



**Maru v Wafula (Environment & Land Case 103 of 2008)  
[2022] KEELC 15590 (KLR) (5 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 103 OF 2008  
FO NYAGAKA, J  
DECEMBER 5, 2022**

**BETWEEN**

**MANSUKHALAL JESANG MARU ..... PLAINTIFF**

**AND**

**FRANK WAFULA ..... DEFENDANT**

*(On a point of law on the jurisdiction of the Court)*

**RULING**

**The Application**

1. The Applicant herein is a man of zeal: fully determined to make applications after another in this matter. The obvious reason is for him to delay the matter as much as he possibly can. This is despite the fact that this Court has on two occasions ruled that the Applicant files not any application without leave of the Court. Since he understands the orders of the Court he resorted to a clever way of raising the present issue without leave of the Court. The Court permitted him to raise it since the Court understood it to be one which might, if successful, go to the root of the case. I now summarize here below the issue as presented.
2. On November 14, 2022 when this suit came up for further hearing of the Defendant's case after the Defendant testified, he called DW2, the Land Registrar of Trans Nzoia County, to give evidence. Upon the witness concluding her testimony, the Defendant moved the Court, requesting it to give directions on the suit since, to him, this Court did not have jurisdiction to here the suit. His contention was that this suit was filed in the High Court of Kenya at Kitale in 2008 as HCCC No 103 of 2008. That was when the Environment and Land Court (ELC) was not in existence hence the High Court had jurisdiction.
3. In the year 2012, the ELC was established. Upon the Court being established, the matter was transferred to this Court. He emphasized that this was done without a specific order to the effect that it



be transferred. His further contention was that the proceedings in the matter had already commenced hence there was need to have an order specifically indicating that this Court was to hear the suit. His further argument was that proceedings herein commenced by virtue of Plaintiff having filed an Application praying for summary judgment against him and the same was to be heard when the suit was transferred to this Court. I perused the Court record and noted that the application the Defendant had in mind was the one dated February 5, 2009. It was filed on February 12, 2009 and a Relying Affidavit thereto filed on June 26, 2009. To the Defendant, moreover, for the reason of the suit bearing the heading as it is, it is a High Court matter and not an ELC one.

4. He then contended that the transfer of the suit to this Court, without the specific order to that effect offended the provisions of the Practice Direction of this Court as give in Legal Notice No 5178 of 2014. He stated that the provisions therein were clear that all matters or suits that had been filed in the High Court before the ELC was established, and were commenced or partly heard, were to continue being heard by that Court. Those that were filed in that Court but had not commenced were to be transferred to the ELC for determination. Therefore, to him, this suit being partly heard, was under the preserve of the hearing of the High Court and not the ELC.
5. The plaintiff, on his part opposed the argument, that eventually mutated into a preliminary objection on the jurisdiction of this Court. He contended that this Court had jurisdiction to hear the matter. Furthermore, he stated, this suit was not partly heard by the time of transfer to this Court. Again, the Practice Directions did not deprive this Court of jurisdiction. In any event, Article 159(2) obligated this Court to determine matters not based on technicalities but substantive justice. His other argument was that the suit commenced fresh in this Court. He asked that the objection be dismissed.
6. I have considered the matter raised before on the jurisdiction of this Court. I have analyzed the law, the facts as borne by the Court record, and the oral submissions by both parties. It is my view that that only two issues lie before me for determination. They are:
  - a. Whether the objection merited.
  - b. Who to bear the costs of the objection.
7. It is worth noting that the Plaintiff raised the objection in the course of the defence hearing. While this was a subtle way of trying to delay this matter and go ground the requirement of leave of Court to be satisfied by the Defendant before moving the Court on any application, the Defendant's explanation of raising the issue was that two or so weeks prior to appearing before me on the material date, he and the Plaintiff had appeared before the Court of Appeal in Kisumu and he raised the issue of the jurisdiction of this Court on the instant matter but the Court referred him to this Court to raise it here. Be that as it may, since under Article 50 of the Constitution 2010 parties have a right to be heard, I hereby give the Defendant the chance to ventilate his issue. It is being raised late in the date but since jurisdiction is everything, I will not gloss over the issue for reason of delay since by so doing, I would be arrogating myself a power to determine this matter, which I do not have if the objection is merited. Thus, I now consider the merits of the argument.

