



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CASE NO. 370 OF 2014

MANJULA DHIRAJLAL SONI

(Herself and on behalf of the Estate of

DHIRAJLAL RATILAL SONI (Deceased).....PLAINTIFF

VERSUS

DUKES INVESTMENTS INTERNATIONAL LIMITED.....1ST DEFENDANT

JOSEPH MISATI GESORA.....2ND DEFENDANT

MIDDLE EAST BANK KENYA LIMITED.....3RD DEFENDANT

AND

CHANDULAL RATILAL

BHURABHAI SONI.....INTERESTED PARTY

RULING

Introduction

1. By an Amended Plaint dated 26th February 2020, the Plaintiff brought this suit against the Defendants for prayers that;

i) A permanent injunction prohibiting the defendants, the registration of land from disposing of, transferring, charging, taking possession of land title L.R No. 209/525/4 or offering it for sale to another party and/or offering the same as a security to the bank or any other financial institution in order to obtain a loan or any other financial facility.

ii) Mandatory decree of injunction putting the defendants to specific performance of the contract by paying for the land as per the agreement of 28th September 2013 in default the contract for sale of land L.R No. 209/525/4 dated 28th September 2013 between the plaintiff and the 1st defendant be considered rescinded.

iii) A declaration that the contract of sale between the plaintiff and the 1st and 2nd defendant dated 28th September 2013 is rescinded and the plaintiff's documents of title be returned to the plaintiff.

iv) General damages

v) Costs of the suit

vi) Interest on (iv) and (v) above.

2. The 3rd Defendant filed a statement of defence on 9th April 2021 and pleaded that this Court lacked jurisdiction to hear the suit pursuant to **Article 162(2)d of the Constitution** and further that this was purely a commercial dispute not related to use and occupation to land.

3. Pursuant to the directions of this Court issued on 15th November 2021, the Court directed that the issue of jurisdiction be heard first and parties were directed to file their written submissions in respect to the same. The 3rd Defendant and the Plaintiff filed their respective submissions for consideration by the Court.

3rd Defendant's Submissions

4. The gist of the 3rd Defendant's submission is that this Court lacks jurisdiction to entertain the Plaintiff's suit.

5. It was submitted that the reliefs sought by the Plaintiff are for exclusive jurisdiction and determination by the High Court pursuant to **Article 165(3) of the Constitution**.

6. It was further submitted that the causes of action for specific performance of an alleged agreement of sale between the Plaintiff and the 1st defendant, damages for its non-specific performance and that in default of payment the agreement of sale be declared rescinded are all purely commercial matters for determination by the High Court.

7. In support of this position, the 3rd Defendant relied on the case of **Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR**, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to 'use' of land and do not include mortgages, charges, collection of dues and rents since those are within the civil jurisdiction of the High Court. The Court further held that the exclusive jurisdiction of the ELC is limited to **Articles 162 of the Constitution and Section 13 of the ELC Act** which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by **Article 165(3) of the Constitution**.

8. The 3rd Defendant also submitted that the **Okongo J.** while considering an application to set aside various orders issued by **Nyamweya J. (as she then was)** had ruled that **Nyamweya J.** was not ELC judge when she issued the earlier orders in the matter. It was further stated that, the said decision had not ruled on the jurisdiction of the suit. The 3rd Defendant thus concluded its submission by urging the Court to dismiss the suit for want of jurisdiction.

Plaintiff's submissions

9. The Plaintiff contended that the suit was properly before this Court by dint of **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act**.

10. It was the Plaintiff's submission that she entered into an agreement for sale of **L.R No. 209/525/4** situate at Nairobi with the 1st Defendant whose terms were that a deposit of 10% of Ksh 35,000,000/= was to be paid by instalments then allow the balance to be paid by monthly instalments until completion. The 1st Defendant neglected, refused and or failed to pay the agreed deposit yet he had caused the Plaintiff to release the completion documents to him. When the Plaintiff realized that she was being duped she sought the courts' redress by filing the instant suit and praying for orders of permanent injunction restraining the disposition, transfer, taking possession of the suit property, specific performance, general damages and in the alternative the contract be rescinded.

11. The Plaintiff contended that the prayers sought falls squarely within the jurisdiction of the ELC and not the High Court as submitted by the 3rd Defendant.

12. It was the Plaintiff's further contention that pursuant to **Section 13 (7) of the ELC Act**, the ELC has jurisdiction to grant the reliefs sought in the plaint.

13. According to the Plaintiff, the authorities cited by the 3rd Defendant, specifically **the Cooperative Bank case**, was not applicable to this case since there is no privity of contract between her and the 3rd Defendant.

14. In respect to the ruling delivered by **Okongo J.** and **Nyamweya J (as she then was)** the Plaintiff submitted that the court had no obligation to delve into the same and if the 3rd Defendant was not satisfied with their outcome, they were at liberty to appeal which appeal had not been initiated to date. The Plaintiff urged the Court to dismiss the objection and allow the suit to be heard on its merits.

Analysis and determination

15. I have considered the objection, the written submissions filed on behalf of the parties and the authorities cited. The main issue for determination is whether this court has jurisdiction to hear and determine the plaintiff's suit.

16. The case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** has been the watershed as to what constitutes preliminary objections. The Court of Appeal in **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** also pellucidly captured the legal principle when it stated as follows:

"...A Preliminary Objection 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..."

