



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1807 OF 2002

FORMERLY MILIMANI COMMERCIAL COURT CIVIL CASE NO. 987 OF 2001.

BOOKPOINT LIMITED.....PLAINTIFF

VERSUS

GUILDERS INTERNATIONAL BANK LIMITED.....1ST DEFENDANT

GUARDIAN BANK LIMITED.....2ND DEFENDANT

RULING

The application before the court for determination is the Notice of Motion dated 4/7/2014 brought under Article 162(2)(b), 165(5)(b) of the Constitution of Kenya, Section 13(1) & (2) of the Environment and Land Court Act, 2011, Section 5 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:

- 1. The suit herein be transferred to the Environment and Land court of hearing and Final determination.***
- 2. That the 2nd Defendant/Applicant be at liberty to apply for further orders and/ or directions as the honourable court deem fit to grant.***
- 3. That the cost of this application be provided for.***

The application is premised on the grounds on the face it and is supported by the affidavit of James Ochieng Oduol, counsel for the 2nd Defendant. He avers that the Plaintiff's claim is premised on lease dated 1st April 1996 and registered as IR 62230/4 between the Plaintiff and the 1st Defendant, Guilders International Limited and the 2nd Defendant who became a party by virtue of a merger between itself and the 1st Defendant. The Plaintiff applied for summary judgment for the sum of Kshs.9,552,714/- with interest of 30%. The ruling was delivered on 9/7/2003 by Hon Justice Philip Ransley and judgment was entered in favour of the Plaintiff against, the 1st Defendant for Kshs.14,573,311.50 and the 2nd Defendant's defence struck out. The Plaintiff also filed an application dated 7/12/2005 seeking to review the said ruling to have the decree apply to the 2nd Defendant after the 2nd defence was struck out. This court heard the application and delivered a ruling in favour of the Plaintiff against the 2nd Defendant.

The Applicant claims that the decree sum was paid into court in full as contained in the decree. The cost of the suit was also taxed by the Deputy Registrar on 3rd November 2011 at Kshs.583,231.00 which was settled by the 1st Defendant. The Applicant stated that the main issue before the court for determination now is whether the Plaintiff can embellish a decree issued by a court with claims, rents, service charge, interest and other outgoings which have not been the subject matter of the court's determination.

The Applicant maintains that the issue before the court arises from the lease dated 1st April 1996 and registered as IR 62230/4 between the Plaintiff and the 1st & 2nd Defendants in so far as it relates in and to the use of land. He further claims that under Article 162(2) (b) of the Constitution all disputes relating to the environment and the use and occupation of, and title to, land are exclusively vested in the Environment and Land Court. Also that Article 165(5) (b) prohibits the High Court from exercising jurisdiction and/or hearing and determining all disputes relating to the environment and the use and occupation of, and title to, land. The Applicant also stated that under Section 13(2) (d) of the Environment and Land Control Act 2011, all disputes relating to the environment and the use and occupation of, and title to, land including disputes relating to public and private and community land, and contracts granting any enforceable interests in land are exclusively vested in the Environment and Land Court, (ELC). The Applicant also claims that Section 5 of the Civil Procedure Act bars this honourable court from exercising jurisdiction to hear and finally determine the matter herein.

The application is opposed. Virinder Nath Goswami, the advocate for the Plaintiff, swore a Replying affidavit dated 24th July 2014. The Respondent stated that the matter has been heard and concluded by way of this court's decision on review. That after the review, the Plaintiff drew the decree in circumstances set out in its reply to the Defendants' application challenging the decree.

The application was prosecuted by way of written submissions which were filed and exchanged. The parties also highlighted the same on 9th October 2014 before this court.

The Applicant submitted that before the court makes any step in these proceedings, the court must satisfy itself that it does have jurisdiction to hear and determine the suit and that jurisdiction must only be derived either from the constitution or statute as applied in judicial precedent.

