



**Gami Properties Ltd v Charming General Trading Ltd (Environment & Land
Case E382 of 2021) [2022] KEELC 2780 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E382 OF 2021**

EK WABWOTO, J

JUNE 30, 2022

BETWEEN

GAMI PROPERTIES LTD PLAINTIFF

AND

CHARMING GENERAL TRADING LTD DEFENDANT

RULING

1. By a plaint dated November 10, 2021, the Plaintiff sought for special damages of Kshs 52,514,352.29, general damages and costs against the Defendant.
2. Upon being served with the summons and plaint, the Defendant filed a statement of defence dated January 11, 2022 denying the jurisdiction of this court at paragraph 17 of the said defence.
3. Subsequently thereafter, the matter was placed before me for directions upon which I directed the parties to address me on issue of jurisdiction which was key to the determination and the disposal of the suit herein. Parties opted to canvas the same by way of written submissions. The Plaintiff filed their written submissions dated April 20, 2022 through M/S Masore Nyang'au & Co. Advocates and the Defendant filed their written submissions dated April 4, 2022 through O&M Law LLP Advocates.
4. The gist of the Defendant's written submission is that the court lacks jurisdiction to entertain the Plaintiff's suit. It was submitted that pursuant to the case of *Petro Somoni Moteki –vs- Jeremiah Matoke Nyang'wara & 2 others* (2021) eKLR, the primary cause of action as expressly stated at paragraph 8 of the plaint, is damage caused by the negligence on the part of the Defendant which is kin to the cause of action of tort and as such it should be handled by the High court.
5. Counsel further argued that the dispute between the parties was not rooted in the contests about ownership, deficiency in title, occupation or use of the land but of tortious actions by the Defendant causing damage to the Plaintiff's warehouse.



6. The Plaintiff contended that the suit was properly before this court by dint of Article 162(2) (b) of the Constitution. It was the Plaintiff's submission that the fire which gutted the Plaintiff's warehouses started through the negligence of the defendant during the Defendant's use and occupation of the Plaintiff's land and hence the court has jurisdiction to hear and determine the suit.
7. It was the Plaintiff's further contention that the Defendant had denied the Plaintiff's title to the land and had further denied being a tenant to the suit premises and as such in applying the pre-dominant test in this case and having regard to the directive words, "use, occupation and title to land", the dispute in this case is within the providence of the Environment and Land Court. Counsel concluded his written submissions by stating that should the court find that it has no jurisdiction to hear the matter, then it can consider transferring the same to the High Court rather than to strike out the same as was held in the case of Norapek (PK) construction & Engineering Co. Kenya Ltd & 2 others -vs- The County Government of Kiambu, Kiambu HCCCNo 26 of 2017.
8. Having considered the written submission of the parties, the sole issue for determination is whether this court has jurisdiction to determine the suit herein.
9. In Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

10. The Supreme Court in the case of Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 others, Civil Appl. No. 2 of 2011, observed that:

"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for



the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

11. It therefore behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* 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.”
12. From a careful examination of the pleadings herein, the cause of action relates to fire which consumed the Defendant’s merchandize and destroyed the entire warehouse. The said fire spread to other warehouses namely numbers B16 and B15 and burnt them down. According to the Plaintiff, the damage was caused by negligence on the part of the Defendant particulars of which were set out at paragraph 8 of the Plaint.
13. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to determine whether the Defendant is liable for the fire which was allegedly caused by the Defendant’s actions and negligence causing damage to warehouses No. B16 and B15.
14. In *Suzanne Butler & 4 Others v Redhill Investments & Another* [2016] eKLR the court stated as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of



the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

15. Being guided by the above authority and considering the facts of this case, it is evident that from the Plaintiff’s pleadings, the suit does not deal with any issue on use, occupation or title to land but rather negligence on the part of the Defendant. The jurisdiction of the ELC is limited to Articles 162(2) (b) of *the Constitution* and Section 13 of the ELC Act whereas the jurisdiction of the High Court in civil and criminal matters is evidenced by Article 165(3) of *the Constitution*.
16. In his submissions, Counsel for the Plaintiff appreciates that should this court find that these proceedings could have been instituted before the High Court, then this court should exercise its interest power and have the matter transferred to the High Court with a view of ensuring that substantive justice is achieved.
17. In conclusion, I find that this matter falls within the jurisdiction of the High Court pursuant to Article 165(3)(a) of *the Constitution*. In the premises the order which commends itself to this court and which I hereby make is that these proceedings be heard and determined by the High Court and the Deputy Registrar of this court is directed to facilitate the same. I make no orders as to costs.
18. It is so ordered.

DATED, SIGNED, DEVLIDERED VIRTUALLY THIS 30TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Masore Nyang’au for Plaintiff.

Mr. Javer for the Defendant.

E. K. WABWOTO

JUDGE

