



Sigilai Developers Limited v Kiptugen (Environment & Land Case E032 of 2024) [2024] KEELC 13552 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E032 OF 2024**

**EO OBAGA, J
DECEMBER 5, 2024**

BETWEEN

SIGILAI DEVELOPERS LIMITED PLAINTIFF

AND

DAUDI KIPTUGEN DEFENDANT

RULING

1. This Ruling is in respect to two Notice of Motion Applications dated 13th June, 2024 by the Plaintiff and 21st June, 2024 by the Defendant.
2. By a Notice of Motion dated 13th June, 2024 the Plaintiff/ Applicant sought for the following orders: -
 - a. Spent.
 - b. Spent
 - c. That the Respondent's agents (including Messrs Bundotich Korir & Co. Advocates) assigns and person claiming under him be restrained from withdrawing, releasing, disposing or in any manner interfering with the sum of Kshs. 11,000,000/= pending the hearing of the suit.
 - d. That the Respondent and his agent Messrs Bundotich Korir & Co. Advocates, be ordered to deposit a sum of Kshs. 11,000,000/= in a joint interest-bearing account with a banking institution pending the hearing and determination of the suit.
 - e. That in alternative to prayer 4 (d) above, the Respondent be ordered to deposit in court pending the hearing and determination of the suit.
 - f. That in default of compliance with 4 above, leave to garnishee account number 6610000051 Bank, Eldoret Branch and a sum of Kshs. 11,000,000/- be deposited in terms of 4 above.
 - g. That the costs of the application be provided for.



3. The application is based on the 8 grounds thereof and the Supporting Affidavit sworn by Samuel Kosgei, a Director of the Plaintiff on even date. He stated that the defendant, who is the registered owner of the parcel No. Eldoret Municipality/ Block 7/154; attempted to sell the land to the plaintiff vide an Agreement dated 28/4/2024, at a consideration price of Kshs. 110,000,000/=
4. That pursuant to the said agreement; a deposit of Kshs. 11,000,000/= was paid, being 10% of the purchase price. The balance of the purchase price was subject to funding by way of a bank loan facility as stipulated in the said agreement. However, the banker's valuers discovered the existence of an active case pending in the Court of Appeal; COA Misc. Civil Application No. 05 of 2024 - Heldo Foods Limited vs Kiptugen, and consequently declined to process the loan facility of Kshs. 99,000,000/- on the strength of the suit land as security.
5. It is his claim that the defendant/respondent breached the agreement dated 26/4/2024 by failing to disclose the existence of an active case pending in the court of appeal, resulting in the refusal to process the loan facility and thus frustrating the whole agreement.
6. He further contended that the defendant/respondent is determined to detain and utilize the funds deposited to his advocate's account without any basis. He averred that the defendant and his advocate are employing collusive endeavors to deprive the applicant of Kshs. 11,000,000/- deposited towards the performance of the agreement. He maintained that the conduct of the defendant and his advocate is reason enough for him to believe that they are intent on depriving him of his funds paid as deposit and therefore urged the court to allow the application as sought.
7. The application was opposed. The Defendant/ Respondent filed a Replying Affidavit sworn on 16.09.2024 in response to the allegations made by the Applicant. It was his claim that he has not breached the agreement as alluded but maintained that the breach was on the part of the applicant, who is not deserving of the orders sought.
8. He averred that even though the contract provided that the balance of the purchase price would be paid through a bank facility, there was no express clause in the sale agreement stipulating that the subject land would be used as security to secure the loan facility.
9. It was his contention that at the time of making the sale of land agreement; the plaintiff was fully aware that the land parcel was subject to litigation but which had been concluded in the Court of Appeal vide a judgment rendered on 15/12/2023 in his favor. That the case in question vide COA Misc. Civil Application No. 05/2024 was served upon him way after they had entered into the sale agreement.
10. Be that as it may, he maintained that there are no orders resulting from the said Application which would adversely affect their transaction to warrant the rescission of the contract.
11. Further, he contended that the orders sought by the applicant, particularly, those seeking to attach the account of the firm of M/s Bundotich Korir & Co. Advocates account are not tenable, as the said firm has not been enjoined in these proceedings and granting the said orders would amount to condemning the said firm unheard. That the said firm was merely an agent, receiving the funds on his behalf and for his onward transmission.
12. It was his assertion that he has since used the funds in his other obligations and thus the orders sought of depositing the same Kshs. 11,000,000/= is untenable at this point unless the court finds that he was the one in actual breach of the sale agreement. He urged the court to dismiss the application.
13. The Defendant/ Respondent also filed a Grounds of Opposition dated 21/6/2024 in response to the application; wherein he dismissed the application as being incompetent and incurably defective. That



the orders sought are untenable and cannot be granted at an interlocutory stage since they have been overtaken by events.

14. It was also his claim that the application is sub judice as there is a pending suit Eldoret CMCC No. E171 of 2024 and further that the court lacks jurisdiction to grant the orders sought.
15. In the second Notice of Motion Application dated 21st June, 2024, the Defendant/ Applicant sought the following orders: -
 - i. Spent.
 - ii. That the suit herein be struck out with costs to the defendant.
16. The application is premised on the 3 grounds on its face and on the Applicant's Supporting Affidavit sworn on 14th June, 2024. It was his claim that the suit as filed offends the provisions of section 6 of the *Civil Procedure Act*; in view of the fact that the subject matter herein is directly and substantially in issue in a previously instituted suit being Eldoret CMCC No. 171 of 2024 (Daudi Kiptugen vs Sigilai Developers Ltd)
17. Further, it is his contention that the plaintiff's claim is a money claim and is therefore a commercial dispute. As a result, the same is not within the jurisdiction of this court as conferred by Article 162 (2) (b) of *the Constitution* and section 13 of the *Environment and Land Court Act*. He urged the court to strike out the suit with costs.
18. I have looked at the court record, as well as the CTS platform and I have not seen any response filed by the Plaintiff/Respondent in relation to the Application dated 21/6/24. The plaintiff however filed his written submissions with regards to the application.
19. Both Applications were disposed off by way of written submissions; both parties filed their rival submissions in respect to the two applications together with authorities, which I have read and considered;

