of the notion of use and occupation of land is that it also embraces the concept of development of land and so one has to think about; (1) the type of use, say, for agricultural, residential, commercial, or industrial purposes, in this category include tenancy; (2) the density of use as in the physical structures on the land; (3) the aesthetic use of land, for instance the design, planning; and (4) the placement of land as easement, security or encumbrance. In fact, our new land laws are tailored towards this broad understanding of land law and matters of lease and tenancy are matters relating to land and are provided for under Part VI of the Land Act. Unlawful eviction is in fact provided for under section 77 of the Land Act. Even the previous repealed Acts provided for buildings on, whether for residential or commercial purposes or for self-occupation by the owner or for renting or leasing out, to be land. With this rendition, I am not in agreement with Mr. Kioga’s submission that land as defined in article 260 of

the Constitution does not include a shop or commercial or residential dwelling. Accordingly, trespass and unlawful eviction from premises, are matters relating to land for which Environment and Land Court is the competent court to grant relief of damages and compensation. On this you may look at section 13(17) of the Environment and Land Court Act for reliefs which Environment and Land Court may grant, and damages and compensation is one of them.

[8] The upshot of my above analysis is this. The Environment and Land Court is the correct court to which I should transfer this suit. It is also the right court, as a superior court, to transfer the suit to any other subordinate court that is competent within the hierarchy of courts to deal with matters of land. I will, therefore, not determine whether subordinate courts have jurisdiction to try land matters for two reasons; (1) the debate on this subject is still raging on within the judicial arena; and (2) it is a serious and substantial constitutional question that will require a comprehensive constitutional petition to resolve, rather than pretend to settle it in a simple application for transfer of suit to Environment and Land Court. My view is that, since the Environment and Land Court has power and jurisdiction to determine constitutional questions, it should be the one to deal with the issue of whether subordinate courts have jurisdiction to try disputes relating to environment, use and occupation of, and title to land. This court's power at the moment is simply transitional one of transmitting suits which were pending before it at the effective date of the Constitution to the Environment and Land Court. As the hearing of this suit is yet to commence, I accordingly order that this file shall be transferred forthwith to the Environment and Land Court in Meru. I will not make any order for costs as this is an administrative act that I must perform. It is so ordered.

**Dated, signed and delivered in open court at Meru this 31<sup>st</sup> day of March 2016**

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**F. GIKONYO**

**JUDGE**

***In the presence of:***

*Kioga for plaintiff*

*Muthamia for Nyaundi for defendants*

*C/c – Mwenda/Mark*

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**F. GIKONYO**

**JUDGE**