### **Whether the objection is merited**

8. It is trite law that the jurisdiction of a Court to hear and determine a matter is everything in relation to the matter before it. When an issue concerning it, it should be raised at the earliest instance and be done in the form of a Preliminary Objection. It is vital to define a Preliminary Objection.
9. In our jurisdiction, a Preliminary Objection has been well defined. It is an argument raised only on a point or points of law which can be pleaded by a party or raised as a result of necessary implication. Such



a point should not be hinged on facts otherwise it would lead to an examination and analysis of evidence hence not pass as a preliminary point of law. In the seminal case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696*, their Lordships defined it 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.'

10. In the case of *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR* the Court of Appeal has held that:

' We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue. We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.'

11. While determining a similar issue, the same Court, in *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR*, stated as follows:

' We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.'

12. In *Susan Wairimu Ndiangui V Pauline W Thuo & Another [2005] eKLR* Musinga J as he then was held that:

' A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.'

13. In the instant case, the Defendant was not clear. He was vague in the manner he raised the issue. He argued that this Court needed to give directions in this matter. He then went on to submit that the suit having proceeded to hearing in the High Court, that deprived this Court jurisdiction over it. It was at the tail end of his submissions that he came out to bring the point on the lack of jurisdiction of the Court. That notwithstanding this Court shall now consider the arguments and make its finding thereon.



14. In the case of the Owners of the *Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] eKLR* the Court of Appeal stated clearly that absent of jurisdiction a court must and down its tools. In the case, the Court rendered itself as follows:

' 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

15. In the more recent case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR*, the Supreme Court held 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 itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere technicality: It goes to the very heart of the matter for without jurisdiction the court cannot entertain any proceedings.'

16. The jurisdiction of this Court to hear and determine matters relating to the Environment and Land flows from both the *Constitution* of Kenya 2010 and the parent statute that establishes this Court. Specifically, Article 162(2)(b) creates the ELC as one other Court of equal status with the High Court. The fact that the *Constitution* compared this Court with the High Court and stipulated that this Court is of equal status to it does not make this Court any less than the sister Court. That comparison has a statutory historical background. From early independence when the Judiciary was established, only the High Court and the Court of Appeal were the courts of record, as per the *Judicature Act*, Chapter 8 of the Laws of Kenya.

17. Prior to 2010, the High Court used to determine all sorts of disputes both in the original and appellate jurisdiction. These included the ones relating to Environment and Land. But when the 2010 Constitution established the ELC and the Employment and Labour Relations Court to handle the disputes respective to their jurisdictions, there was need to clearly state that though exercising these separate specific jurisdictional powers, the three Courts were of the same status. None was superior to the other, lest there was discrimination against, and demeaning of, one or other. These Courts being three are like the Godhead (three) as explained in the Holy Bible: they are co-equal.

18. The jurisdiction of this Court was specifically stipulated under Section 13 of the ELC Act. It provides, in Subsection 2(a), for the power of this Court to handle, among others, disputes relating to 'land use planning, title, tenure, boundaries, rates, rents,' I have singled out this aspect because of its relevance to the instant matter: it relates to the cause of action herein. In the instant suit, the Plaintiff sued the Defendant for the following relief:

- a. Declaration that the Plaintiff is the sole legal owner of the land comprised in title number Kitale Municipality Block 12/26 to the exclusion of the defendant who should be ordered to vacate the said and failing which he be forcefully evicted.
- b. Mesne Profits at the rate of Kshs 10000/= per annum wef 2008 until the determination of the suit.



