



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE NO. 31 OF 2015

SPIRAL SAFARI LIMITEDPLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MAKUENI.....DEFENDANT

RULING

Introduction

The Plaintiff filed the suit herein by way of a Plaint dated 15th May 2015 claiming that it had entered into a contract with China Road and Bridges Corporation Ltd for the supply of building material, which contract was to commence from 15th May 2015. Further, that the Plaintiff then contacted local residents in Kinyambu Masongaleni Ward of Kibwezi East in Makueni County from where it was to harvest sand, and reached an agreement with them. The Plaintiff also contended that it also obtained the necessary authorization from the National Environment Management Authority (NEMA) for the project.

However, that on 14th May 2014 the Defendant's enforcement officers visited the project area and threatened the Plaintiff's employees, and also threatened to impound and detain any of the Plaintiff's motor vehicles plant and machinery used for sand quarrying harvesting and transport. The Plaintiff claims that the project activities are the sole mandate of NEMA, and that the Defendant is only entitled to tax. The Plaintiff consequently filed this suit and sought a permanent injunction restraining the Defendant from interfering with its motor vehicles, plant or machinery, or it's activities of scooping and transporting sand within Makueni county. The Plaintiff also filed a Notice of Motion dated 15th May 2015 seeking similar orders.

The Preliminary Objection

The Defendant thereupon filed a replying affidavit through its legal director opposing the application, and also filed a notice of preliminary objection dated 21st July 2012 seeking to have the Plaintiff's suit and the application struck out with costs on the following grounds:

1. That this court does not have jurisdiction over the present matter. Further, that the matter in dispute relates to the environment and the power and function of the Defendant to conserve the soil and water in accordance with section 10 of part 2 of the Fourth Schedule to the Constitution. It was alleged that the present dispute relates to land and environment whose appropriate forum for resolution is the Environment and Land Court.
2. That Article 165 (5) (b) of the Constitution of Kenya, 2010 takes away the jurisdiction of the High Court in relation to matters of the environment and land which are adjudicated by the Environment and Land Court contemplated under Article 162 (2) (b).

3. That the Plaintiff, has continued to carry out an illegality as it has not been licenced by the Defendant to carry on the business of scooping and transporting sand within Makueni County as contemplated in section 7 (b) of part 2 of the Fourth Schedule to the Constitution. Further, that this court cannot be used to promote an illegality.
4. That injunctions cannot be granted against the government unless it relates to rights and fundamental freedoms. Further, that the Defendant is a government and therefore, section 16 of the Government Proceedings Act applies in this case.

The Submissions

The parties were directed by the Court to file and serve submissions on the Plaintiff's Preliminary Objection. The Defendant's counsel, B.M Musau & Co. Advocates filed submissions dated 15th September 2015, wherein he argued that this matter relates to Land and Environment as it concerns the harvesting of sand, thus there is need for control of such activities by the Defendant. Furthermore, that the transportation of sand on the roads has an impact on the lifespan of roads and consequently on the environment.

It was further submitted that this court is required to determine the issue as to whether the Plaintiff did obtain a licence from NEMA as alleged, and whether the Defendant did licence the Plaintiff to scoop and transport sand from Makueni County. It was contended that these are land and environment matters over which this court has no jurisdiction, and which fall within the purview of the Environment and Land Court (ELC) pursuant to Article 162 (2) of the Constitution of Kenya, 2010. In addition, that sand is a natural resource and a mineral whose exploitation needs regulation with the ultimate aim of environmental protection.

The Defendant submitted that under section 4 and 13 of the Environment and Land Court Act and Article 162 (2) (b) of the Constitution of Kenya, the ELC has the power to hear and determine disputes relating to the environment, the use and occupation of land. Further, that Article 165 (5) (b) of the Constitution of Kenya, 2010 takes away the jurisdiction of the High Court in relation to matters of the environment and land. In addition, that the ELC has the powers grant interlocutory orders in the same way the High Court can.

The Defendant cited the decisions in **Owners of Motor Vessel "Lilian S" -VS- Caltex Oil (K) Ltd, [1989] KLR**, and **Joel Nyabuto Omwenga & 2 Others -VS- Independent Electoral and Boundaries Commissions & Another, [2014]eKLR**, for the position that If a court proceeds without jurisdiction, its proceedings and orders are void.

