



Muvokanza Limited v Muri Mwaniki Thige & Kageni Llp & another (Environment & Land Case 120 of 2021) [2022] KEELC 2275 (KLR) (16 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 120 OF 2021**

JA MOGENI, J

MAY 16, 2022

BETWEEN

MUVOKANZA LIMITED PLAINTIFF

AND

MURI MWANIKI THIGE & KAGENI LLP 1ST DEFENDANT

ZIMELE ASSET MANAGEMENT COMPANY LIMITED 2ND DEFENDANT

RULING

1. Before me for determination is the notice of preliminary objection dated 5/10/2021 by the 1st and 2nd defendant which seeks to strike out the plaintiff's plaint dated on 7/04/2021 with costs on the grounds that the court lacks jurisdiction to hear and determine the suit herein. The preliminary objection was brought under Article 162 (2) (b) as read with Article 162 (3) of *the Constitution*, Section 150 of the *Land Act* No. 6 of 2012, section 13 (2) of the *Environment and Land Court Act* 2011.

The prayers sought in the preliminary objection are as follows:

- a. The suit relates to the creation of a legal charge and retention of the title to the land subject of that charge due to inter alia an advocates' lien and unpaid charge costs, the Honorable Environment and Land Court lacks jurisdiction to handle the suit.
 - b. The alleged dispute is purely of a civil nature, which is the remit of the High Court of Kenya and does not relate to the environment, use and occupation of the title to land
 - c. The suit is incompetent, an abuse of this Honorable Court's process and ought to be struck out with costs.
2. The plaintiff had brought this suit by plaint dated 7/04/2021 and where they sought the following prayers:



- i. An order directed against the Defendants to release to the Plaintiff the Original Instrument of Title of all the parcel of land referred to as L.R No 209/5862
 - ii. Costs
3. Briefly, the undisputed facts of the case could be stated in summary as follows. The plaintiff at all material times was/is the registered proprietor of all that parcel of land LR NO. 209/5862 situated along Vihiga Road in Nairobi City. That sometime in August 2020 the 2nd defendant having been approached by the plaintiff to obtain a finance facility and the property being held as security the original instrument of title of the property was deposited with the 1st defendant. However, in January and February 2021 the plaintiff being undesirous to take up the finance facility from the 2nd defendant they sought to have the instrument of title over the property released back to them and that at all material times no monies were advanced to the plaintiff by the 2nd defendant. The brief entailed creation of a legal charge and retention of the title to the land subject of that charge due to among others an advocate's lien and unpaid charge costs. That the plaintiff is now desirous to sell the property to a Third Party and is no longer interested with obtaining a financing facility worth Kshs. 150,000,000 from the 2nd defendant.
4. The court had earlier directed on 21/09/2021 that the suit filed by way of plaint was to proceed after the defendants had filed their defence plus witness statements and all documents that they wished to rely on during the hearing. The plaintiff was also granted 7 days upon service to file a response. The matter was to be mentioned on 18/10/2021 before the Deputy Registrar and to confirm compliance and go through the pre-trial processes. However, when the parties appeared before court for mention 23/02/2022 S.C Khaminwa alerted court that there was a Preliminary Objection on record filed by the defendants and the parties prayed that they dispose of the same by way of written submissions. Therefore on 23/02/2022 the Court directed that the preliminary objection be canvassed through written submissions. Both parties filed their respective submissions for consideration by the Court.

Issues For Determination

5. Having considered the pleadings, Preliminary Objection, rival submissions and the authorities cited to me, the following issues arise for determination
 - i. Whether the Preliminary Objection raises pure points of law.
 - ii. Whether the Court has jurisdiction to hear and determine this suit.

Analysis And Determination

Whether the Preliminary Objection raises pure points of law.

The starting point is to define what a preliminary objection is.

6. 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...”



7. This statement of the law has been echoed time and again by the courts: see for example, *Oraro v Mbaja* [2007] KLR 141. In *Hassan Ali Joho & another v Sulciman 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]

8. In the instant suit the 1st and 2nd defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff’s suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court *in the Matter of Interim Independent Electoral Commission* [2011] eKLR held as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“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.”

[30] The *Lillian ‘S’ case* establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

9. The issue of jurisdiction is key since without jurisdiction a court has no powers to proceed to entertain the matter and it has to down its tools. I am of the considered view that since this matter is yet to be heard, the 1st and 2nd defendants are within the law to raise Preliminary Objection challenging the jurisdiction of this court. It is my finding that the Preliminary Objection raised by the 1st and 2nd defendants is one on pure points of law that that this court needs to determine.