- c. Permanent injunction against the Defendant.
  - d. Costs.
  - e. Interest.
19. Indeed, the Practice Directions of this Court referred to by the Defendant, as Gazette Notice No 5178 of 2014, in making his argument over lack of jurisdiction of this Court provide for transfer of matters that were initially filed in the High Court, that is prior to the establishment of the ELC. Section 4 thereof stipulates that 'All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.' Section 5 'All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge'. Clearly, only the matters which were 'heard in part' by the time of establishing the ELC that were to be continued in the Court where they had been filed. Actually, Section 4 was only taking care of transitional steps which would take care of expeditious disposal of disputes. All other matters were to be transferred to the ELC as directed by the judge.
20. The distinctiveness of the jurisdictions of the High Court and the ELC was clearly enunciated in [\*Republic v Karisa Chengo & Others \[2017\] eKLR\*](#) where the Supreme Court emphasized the clear boundary of the two as follows: -
- ' From a reading of the [\*Constitution\*](#) and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.'
21. Also, in [\*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others \[2012\] eKLR\*](#), the Supreme Court expressed itself on jurisdiction of courts as follows: -
- ' 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. This Court dealt with the question of jurisdiction extensively in, [\*In the Matter of the Interim Independent Electoral Commission \(Applicant\), Constitutional Application Number 2 of 2011\*](#). 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the [\*Constitution\*](#). Where the [\*Constitution\*](#) confers power upon Parliament to



set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.'

22. In my view, when the judge directed that this suit be heard before the ELC, he was perfectly in order to do so. The provision does not require the judge to minute specifically in each file that the suit be transferred to the rightful Court. It could be done administratively, as was in this case. Failure to minute such an order is a technicality which no Court can bother considering, contrary to the requirements of Article 159(2)(2) of the Constitution 2010. In any event, in the interest of justice and the spirit of the Constitution 2010, the ELC Act and the Civil Procedure Act of expeditious and efficient determination of disputes, suits whose subject was as the one in the instant one had to be concluded before this Court. Failure to minute the order or direction of transfer did not deprive this Court jurisdiction. On the contrary, to hold that the matter be heard in the High Court which ceased to have jurisdiction over the subject matter once the ELC was established would amount to forcing the matter to be placed before a Court that does not have jurisdiction. This Court can read the mind of the Applicant herein: he wishes the matter to be transferred to the High Court so that once there he raises the lack of jurisdiction therein.
23. Having found that there was no requirement for the judge to specifically direct the matter to be placed before the ELC judge, before making further analysis, it behooves me to state that Gazette Notice No 5178 of 2014 is subsidiary legislation. It cannot override the provisions of the parent statute, just like any law, including customary law, which is inconsistent to the Constitution is void to the extent of its inconsistency. Thus, when the parent statute confers jurisdiction to a Court, subsidiary legislation cannot oust that power.
24. Be that as it may as reasoned above, I will now examine the merits of the objection, based on the Court record. The application the Defendant postulates as the reason why this matter was part-heard as at the time it was transferred to this Court, without as a specific order, was the one dated February 5, 2009 which was filed on February 12, 2009 as stated above. After it was filed, it was fixed for hearing on May 5, 2009. On that date, it did not proceed. It lay in the Registry until May 21, 2009 when someone fixed a date therein on behalf of the Applicant for July 13, 2009. On that date, the parties agreed by consent to mention the case for July 29, 2009. On the latter date, both counsel were in Court when the one for the Applicant sought leave of the Court to file a Supplementary Affidavit. Leave was granted for that to be done within 21 days.
25. From the July 29, 2009, nothing took place on the file until February 3, 2016 when suit came up for the hearing of a Notice to Show Cause why it should not be dismissed for want of prosecution. On the material date, counsel for the Plaintiff showed cause by explaining that the Defendant had filed a case in the lower Court against the Plaintiff as a result of which the instant suit could not proceed pending the determination of that case. Counsel explained further that the lower Court case had been determined on December 11, 2015 hence the instant suit could proceed from that date. The explanation was accepted.
26. On this material date, the Application dated February 5, 2009 was withdrawn. In the order of withdrawal, the Court indicated that the Application was dated February 12, 2009 but in essence that was the date it was filed. That is the position of the Court file as at the time the suit was transferred to this Court.
27. Of course, the suit was transferred without a specific order being made as such. But the position is that as at that date, there was no evidence that had been tendered in regard to the suit herein. In any event, the Defendant has not shown the prejudice he would suffer or has actually suffered by this matter proceeding in this Court and not the High Court. Also, there is no prejudice suffered by him by the



