



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS APPLICATION NO. 403 OF 2015**  
**AFRICALITY CIO .....1<sup>ST</sup> APPLICANT**  
**AFRICALITY MARARAL**  
**SAFARI LODGE LIMITED .....2<sup>ND</sup> APPLICANT**  
**VERSUS**  
**SAMBURU COUNTY GOVERNMENT .....RESPONDENT**

**RULING**

By a Notice of Motion dated 15<sup>th</sup> September 2015 and filed in court the same day under certificate of urgency, the applicants, Africality CIO and Africality Maralal Safari Lodges Ltd sought from this court orders:

1. Spent
2. That an order of injunction directed at the respondent to desist from evicting the applicant or in any way interfering with the quiet possession of the suit premises that is say Maralal Safari Lodge within Maralal Wildlife Sanctuary an approximate area of about 1235 acres and as defined in the Kenya land registry on map sheet No. 216/51 issued on 23<sup>rd</sup> December 1988 as well as the entire collection of assets, fixtures and movables within the said premises pending interpartes hearing of this application.
3. That the Officer Commanding Station Maralal does assist in the execution of the above order.
4. That upon granting of the orders sought, this court do order the dispute be referred to arbitration in accordance with the Head of Terms governing the relationship between the parties herein.
5. That costs of the application be borne by the respondent.

The application is brought under the provisions or Order 40 Rules 1, 2 of the Civil Procedure Rules 1A, 1B, 3A of the Civil Procedure Act Section 7(1) of the Arbitration Act and all other enabling provisions of law. The said application against the Samburu County Government is predicated on the grounds that:

1. The applicant herein entered into an agreement of lease with the respondent over the suit property;
2. The applicant took over management of the conservancy and invested huge capital amounts to

rehabilitate and ensure the business was a going concern within the terms of the agreement.

3. The respondent suddenly through its lawyers issued a five day eviction notice on 11<sup>th</sup> September 2015 to the applicant.
4. As per the agreement between the parties, the term of the lease was to be ten years and any dispute was to be referred to arbitration.
5. It is in the interest of justice that the orders sought be granted any damage suffered can be remedied by an award of costs.
6. On the contrary, the applicant stands to suffer irremediably if the orders sought are not granted.

The said application is further supported by the affidavit sworn by Humperdinck Jackman the Chairman and founder of the applicant organization and company, reiterating the grounds and annexing the agreement between the parties hereto over the subject premises. He avers in addition to the grounds that they have expended over kshs 20,000,000 renovating the premises but that the respondents have changed their mind and attitude towards the company and are engaged in a smear campaign against the applicants including inciting members of the local community against the applicants. Further that efforts to execute a lease with the tourism department of the County Government have been futile only to receive a letter on 29<sup>th</sup> July 2015 indicating that the intended lease has to be subjected to procurement rules and the respondent's officials taking inventory of the property and inspecting the premises.

Further, that despite protests by the applicant, the respondent have given them 5 days notice to vacate the premises yet they owe the applicant kshs 705,660 in respect of invoices for meals and services provided.

The applicant further avers that under the Heads of Terms, any dispute between the parties is to be referred to arbitration and that they stand to loose irremediably if evicted owing to huge capitals investments made and good reputation. The deponent is also apprehensive of his personal safety as a result of the threat of eviction.

The matter was placed before me as vacation duty judge on 15<sup>th</sup> September 2015 and I did certify it as urgent for consideration during the vacation. I also granted status quo prevailing to be maintained until today 21<sup>st</sup> September 2015 and directed the applicant to serve the respondent's forthwith for interpartes mention today.

This 21<sup>st</sup> September the parties advocates appeared before me, with Mr Macharia Ngari appearing for the respondent and Mr Wambugu advocate representing the applicant. The parties advocates agreed to proceed with the hearing of the application expeditiously.

Mr Macharia intimated to court that their client had not been served with the application as directed by the court. He also protested the jurisdiction of this court maintaining that the dispute relates to occupation of land which dispute is preserved for the jurisdiction of the Environment and Land Court by dint of Articles 162(2) and 165(5) of the Constitution, and therefore the High Court has no jurisdiction to hear and determine such dispute. He urged the court to discharge the orders made on 15<sup>th</sup> September as they were made without jurisdiction.

In a brief rejoinder, Mr Wambugu for the applicant contended that they only extracted the orders on 17<sup>th</sup> September 2015 and could not serve the respondents over the weekend hence they only informed counsel for the respondent of the existence of the orders.

On the issue of jurisdiction, the applicant's counsel submitted that the issue cannot be determined now as it requires an examination of facts to be ascertained by affidavit evidence and that this was a

matter of arbitration hence the court has jurisdiction to grant interim relief under Section 7(1) of the Arbitration Act.

The objection to the jurisdiction of this court is contained in ground No. 1 of the grounds of objection filed on 21<sup>st</sup> September 2015.

My rendition on the above submissions is as follows:

That whenever the issue of jurisdiction is raised in a suit, the court must first deal with that issue before it can embark on any other determination on the merits or otherwise of the suit or matter before it.

