



**Aden & 4 others v Kiptum & 6 others; Xplico Insurance Company (Interested Party)
(Environment & Land Case E056 of 2024) [2025] KEELC 3144 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E056 OF 2024**

YM ANGIMA, J

APRIL 3, 2025

BETWEEN

**ISAACK NOOR ADEN 1ST PLAINTIFF
AZA MOTORING LOGISTICS (K) LIMITED 2ND PLAINTIFF
ALEX MUTWA 3RD PLAINTIFF
ABDISHARAF AHMED 4TH PLAINTIFF
HASHIM JAFER 5TH PLAINTIFF**

AND

**GODFREY KIMAIYO KIPTUM 1ST DEFENDANT
INSURANCE REGULATORY AUTHORITY 2ND DEFENDANT
POLICY HOLDERS COMPENSATION FUND 3RD DEFENDANT
REGISTRAR OF COMPANIES 4TH DEFENDANT
REGISTRAR OF LANDS - MOMBASA COUNTY 5TH DEFENDANT
CABINET SECRETARY - NATIONAL TREASURY 6TH DEFENDANT
THE HONOURABLE ATTORNEY 7TH DEFENDANT**

AND

XPLICO INSURANCE COMPANY INTERESTED PARTY



RULING

A. The 5th, 6th and 7th defendants notice of preliminary objection

1. The 5th, 6th and 7th defendants filed a notice of preliminary objection dated 22.10.2024 seeking to dismiss the plaintiffs' suit and notice of motion dated 21.06.2024 on the following grounds:
 - a. That, the Honourable Court lacks jurisdiction to hear the matter as it is a commercial dispute veiled as a matter within the Jurisdiction of the Environment and Land Court.
 - b. That, the plaint as filed flouts and defies Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act.
 - c. That, the applicant /plaintiff has failed to exhaust remedies under statutory provisions specifically under the Insurance Act section 173, thus violating the doctrine of exhaustion.

B. The 1st and 2nd defendants' notice of preliminary objection

2. The 1st and 2nd defendants filed a notice of preliminary objection dated 31.10.2024 seeking to dismiss the plaintiffs' suit and notice of motion dated 21.06.2024 on, inter alia, the following grounds:
 - a. The Plaintiffs/Applicants' Application and the entire suit offend the provisions of Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011 as it does not relate to a dispute over the ownership, use and title to land, but emanates from a corporate dispute relating to the allocation of shares.
 - b. The Plaintiffs'/Applicants' Application and suit, offend the legal principles of exhaustion of local remedies/alternative dispute resolution mechanisms as provided for under Section 173 and Section 204A(3) of the Insurance Act and Section 9(2)(3) of the Fair Administrative Action Act and this honourable court therefore lacks jurisdiction to hear the suit.
 - c. The 1st and 2nd Defendants do not have any interest in the suit properties, they are neither the owners of the suit properties nor have beneficial interests in the suits and therefore lack the requisite locus standi to move this Honourable Court.
 - d. This Honourable Court and any other Court's jurisdiction is ousted as the Plaintiff's Application and the entire suit against the 1st defendant is res judicata to High Court Commercial Miscellaneous Application No. 490 of 2014 [2019] eKLR. Obsidition Investments Limited v Attorney General & Another, Xplico Insurance Company Limited (Ex parte Application) HCCOMM.E303.2020) offending the mandatory provisions of Section 19 (2) of the Environment and Land Court Act No. 9 of 2011 as read with Section 7 of the Civil Procedure Act, 2010; and
 - e. The suit against the Defendants is an affront to the well-known legal principle of sub judice provided for under Section 19 (2) of the Environment and Land Court Act as read with Section 6 of the Civil Procedure Act, 2010, owing to the pendency of the proceedings in Nairobi Court of Appeal Civil Appeal No. Xolico Insurance Company Limited v Obsidition Investments Ltd & 4 Others.



C. Directions on submissions

3. The court directed the two notices of preliminary objection to be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The 1st and 2nd defendants filed their submissions and list of authorities dated 30.10.2024 whereas the 5th, 6th and 7th defendants filed their submissions dated 27.01.2025 and their list of authorities on 30.01.2025.

D. Issues for Determination

4. The court has perused the two notices, the responses thereto and the material on record. The court is of the view that the following key issues arise for determination herein;
 - a. Whether the court has jurisdiction to entertain the suit.
 - b. Whether the plaintiffs have locus standi to file the suit.
 - c. Whether the plaintiffs' suit is barred by the doctrine of exhaustion of remedies.
 - d. Whether the plaintiffs' suit is res judicata.
 - e. Whether the plaintiffs' suit violates the principle of sub-judice.
 - f. Who shall bear the costs of the proceedings.