Whether this court has jurisdiction to hear and determine this suit

10. Having determined that the Preliminary Objection by the 1st and 2nd defendant is based on pure points of law, it will be important to determine whether this court lacks jurisdiction to hear and determine this suit. Counsel for the 1st and 2nd defendant submitted that Article 162 of *the Constitution* as read with section 13 of the Environment and Land Court 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.”

11. The broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that Parliament shall establish a court 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. Counsel went on to submit that Parliament indeed enacted the *Environment and Land Court Act*, 2011. It is the plaintiff’s case that this court has jurisdiction to entertain this matter by virtue of provisions of section 13(a) (d) and of the *Environment and Land Court Act*. The plaintiff states that the sole prayer is to have their title released and that according to section 13(2) (a) since the matter relates to title, then the court has jurisdiction. Further that section 13(2) (d) of the ELC Act grants the court any enforcement measures. Although the plaintiff denies existence of a charge.
12. The issue at hand is that the plaintiff approached the 2nd defendant for a financial facility together with its holding company Muvosunza Investment Limited for a financial facility for a sum of Kshs. 150,000 to be secured by the LR No. 209/5852 which he deposited with the defendants to create a charge.
13. On the other hand, the defendants contend that there is no dispute about the title because they recognize that the title belongs to the plaintiff and therefore the court shall be called upon to determine ownership of title. The defendants’ case is that the original title to LR No. 209/5852 is under charge and may not be released without the plaintiff settling all the outstanding fees owed to the defendants since the plaintiff and the Muvosunza Investment Limited are legally and contractually bound. According to the defendants, the costs, fees, expenses and charges arose out of the transaction, which neither the Plaintiff nor Muvosunza Investment Ltd is yet to pay or refund the Defendants.
14. It is common ground that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use occupation and title to land. However, what is in dispute is whether the cause of action in this suit which the Plaintiff has stated to be release to the plaintiff the original instrument of title of all that parcel of land referred to as L.R No. 209/5862.
15. The above provision gives the ELC a very wide subject matter jurisdiction, and indeed, it does appear that so long as the dispute is one in which there is an issue over land or the environment, then the ELC would have jurisdiction.
16. The ELC Act is not the only statute that gives the ELC jurisdiction. There are other statutes which provide that for purposes of the matters that they address, it is the ELC which will have jurisdiction. These statutes generally cover subject matter related to land and the environment. Among these statutes are the *Land Act*, 2012 and the *Land Registration Act*, 2012. Part of what these statutes address



are land transactions and dispositions including charges. Counsel for the defendants have relied on the cases of *Cannon Assurance Kenya Ltd v Fredrick Gathithi Kabue* [2013] eKLR, and the Court of Appeal decision in the case of *Cooperative Bank v Patrick Kangethe Njuna & 5 others* [2017]eKLR which I have also considered.

17. The Court of Appeal in the case of Cooperative Bank(supra) was of the standing that a charge/ mortgage does not constitute use of land and as such does not fall within the jurisdiction of the Environment and Land Court as broken down in Article 162 of *the Constitution* and Section 13(2) of the *Environment and Land Court Act*. In the case of Cooperative Bank of Kenya Limited v Kangethe Njuguna,(supra) the Court of Appeal had this to say about use of land;

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, the air above it or ground below it is adapted. To the law, therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.”

18. The Court of Appeal further defined a charge and whether a charge fits the definition of use of land as follows;

“By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.” The Court of Appeal went on to rule that a charge does not constitute use of land within the definition in Article 162 of *the Constitution*.

19. When discussing whether a charge is an instrument granting an interest in land as per Section 13(d) of the *Environment and Land Court Act*, the Court of Appeal stated as below;

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

20. From pleadings of the parties and submissions it is important to note that the “charge” being referred to had not been secured against the title to the property known as LR No. 209/5862. Prayer number one in the plaint has the plaintiff seeking release of the original instrument of title and followed by an order for costs. As the prayers stand in the plaint it is more of a civil dispute than a land dispute.

21. The counsel for the 1st and 2nd defendants, submitted that this claim is an ordinary civil claim for the breach of contract that ought to be handled by the High court as it is not related to land. This court therefore has no jurisdiction and henceforth it must down its tools. Jurisdiction is primordial and cannot be equated to a procedural technicality, and where a court lacks jurisdiction and has downed its tools, the same cannot be cured.



Disposition

22. The upshot is that I find that this Court lacks jurisdiction to entertain this suit. I can do no more than down my tools. The suit is hereby dismissed with Costs awarded to the Defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2022.

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MOGENI J

JUDGE

In the presence of

.....Plaintiff

.....1st Defendant

.....2nd Defendant

Mr. Vincent Owuor.....Court Assistant