That Applicant submitted further that Parliament, pursuant to Article 162 (2) of the Constitution, enacted the Environment and Land Court Act, 2011 which establishes the ELC court under Section 4 as superior court of record with the High Court having and exercising jurisdiction throughout Kenya. The Applicant further submitted that the jurisdiction conferred on ELC court is exclusive and the High Court pursuant to Article 165(5) does not exercise such jurisdiction in respect of such claims. The Applicant stated that Article 165(5) of the Constitution as read with Section 13 of ELC Act 2011 expressly bars this court from exercising in respect of matters reserved for the jurisdiction of the ELC court.

The Applicant also submitted that the practice directions by the Chief Justice are mere administrative directions on the conduct of the affairs by various courts. That they do not override express the provisions of the Constitution or Statutes or Confer jurisdiction where the Constitution and/or an Act of Parliament expressly deprives a court of jurisdiction to hear and determine a matter as is the case herein. The Applicant further submitted that the practices direction dated 9th November 2012 only referred to part heard matters pending before the high court. It does not cover matters which are not part heard like the current matter which has never been heard.

The Respondent on the other hand submitted that the Chief Justice was right in promulgating his practice directions. That Section 22 of the Sixth Schedule of the Constitution by the provision set out in paragraph 49 of the Applicant submissions provides that *all judicial proceedings pending before any court shall continue to be heard and determined by the same court or a corresponding court established under the constitution or as directed by the Chief Justice or the Registrar of the High Court*. The Respondent also submitted that Section 30 of the ELC Act also gives the Chief Justice similar powers to issue directions.

I have considered the submissions from both sides. I am of the view and find that the only issue for determination is ***whether on the facts and circumstances of this case the court has jurisdiction to hear and determine this matter.***

It is now indeed settled that the question of jurisdiction is paramount in any adjudication and whenever raised, the Court or Tribunal seized of the matter must as a matter of prudence inquire into it in *limine* and resolve it before doing anything concerning the matter in respect of which it is raised. In the case of **The**

Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (Supra), Nyarangi J. stated:

“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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

Recently the Supreme Court of Kenya in the case of **Samuel Kamau Macharia Vs KCB & 2 Others**, Civil Application No.2 of 2011 stated this:

“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”

The ELC court is established pursuant to the provisions of Article 162 (2) (b) of the Constitution. It is one of the Superior Courts alongside the Supreme Court, the Court of Appeal, the High Court and the Industrial Court. According to the provisions of Article 162 (2) (b) of the Constitution, Parliament was mandated 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, hence the enactment of the Environment and Land Court Act No.19 of 2011. The Jurisdiction of the court is found at Section 13(1) of the Environment and Land Court Act No. 19 of 2011 which is really an exposition of the provisions of Article 162(2) (b), which is to determine disputes relating to the Environment and the use, occupation and ownership of land.

In the instant case, it is the Applicant case that this court lacks jurisdiction to determine the matter before it since it relates to a lease dated 1st April 1996. From the record before the court, the Plaintiff filed the suit against the 1st and 2nd Defendant to recover the unpaid rents and service charge from July 2000, secured from the aforesaid lease amounting to approximately Kshs.9,552,714.00, with interest. The Plaintiff filed an application seeking to strike out the defences. Summary judgment was entered against the 1st Defendant for Kshs.14,573,311.50. The decree was extended to the 2nd Defendant by a ruling delivered by this court on 8th December 2010. The Plaintiff served the 2nd Defendant with a notice to show cause why execution should not be issued under Order 21 Rule 18 for the sum of Kshs.178,514,179.00. The 2nd Defendant filed an application seeking to stay the notice to show cause. The parties agreed to prosecute it by way of written submissions which were filed and served. The parties appeared before the court to highlight their submissions when counsel for the 2nd Defendant raised this issue of jurisdiction.

From the foregoing it is very clear that before the Applicant raised the issue of jurisdiction the matter was still pending in this court. Under Schedule Sixth of the Constitution, pending judicial proceedings shall proceed before the same court and be determined by the same court or a corresponding court established under the Constitution or as directed by the Chief Justice or the Registrar of the High Court. This court therefore has jurisdiction to determine this matter. This application has accordingly no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of May, 2015.

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JUDGE