E. Analysis And Determination

a. Whether the court has jurisdiction to entertain the suit

5. Jurisdiction is at the cornerstone of each case hence when raised by any party to a suit at any stage of the proceedings, the court has to determine it before making any more steps. It has been held that jurisdiction flows from either *the Constitution*, legislation, or both. It was held by the Supreme Court of Kenya in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR that;

“A court’s jurisdiction flows from either *the constitution* of 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 submissions 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.”

6. Article 162 (2) (b) of *the Constitution* establishes and confers this court with jurisdiction thus:

“Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to land.” Parliament then enacted the *Environment and Land Court Act* to give effect to Article 162 (2) (b) of *the Constitution*.

7. The jurisdiction of the court is set out in Section 13 of the *Environment and Land Court Act* as follows:



In the 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 the environment and land.
8. The plaintiffs averred in their plaint dated 21.06.2024 that the 3rd, 4th and 5th plaintiffs were the registered proprietors of Parcels No. MN/III/7025, MN/III/7023 and MN/III/7023. On 30.09.2024, the 3rd, 4th and 5th plaintiffs transferred the said parcels to the interested party for the sole purpose of the 1st and 2nd plaintiffs or their nominees being allocated shareholding and directorship of the interested party. It was the plaintiffs' case that the 2nd defendant declined to admit the said parcels of land to determine the capital adequacy ratio for the interested party. The plaintiffs prayed for, inter alia, an order for cancellation of the transfer and reinstatement the 3rd, 4th and 5th plaintiffs as the registered proprietors of the suit lands.
9. In this instance, the court shall employ the predominant purpose test to determine whether the predominant purpose was the sale of land whereby the ELC would have jurisdiction, or acquisition of shares and directorship whereby the High Court would have jurisdiction. Ngugi J, as he then was, held in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR;
- “When faced with a controversy whether a particular case is a land dispute (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 predominant 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.”
10. In the instant case, the plaintiffs claim to have transferred their parcels of land to the interested party for the purchase of shares. They contended that the defendants had frustrated their efforts to complete the said exchange. In such an instance, it is clear that the question before this court is on the sale of the shares of which the parcels of land were only used as consideration for the transaction. Even though the plaintiffs have prayed for cancellation of the transfer of the parcels of land and their reinstatement as the registered owners the predominant purpose of the transaction was the sale of the shares in an insurance company a matter over which this court has no jurisdiction.
11. Article 162 (2) of *the constitution* stipulates as follows;
- “parliament shall establish court with the status of the High Court to hear and determine disputes relating to;



- a). Employment and labour relations; and
- b) The environment and the use and occupation of and title to land”

12. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR the Court of Appeal was of the view that where the cause of action was not on validity of the charge but a question of accounts then it is the High Court which had jurisdiction over it since the dominant issue was the settlement of amounts on account of a contractual relationship of a banker and lender. It was held, inter alia, that;

“While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions.”

b. Issues (b), (c), (d) and (e)

- 13. In view of the court’s finding on the issue of jurisdiction it shall not be necessary to determine the rest of issues. For without jurisdiction, a determination on the rest of the issues would not serve any useful purpose.
- 14. Consequently, the court holds that the dispute between the plaintiffs and defendants, as presented, is not primarily on land and finds that this court has no jurisdiction to hear the suit. Without jurisdiction, this court can do nothing else and must put down its tools.

c. Who shall bear the costs of the application

15. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Since the court is of the view that the dispute was filed before the wrong forum and may still have to be resolved before the right forum the court is of the view that the appropriate order to make is that there shall be no order as to costs.

F. Conclusion and disposal order

- 16. The upshot of the foregoing is that the court finds and holds that the 1st and 2nd defendants’ notice of preliminary objection dated 31.10.2024 alongside the 5th, 6th and 7th defendants’ notice of preliminary objection dated 22.10.2024 are merited. As a consequence, the court makes the following order for the disposal of the suit;
 - a. The plaint dated 21.06.2024 and filed on 25.06.2024 is hereby struck.
 - b. There shall be no orders as to costs.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 3RD DAY OF APRIL 2025.

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Y. M. ANGIMA
JUDGE



In the presence

Court assistant Gillian

Ms. Karongo for the plaintiff

Mr. Ouko for 1st and 2nd defendants

No appearance for the 3rd defendant

No appearance for AG for the 4th to 7th defendants