heading of this suit being retained as it was when the suit was filed. His contention over this issue is simplistic and a design to buy time. But if the Defendant thinks that by the heading of the pleadings being amended to read the 'ELC' in stead of the 'High Court', he would be pleased with it, this Court permits the parties to amend only the heading the same accordingly within 14 days.

28. Instructive also is to understand what the term part-heard means. The online Law Insider Dictionary defines the term to mean 'a case in which bipartite final hearing of a main case has commenced but not concluded and is marked - part-heard.' Order 17 Rule 1(1) provides for the hearing of a case to proceed on a day to day basis and should not be adjourned until it is concluded unless a party applying for the adjournment satisfies the Court that it is just to grant the prayer. Sub-Rule 2 thereof is the one that provides for partly heard cases. It states that where an adjournment is granted the Court can give directions on further hearing of the case.
29. The term part-heard is a compound word which fuses two root words which are a verb and an adverb, being, 'hear' and 'part'. The grammatical meaning of the word 'part', which qualifies the verb by giving its status, is not the whole. It gives rise to a noun, which is, 'hearing'. The term hearing means opportunity to state a case. It occurs when the party and/his witnesses give evidence in Court or tribunal. *Brian A Garner (2019). Blacks Law Dictionary, 11<sup>th</sup> Edition, Thompson Reuters, St. Paul, MN, p 865* defines hearing as follows, 'A judicial session, usually open to the public, held for the purpose of deciding issues of fact or of the law, sometimes with witnesses testifying.' Thus, the Office of the Commonwealth Director of Public Prosecutions (CDPP) of the (Australia's Federal Prosecutions Service) defines a part-heard case as one in which 'court proceedings have begun but are not completed.'
30. It therefore means that for a matter to be part-heard, evidence of a witness(es) ought to have been received by the Court but not to the extent of concluding the case. The hearing of inter-locutory applications, be they of whatever nature, cannot constitute a part hearing of a matter. Further, when an inter-locutory application is heard in part it does not constitute part hearing of the matter. To argue and interpret that the filing of an application constituted making the suit part-heard in the real meaning of the term would be stretching the meaning too far and abusing the intellect of the Court. It is even far-fetched to conclude that the mere filing of an application leads to the matter being partly heard for the reason of the prayers sought in the application.
31. In the instant matter, it is clear that the Application dated May 20, 2009 was only filed and not prosecuted. It was finally withdrawn by the consent of the parties, on February 3, 2016. It was not therefore concluded on merits. The Defendant was only splitting hairs by raising such a frivolous objection. The Court is unhappy about this subtle way of trying to scuttle the hearing. I am aware of the fact that the Defendant has tried all means possible to derail the hearing of this matter. He has made numerous applications, most of which have been dismissed.
32. While the outcome of the applications did not influence this Court to arrive at the finding it has in the instant objection, this Court abhors the conduct of the Defendant in deliberately pursuing the trajectory of delaying this suit, especially given the fact that he is on the suit land, which is claimed by both him and the Plaintiff. It would be one hundred percent just to conclude this matter within the shortest time possible so that the party to whom the proprietorship of the suit land vests is given justice. It does not help anyone using delaying tactics to lay barriers to the course of justice. Justice delayed is justice denied. I find the objection absolutely baseless.

### **Who to bear the costs of this application**

33. I have arrived at the conclusion that the objection herein was unmeritorious, baseless and an abuse of the process of this Court. Costs follow the event. I dismiss the objection with costs to the Plaintiff.



34. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS  
5<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON. DR. *JUR* FRED NYAGAKA**

**JUDGE, ELC, KITALE**