Lastly, it was submitted by the Defendant that injunctions cannot be granted against the Government unless it relates to rights and fundamental freedoms. Further, that the Defendant is a government and, therefore, section 16 of the Government Proceedings Act applies in this case.

M. Mutinda & Associates, the counsel for the Plaintiff, filed reply submissions dated 24th September 2015, and contended that this suit was initially filed before the ELC court at Nairobi as ELC No. 411 of 2015, and was subsequently transferred on the instance of the same to the High Court Machakos. Further, that at Machakos the same was registered at the ELC registry Machakos, and that the file was again forwarded to Nairobi for the hearing of an application filed under certificate of urgency dated 15th May, 2015 by the duty judge at the ELC division of the High Court Nairobi. The ELC duty Judge thereupon directed that this was a matter for the civil division of the High Court, and that the same be taken back to Machakos High Court and heard as a High Court civil case.

The Plaintiff submitted that in view of the above directions, given by a court of competent jurisdiction, his matter is properly before this court and this court is therefore seized of the requisite jurisdiction to hear and determine this suit. However, that should this Court find reason to differ with the said directions, then the only logical move would be to transfer this matter to the ELC in Nairobi from where it had initially been filed. Further, that this court cannot dismiss the suit, as the same was originally filed before the Environment and Land Court.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the Plaintiff's Preliminary Objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“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 is sought is the exercise of judicial discretion.”

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

It is not disputed that this suit is currently being heard in the High Court of Kenya at Machakos. It has been argued by the Defendant that the High Court has no jurisdiction, and that jurisdiction in the matter lies with the Environment and Land Court. Jurisdiction is a pure question of law and as held in **Owners of Motor Vessel “Lilian S” –VS- Caltex Oil (K) Ltd, [1989] KLR 1**, it is granted by statute or other like legal instrument. The applicable constitutional and statutory provisions in this regard are Article 165(3) of the Constitution which provides for the jurisdiction of the High Court, and Article 162(2) of the Constitution which provides for the establishment of the Environment and Land Court, whose jurisdiction is provided for under the Environment and Land Court Act at section 13.

Article 165 (3)-(5) of the Constitution provides as follows with regards to the jurisdiction of the High Court:

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

Article 162 (2) (b) of the Constitution provides that Parliament shall establish courts with the status of High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The Environment and Land Court was consequently established by the Environment and Land Court Act, and the jurisdiction of the Court is granted by section 13 (2) of the said Act which provides as follows:

“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, leases in action or other instruments granting any enforceable interests in land; and**
- e. any other dispute relating to environment and land.”**

This Court notes in this regard that one of the orders sought by the Plaintiff is an injunction to restrain the Defendant from interfering with the Plaintiff’s activities of scooping and transporting sand within Makueni county. This is an activity that is related to both the use of land and environment, and it is also not disputed by the parties that there are also approvals that are required by the National Environment Management Authority (NEMA) in this regard. This Court is also now bound by the decision of the Court of Appeal sitting in Malindi in **Karisa Chengo & 3 Others versus Republic, Criminal Appeal Nos. 44, 45 and 76 of 2014, (2015) eKLR** that a judge who has been appointed as a judge of the High Court cannot preside over matters reserved for either the Environment and Land Court or the Employment and Labour Relations Court.

This Court accordingly finds for the above reasons that the Defendant’s Preliminary Objection dated 21st July 2012 does raise a pure point of law, and therefore has merit.

However, the Court has also taken cognizance of the history of this proceedings as shown in the court record, and particularly the fact that this suit was first filed in the Environment and Land Court in Nairobi by the Plaintiff, before being transferred to the Machakos High Court. It is therefore neither just nor equitable to strike out the suit.

The most appropriate course of action in the circumstances is to order that this suit be transferred to the Environment and Land Court in Nairobi for further hearing and determination, which I hereby accordingly do.

Each party shall meet their respective costs of the said Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of October 2015.

P. NYAMWEYA

JUDGE