17. This statement of the law has been echoed time and again by the courts: see for example, **Oraro –v- Mbaja [2007] KLR 141**.

18. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:-

“... 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”. [emphasis added]

19. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added]

20. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with *in limine*.

21. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

22. The Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011, observed 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 submission 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... 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.”

23. It therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

24. **Article 162(2)(b) of the Constitution** states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, **Section 13 of the Environment and Land Court Act** expounds on the jurisdiction of this Court as follows:

“(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 law applicable in Kenya 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—

(a) relating to environmental planning and protection, 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.”

25. **Section 150 of the Land Act No. 6 of 2012** also stipulates that the ELC has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

26. About two years after the **Cooperative bank** case, the Court of Appeal in the case of **Nakumatt Holdings Limited & Another v Ideal Locations Limited(2019) eKLR** rendered itself on the question of ELC jurisdiction of this as follows:

“In rejecting the contention that the ELC did not have jurisdiction, the Judge stated that it was not contested that the dispute between the parties stemmed from a landlord and tenant relationship in which the landlord claimed that Nakumatt had breached the terms of the lease agreement by defaulting in the payment of rent, service charge and promotion fund. The Judge expressed that the ELC was established under Section 4 of the ELC Act enacted pursuant to Article 162(2) of the Constitution; that under Article 162(2) of the Constitution and Section 13 of that Act, the ELC has exclusive jurisdiction to hear and determine disputes relating to the use and occupation of and title to land; that under Article 165(5) of the Constitution, the High Court is prevented, in express terms, from exercising jurisdiction in matters reserved for the ELC. The learned Judge held that the Constitution does not prohibit the ELC from hearing a dispute over use and occupation of land where there is a pending insolvency cause involving one of the parties. Being satisfied that the dispute related to use and occupation of land, the Judge concluded:

“...under Article 162(2)(b) of the Constitution and Section 13(2)(a) of the Environment and Land Court Act, this Court has jurisdiction to hear the suit and the application and issue the orders sought by the plaintiff. In my view, the plaintiff’s action does not in any way contravene Section 430 of the Insolvency Act as the Plaintiff in this case is not undertaking or seeking to undertake any of the actions listed in Section 430. The plaintiff has not taken any action against the assets of the 1st defendant, whether attachment, sequestration, distress or execution. The plaintiff is only seeking to exercise its rights to peaceable re-entry which in my view, is not prohibited by Section 430 of the Insolvency Act.”

Given the background to the matter as set out above, there can be no doubt that the subject matter of the suit, and the cause of action arose from the sub-lease over L.R. No. 14407 and 16088 under which the landlord leased a portion of those premises to Nakumatt.

That, as the learned Judge correctly concluded, is a matter within the class of “use and occupation” of land under Article 162(2) of the Constitution and therefore within the jurisdiction of the ELC under Section 13 of the ELC Act. Under Article 162(2) of the Constitution, Parliament was empowered to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land” and to “determine the jurisdiction and functions of such Courts”. Pursuant thereto, Parliament enacted the Environment and Land Court Act. Section 13(1) of that Act outlines the jurisdiction of the ELC as follows:

“(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court [the ELC] shall have power to hear and determine disputes-

(a) relating to environmental planning and protection, 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 a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

Given those provisions, we are fully in agreement with the learned Judge that the dispute between the parties, stemming as it did, from the sub lease over the leased premises over L.R. No. 14407 and 16088, is a matter falling within the jurisdiction of the ELC.”

27. The contract which the plaintiff in this suit alleges was breached by the defendants related to “use” of land because the material contract was an agreement for sale of L.R No. 209/525/4. Even if I were to apply the criteria set in the Cooperative bank case in interpretation of **Section 13 of the ELC Act**, I would still hold that this court has jurisdiction because the claim in this suit relates to breach of that agreement.

28. From a careful examination of the pleadings herein, the suit relates to an agreement for the sale and purchase of **L.R No. 209/525/4** which was executed on 28th September 2013 between the Plaintiff and the 1st Defendant herein. The Defendants fraudulently breached the

terms of the said agreement and not even the 10% deposit was paid. The Plaintiff also pleaded fraud on the part of the defendants who according to the plaintiff, the 1st Defendant had caused her to sign some documents which she later learnt that they were transfer documents and loan application forms to the bank, the 3rd Defendant.

29. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to resolve the dispute that emanated from the agreement for the sale of the suit property which was breached and the subsequent and or alleged fraud that had been pleaded by the plaintiff.

30. In **Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR** the court stated as follows:

“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.”

31. In view of the foregoing and guided by the Court of Appeal decision in **Nakumatt Holdings Limited v Ideal Locations Limited [2019] eKLR**, I find that this court has jurisdiction to adjudicate the dispute in this suit. The 3rd defendant’s objection is thus declined.

32. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY 2022

E. K. WABWOTO

JUDGE

IN THE VIRTUAL PRESENCE OF :-

MR. MORIASI FOR THE PLAINTIFF.

MR. ESMAIL FOR THE 3RD DEFENDANT/OBJECTOR.

N/A FOR THE 1ST DEFENDANT

N/A FOR THE 2ND DEFENDANT.

N/A FOR INTERESTED PARTY.

COURT ASSISTANT: CAROLINE NAFUNA.

E. K. WABWOTO

JUDGE