



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2666 OF 1976**

**MBURU MUCHERU .....PLAINTIFF**

**VERSUS**

**CHEGE MUCHUNU.....DEFENDANT**

**RULING**

By a plaint filed in court on 25<sup>th</sup> November 1976 which is about 40 years ago, short of 2 months away from today, the plaintiff Mburu Mucheru filed suit against the defendant Chege Muchunu.

The claim by the plaintiff against the defendant is that “ the defendant entered on the plaintiff’s land known as LOC.4/Ngararia/855 without his consent and excavated stone worth kshs 30,000 since the year 1973 until the date of filing the suit” and that by the aforesaid reasons the plaintiff had suffered loss and damage which he claimed from the defendant. He therefore prayed for:

- a. Special damages shs 30,000/-.
- b. Mesne profits appendre at shs 400 per month.
- c. General damages.
- d. Interest at 8% since 1973 till date of judgment and thereafter at court rates.
- e. Removal of the caution.
- f. Costs and interest thereon.

Several interlocutory applications were determined culminating in a ruling of 30<sup>th</sup> July 1982 by Honourable Justice Todd (as he then was, which the plaintiff challenged by filing notice of Appeal dated 22<sup>nd</sup> September 1982 to the Court of Appeal.

The matter was then referred to arbitration and judgment was entered following arbitration proceedings. On 7<sup>th</sup> May 2001 the plaintiff by Notice of Motion dated 3<sup>rd</sup> May 2000 filed an application seeking to set aside that judgment. The said application was dismissed on 17<sup>th</sup> October 2001.

On 16<sup>th</sup> January 2002 the plaintiff filed Notice to act in person and ever since, until 20<sup>th</sup> March 2015, when the plaintiff fixed a date for pre-trials, nothing had taken place.

The matter also appears to have been consolidated with HCC 1976/1976. on 6<sup>th</sup> May 2015 Honourable Mboghli Msagha J noted the case to be one of the oldest on record and directed the Deputy Registrar to issue notice to the parties why the suit should not be dismissed for want of prosecution.

The firm of Ishmail & Company Advocates have filed an application dated 16<sup>th</sup> June 2015 to come on record for the plaintiff and for an order for the file to be taken to the Environment and Land Court for directions as to how to proceed with the matter.

I have given the background of this matter to establish the length of time it has taken in the court corridors and records and whether this court has jurisdiction to hear and determine any remaining term and issues on record, notwithstanding the judgment that was entered vide arbitration proceedings.

In view of the fact that the claim concerns trespass to land and ownership thereof, albeit this suit was instituted 39 years and 10 months ago, and since the plaintiff is seeking orders of this court to set aside that judgment, the jurisdiction of this court has been caught up in the ouster provisions of Article 165(5)(b) of the Constitution. That provision expressly bars the High Court from hearing and determining disputes that fall within the courts contemplated in Article 162(2) of the Constitution, and the Supreme Court.

Under Article 162(2)(b), it is contemplated that all disputes relating to environment, occupation, title to land and ownership of land shall be heard and determined by a Superior Court with the same status as the High Court. Then Parliament is mandated to make legislation under Article 162(3) to provide for the jurisdiction and functions of the said court. In 2011, Parliament implemented the above provisions by enacting the Environment and Land Court Act, 2011.

The court is anchored in Section 4 of the Act whereas the jurisdiction of the court, both original and appellate is provided for in Section 13(1). The orders that the court can make are set out in Section 13(7) and they include:

- Declaratory
- Specific performance
- Damages
- Injunctions
- Judicial Review among others

Albeit this dispute was instituted before this court long before the promulgation of the new Constitution on 27<sup>th</sup> August 2010 and therefore the court had unlimited jurisdiction in the matter, that jurisdiction is ousted by Article 165(5) (b) of the Constitution.

Furthermore, the remainder of the dispute could only be entertained by this court in the transitional period as contemplated in part 5, Section 22 of the Transitional and consequential provisions of the Constitution on administration of justice which provide that any proceedings pending before the court or tribunal on the effective date shall continue to be heard and determined by that court or tribunal pending the establishment of a corresponding court or tribunal or as may be directed by the Chief Justice or Registrar of the High Court.

In this case, the transitional period lapsed with the establishment and subsequent full operationalization of the Environment and Land Court and the appointment of competent judges to preside over the court.

That being the case, those transitional provisions are spent and the ouster provisions of Article 165(5)(b) of the Constitution are fully operational.

***“Jurisdiction is everything without it, a court of law 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” (see Owners of Motor Vessel “Lilian S” V Caltex (K) Ltd.)***

It is for those reasons above that I have taken this earliest opportunity to render this decision/ruling suo moto knowing that it will not prejudice any parties to this suit and direct that the file herein in its

entirety and all pending applications be and are hereby transmitted to and placed before the Presiding Judge of the Environment and Land Court Nairobi for further directions as to the disposal of the dispute.

Dated, signed and delivered in open court at Nairobi this 29th day of September, 2015.

**R.E. ABURILI**

**JUDGE**

29/9/2015

Coram R.E. Aburili J

C.A. Adline

Mr Tumu for respondent

No appearance for respondent (served)

Mr Tumu- It is our application dated 16<sup>th</sup> June 2015.

R.E. ABURILI

JUDGE

COURT- I have in a separate cover written a ruling on this matter regarding jurisdiction of the court which is hereby read and delivered. The matter is directed to be placed before Environment and Land Court. Mention on 27<sup>th</sup> October 2015 before Environment and Land Court.

R.E. ABURILI

JUDGE

29.9.2015