



Nenkai Investment Limited v County Government of Narok (Environment & Land Case E019 of 2021) [2022] KEELC 15418 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E019 OF 2021
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

NENKAI INVESTMENT LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF NAROK DEFENDANT

RULING

1. Before this court for determination is a notice of preliminary objection dated June 24, 2022 filed by the defendant and it is expressed to be brought under Order 2 rule 9 of the [Civil Procedure Rules](#) and the [Tax Appeals Tribunal Act](#) and the [Tax Procedures Act](#) No 29 of 2015 seeking to strike out the suit on the following grounds: -
 - a. That this court lacks jurisdiction to hear the suit.
 - b. That this suit invites the honourable court to usurp the powers of the Tax Appeals Tribunal.
 - c. That the instant suit is misconceived and an abuse of the court process.
2. This court directed the notice of preliminary objection be disposed off by way of written submissions. The defendant filed written submissions dated October 7, 2022. The defendant raised 3 issues for determination as follows: -
 1. Whether this honourable court is seized with jurisdiction to hear tax disputes.
 2. Whether this instant suit is misconceived and an abuse of the court process.
 3. Whether the court should issue orders as to costs.
3. On the first issue, the defendant submitted that jurisdiction of a court may be conferred by the [constitution](#), statute or both and the court as a creature of the [constitution](#) and the law, must exercise the jurisdiction conferred on it. The defendant relied on the Supreme Court decision in [Samuel Kamau](#)



Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR and *In the Matter of the Interim Independent Electoral Commission*, Constitutional Application Number 2 of 2011.

4. The defendant further submitted that the broad jurisdiction of the Environment and Land Court is donated by article 162 of the *Constitution* which enacted the *Environment and Land Court Act* under which section 13 of the said Act outlines the jurisdiction of this court. The defendant submitted that it should be noted that court does not have jurisdiction in respect of tax disputes and appeals. The said jurisdiction is vested in the tax appeals tribunal which tribunal has jurisdiction to hear appeals from decisions of the commissioner on any matter arising under the provisions of any tax law.
5. On the second issue, the defendant submitted that the notice of preliminary objection is on a point of law as it is an objection to the jurisdiction of the court which this court does not have requisite jurisdiction to try the case as framed rendering the entire trial process unconstitutional.
6. The plaintiff filed written submissions dated December 13, 2022. The plaintiff raised three issues for determination as follows: -
 - i. Whether this ELC court has jurisdiction to intervene and determine this application on merits.
 - ii. Whether the injunction order should be granted as prayed pending the hearing determination of the main suit.
 - iii. Who shall bear costs of the application.
7. On the first issue, the plaintiff submitted that this application falls entirely within this court's jurisdiction and hence should proceed to consider the merits of the case. Further, that the defendant has abhorrent scheme in exorbitantly increasing the rates and this is now increasingly threatening the quiet possession and enjoyment of the suit property that is against the rights guaranteed under the *Constitution* and the statutory provisions. The plaintiff relied on the cases of *Taib Investment Limited v Fahim Salim Said & 5 Others* [2016] eKLR and *Dominic Ng'ang'a & Another v Director General National Environment Management Authority & 4 Others* [2020] eKLR.
8. On the second issue, the plaintiff submitted that this court has powers to hear and determine an application for injunction in order to prevent the plaintiff from being harassed unfairly by the defendant as it has consistently purported to increase rates payable without complying with the statutory provisions. Counsel relied on the cases of *Giella v Cassman Brown* [1973] EA 348, *Nguruman Limited v Jane Bonde Nielsen & 2 Others* NRB CA Civil Appeal No 77 of 2012 [2014] eKLR and *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] eKLR.
9. On the issue of costs, the plaintiff submitted that as a general rule, costs follow event and prays that the preliminary objection be dismissed with costs. Reliance was placed in the case of *Hussein Jammohamed & Sons v Twentsche Overseas Trading Co Limited* [1967] EA 287.
10. I have considered the notice of preliminary objection and the written submissions filed by both parties and the issue for determination is whether this court has jurisdiction to hear and determine this matter.
11. A preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court stated as follows: -

“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. 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. There is no dispute that the preliminary objection herein raises a pure point of law.
13. The jurisdiction of this court stems from *the constitution* and legislation as was held in the Supreme Court of Kenya Application No 2 of 2011 *Samuel Kamau Macharia v KCB & Others* [2012] eKLR where the court stated as follows:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus a court 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.....the court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”

14. Article 162 (2) (b) of the *Constitution* provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land.
15. Section 13 of the *Environment and Land Court Act, 2011* provides that: -

“(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.”

16. Jurisdiction is the authority a court has to decide matters that are litigated before it or take cognizance of matters prescribed in a formal way for a decision. Jurisdiction can neither be implied nor can it be conferred by agreement of parties. When an issue is raised on jurisdiction of a court to hear and determine a matter, the court must first deal with it as jurisdiction of a court is everything as was held in the case of *The Owners of the Motor Vessel Lillian ‘S’ v Caltex Kenya Limited* (1989) KLR 1 the Court of Appeal held 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...?’