In my view, the issue of jurisdiction is not a procedural issue but a substantive issue and once raised as a preliminary issue, it must be determined forthwith. A preliminary objection on jurisdiction of the court is a point of law when taken would dispose the entire suit or matter and in this case therefore, I am satisfied that the respondent's preliminary objection fits the definition of a preliminary objection as espoused in the leading case of **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd (1969) EA 696** wherein law JA stated that thus, of a preliminary objection:

*“ so far as I am aware, a preliminary objection consists of point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a Preliminary Objection 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.”*

Sir Charles Newbold President in the same judgment stated:

*“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 I sought is the exercise of judicial discretion.”*

The respondent in this matter, in seeking the court to strike out the application as filed has not sought judicial discretion of this court. They seek to determine the issue of whether the court has jurisdiction and therefore whether there is a cause of action capable of being adjudicated upon by this court in limine. It is well taken because if the Preliminary Objection succeeds, this court will be saved the cost of a lengthy trial and attendant expenses on either side.

The issue of jurisdiction as I have stated before is a substantive issue of not only the law, but of the Supreme Law of the land, the Constitution. Without jurisdiction, no court or tribunal can clothe itself with the power to hear and determine disputes before the court or tribunal.

The locus classicus in jurisdiction is the case of **Owners of the Motor Vessel “Lilian S” v Caltex Oil (K) Ltd (1989) KLR** where Nyarangi JA held, borrowing from the writings of John Beecroft Saunders in a treatise which is no longer published headed **“Words and phrases legally defined VOL 3:1-N page 113.** The Learned Judge of Appeal stated:

*“ I think 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.”*

I agree with the above position entirely and add that jurisdiction is a creature of the Constitution or other written law. It cannot be clothed or conferred by parties and neither can the court be allowed to

arrogate itself jurisdiction that it does not possess.

Therefore the question for my determination is, does this court have jurisdiction in this matter to grant the injunctive orders sought and or to refer the dispute to arbitration?

The dispute as can be deduced from the Notice of Motion and affidavit and annexures of the applicant is over the occupancy of and management of 1235 acres of land wherein the premises of Maralal Safari Lodge within Maralal Wildlife Sanctuary on LR 216/51 is situate. The applicants claim that they manage the conservancy and the Safari Lodge and that the respondent has issued them with a notice of 5 days to vacate. The applicants have sought injunctive orders to issue against the respondents County Government of Samburu restraining it from evicting the applicants from the conservancy pending referral of the dispute to arbitration as per the Terms of the Agreement between the two parties.

From the foregoing and pleadings as instituted by way of Notice of Motion, filed in court on 15<sup>th</sup> September, 2015, no doubt, the dispute herein is over the occupation and management of not only the Maralal Safari Lodge but of the entire 1235 acres of land described in the Heads of Terms Agreement wherein a formal lease of 10 years was anticipated to be executed between the parties.

In my humble view, that dispute, notwithstanding the provision for arbitration within the agreement falls within the purview of the Environment and Land Court by dint of Section 13(1) & (7) of the Environment and Land Court Act, 2011. That jurisdiction of the said court is donated by Article 162(2) (b) of the Constitution which clearly enacts that disputes relating to environment, occupation, use of and title to Land shall be heard and determined by a court contemplated by Article 162(2)(b) of the Constitution.

In 2011, Parliament enacted the Environment and Land Court Act and Section 4 thereof established the Environment and Land Court with Section 13(1) spelling out the exclusive original and appellate jurisdiction of the court.

Among the orders that the court is to make include injunctions, Declaratory orders, damages, compensation, prerogative orders, specific performance of a contract over land among others. The provisions of the Land Act and Land Registration Act too are clear that disputes relating to dealings or dispositions in land shall be heard and determined by the Environment and Land Court

In addition, Article 165(5) (b) of the Constitution expressly bars the High Court from hearing and determining disputes that fall in the jurisdiction of the courts contemplated in Article 162(2) of the Constitution thus - the Environment and Land Court and Employment and Labour Relations Court; and those matters whose exclusive jurisdiction is reserved for the Supreme Court.

That being the case, this court has no jurisdiction to entertain this matter by whatever name it is called and for whatever long or short period. To do so would be usurping powers of another superior court established under the Constitution which in itself would be acting contrary to Constitutional dictates. I therefore agree with the submissions of counsel for the respondent Mr Macharia that the exparte order granted under certificate of urgency on 15<sup>th</sup> September 2015 were made without jurisdiction and add that the dispute herein was filed before a court that has no jurisdiction to hear and determine and or make the orders that were sought. The same orders can be sought and obtained before an appropriate court that has jurisdiction since it is a fully operationalised court, unlike if it was still in transition in which case part 5 section 22 of the Transitional and Consequential provisions of the Constitution would be applicable.

The upshot of all the above is that I allow the Preliminary Objection raised by Mr Macharia Ngari. I proceed to strike out the Notice of Motion dated 15<sup>th</sup> September 2015 and also discharge the temporary interim orders issued on the same day which were in any event lapsing today. I order that each party bears their own costs of the matter herein.

Dated, signed and delivered in open court at Nairobi this 21<sup>st</sup> day of September 2015.

R.E. ABURILI

JUDGE

21.9.2015

Coram R.E. Aburili J

C.A. Adline

Mr Wambugu for the applicant

Mr Macharia for respondent

COURT - Ruling read and delivered in open court at 2.30 pm as scheduled.

R.E. ABURILI

JUDGE

21/9/2015

Mr Wambugu - I seek leave to apply.

Mr Macharia – I appreciate the speedy manner in which the court has considered this matter. I pray for a copy of the ruling.

**COURT-** The applicant to make a formal application for leave to apply as they are not barred. The ruling and all the proceedings herein to be typed and availed to the parties advocates upon payment of the requisite fees.

R.E. ABURILI

JUDGE