17. In addition, jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. What can be deduced from the above case law principle is that there exists a distinction between cause of action, jurisdiction and adjudicatory jurisdiction. The cause of action jurisdiction is based upon the state of the law conferring jurisdiction at the point. The cause of action is said to have arisen requiring invocation of adjudication of the dispute in a formal way.
18. I have taken time to peruse the pleadings and the plaintiff in this matter filed a plaint dated September 21, 2021 seeking judgment to be entered against the defendant for: -
 1. A declaration that the verbal threats by the defendant’s agents to close access to the suit properties owned by Amir Suleiman despite receiving payment of the requisite rates is null and void.
 2. A permanent injunction do issue restraining the respondent whether by its agent, employees, servants or any other person working under the defendants’ instructions and authority from in any way interfering with the quiet possession, entering, trespassing, occupying, locking or in any other way at all dealing with properties known as: plot No 64 Nenkai Plaza (now 172) Block 4; plot No 132 River Park (now 146) Block 5; plot No 79 Park Avenue (now 136) Block 5; plot No 793 Bulls Court Block 11; plot No 24 Block 5; plot No 17 Block 11-all located within Narok town.
 3. Exemplary damages.
 4. The costs of this suit and interest at court rates.
 5. Any other relief this court deems just to grant.
19. A further reading of the plaint shows that the cause of action arose out of the defendant’s agent unlawfully formulating exaggerated invoices that cover strange and unexplained figures that position the plaintiff in hefty plot rent and rates arrears and the defendant has been harassing tenants and threatened to close down their businesses and residential premises citing arrears. The plaintiff has also pleaded increased interference with quiet possession and enjoyment of the suit properties contrary to the proprietary rights guaranteed under the Constitution.
20. I have also taken time to peruse the notice of motion application dated September 21, 2021 which is seeking the following orders: -
 1. This application be certified urgent and heard ex-parte in the first instance and on priority basis during the High Court vacation.
 2. Pending hearing and determination of this application, an order of temporary injunction do issue restraining the respondent whether by its agents, employees, servants or any other person working under the defendants’ instructions and authority from in any way interfering with tenant’s quiet possession, entering, trespassing, occupying, locking or in any other way at all dealing with properties known as plot no 64 (now 172) Block 4; plot No 132 (now 146) Block 5; plot No 79 (now 136) Block 5; plot No 793 Block 11; plot No 24 Block 5; plot No 17 Block 11 -all located within Narok town.
 3. Pending hearing and determination of this suit, an order of temporary injunction do issue restraining the respondent whether by its agents, employees, servants or any other person working under the defendants’ instructions and authority from in any way interfering with



tenant's quiet possession, entering, trespassing, occupying, locking or in any other way at all dealing with properties known as plot No 64 (now 172) Block 4; plot No 132 (now 146) Block 5; plot No 79 (now 136) Block 5; plot No 793 Block 11; plot No 24 Block 5; plot No 17 Block 11 -all located within Narok town.

4. The costs herein be in the cause.
 5. Any other relief the court may deem fit to grant.
21. My analysis of the pleadings cited herein above does not in any way indicate or show that the matter is the subject of tax or has at any time been referred or heard by a commissioner for tax to warrant referral to the tax appeals tribunal. The dispute revolves around rates and rent of the suit properties which the valuation court has jurisdiction to hear and determine. The reliefs and prayers sought in both the plaint and the notice of motion application fall squarely within the jurisdiction of the valuation court with an appeal to either this court or the Magistrate's Court as is provided for under Section 19 (a) and (b) of the *Valuation for Rating Act* chapter 266 of the Laws of Kenya, Revised Edition 2015 (2012).

Section 19 of the Act provides as follows:-

19 Appeals

“any person who has appeared before the valuation court on the consideration of an objection made before that court under this Part, or who has submitted an objection in writing to that valuation court, and who is aggrieved by the decision of that valuation court on the objection, may appeal against the decision of the valuation court within one month from the date of the notice referred to in section 17 (4)-

- a. to the Environment and Land Court, if such valuation court was appointed under section 12; or
 - b. to a subordinate court held by a Chief Magistrate, a Senior Resident Magistrate or a Resident Magistrate, if such valuation was appointed under section 13”.
22. The provisions of the above cited law grants jurisdiction both to this court and the Magistrates court to hear and determine appeals concerning the land rates. However, I am of the view, that in circumstance where such jurisdiction has been donated to the lower court or a tribunal, by an Act of Parliament, then such a court or tribunal ought to hear and determine the dispute. In this case, the *Valuation for Rating Act* gives the valuation court jurisdiction to hear and determine the dispute at hand. In *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, the Court of Appeal held as follows:

“A party or litigant cannot be allowed to confer jurisdiction on a court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was



stated that where there is a clear procedure for the redress of a particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.”

23. Arising from the above, I find that the plaintiff herein should have approached the valuation court first. As such the notice of motion application and the plaint dated September 21, 2021 is hereby struck out. The notice of preliminary objection dated June 24, 2022 is hereby dismissed. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 21ST day of DECEMBER, 2022.

MBOGO C.G.

JUDGE

21/12/2022

In the presence of:

CA:Chuma