Analysis and disposition

20. Having carefully read and considered the applications, the various Affidavits together with the annexures thereto and the rival submissions; it is my considered view that the following issues arise for determination; -
 - a. Whether this court is vested with the requisite jurisdiction to entertain the plaintiff's suit as filed
 - b. Whether the instant suit is sub judice to warrant its striking out
 - c. Whether the Plaintiff has met the requirements for the grant of an order of temporary injunction and is entitled to the reliefs sought in Application dated 13/6/2024.

Whether this court is vested with the requisite jurisdiction to entertain the plaintiff's suit as filed

21. It is a well settled principle that jurisdiction is everything; it is a court's power to entertain, hear and determine a dispute before it. As was held in the celebrated case of Owners of Motor Vessel 'Lilian S', without jurisdiction, a court has no powers to proceed to entertain the matter.
22. The defendant contends that the court herein lacks the requisite jurisdiction to entertain the suit as filed for the reason that the plaintiff's claim is a money claim and hence a commercial dispute. That



pursuant to Article 162 (2) (b) of *the Constitution* as read with Section 13 of the ELC Act, this court is not vested with the jurisdiction to entertain the plaintiff's claim.

23. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others* (2012) eKLR stated 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 counsels 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. 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.”

24. Article 162 (2) (b) of *the Constitution* establishes the Environment and Land Court to determine disputes relating to the environment and the use, occupation of and title to land. Further, section 13(2) of the *Environment and Land Court Act*, outlines and describes the jurisdiction of this court provides as follows: -

- (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.

25. In order to establish whether indeed this court is vested (or not) with the requisite jurisdiction to hear and determine the matter as filed; it is important to look at the Plaintiff dated 28th May, 2024 to ascertain the cause of action and the reliefs sought and consider whether the same fall within the jurisdiction of this court.

26. I have carefully looked at the said plaintiff dated 28/5/2024 and I must point out that the plaintiff's cause of action arose from an agreement of sale of land dated 26th April, 2024 and which he alleges was breached by the defendant, for failure to disclose the existence of an active case pending in the Court of Appeal in respect to the property in question. Consequently, he sought the following orders; -

- i. A Declaration that the sale agreement stands rescinded for material non-disclosure



- ii. Judgment in terms of clause 13 in the plaint; seeking a refund of Kshs. 11,000,000/= and Special damages of Kshs. 160,000/= being valuers fees
 - iii. Costs of the suit and interest.
27. The question that therefore follows is whether the plaintiff's suit or cause of action is a commercial suit as alleged by the defendant or a claim falling within the jurisdiction of this court as outlined above. In determining which court has jurisdiction, this court will apply the "predominant purpose test".
28. The Court of Appeal in the case of Cooperative Bank of Kenya Limited vs. Kangethe Njuguna & 5 others (2017) eKLR when discussing the jurisdiction of the ELC court as enshrined under section 13(d) of the ELC Act had this to say: -
- “...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.....”
29. Ngugi J. in the case of Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) eKLR held as follows: -
- “23. 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.
 - 24. 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.”
30. Taking the same into account, it is my considered view that the transaction which gave rise to the cause of action herein was a contract/ transaction over a land and the same related to the use, occupation and title over the land and was aimed at granting interest over the suit land Eldoret Municipality Block 7/154. Therefore, guided by the above decisions and section 13(d) of the ELC Act, I find that this court is vested with the requisite jurisdiction to entertain the plaintiff's suit as filed.

Whether the instant suit is sub judice to warrant its striking out;

- 31. It is the defendant's claim that the suit herein is sub judice on account of Eldoret CMCC No. 171 of 2024 – Daudi Kiptugen vs Sigilai Developers Ltd which is still pending for hearing and final determination; that the issues directly and substantially in issue are similar in both suits.
- 32. The doctrine of sub judice is found under section 6 of the *Civil Procedure Act* which provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such



suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed

33. The import of the above section and doctrine is that; no court ought to proceed with the trial of any suit or proceedings in which the matter directly and substantially in issue is similar, between the same parties, suit is pending in the same or any other court having jurisdiction to grant the reliefs sought.
34. The Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) {2020} eKLR while pronouncing itself on the doctrine of sub-judice held as follows:-

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives. (emphasis mine)

35. The existence of the two suits is not disputed. I have perused the annexures in the application dated 21/6/2024 which includes both the plaint and the accompanying documents all dated 16/4/2024 and a copy of the summons dated 17th April, 2024 in Eldoret CMCC No. 171 of 2024. The said suit was filed by Daudi Kiptugen (the defendant herein) against Sigilai Developers (plaintiff herein).
36. In both suits; the subject matter is the same being Eldoret Municipality Block 7/154, the cause of action arose in respect to the sale agreement, which was allegedly breached. The orders sought in the instant suit are for the refund of the purchase price paid and general damages for the breach of contract and special damages. The orders sought in Eldoret CMCC No. 171 of 2024 are also on general damages for the breach of contract and penalty for the breach.
37. From the above, it is clear that both suits are in respect to the same parties, over the same subject matter, arising from the same set of facts and circumstances and both suits are pending before courts of competent jurisdiction. However, it is clear that the Eldoret CMCC No. 171 of 2024 was instituted before the instant suit.
38. Guided by the Supreme Court decision above; the matter that is filed later ought to be stayed to await the determination to be made in the earlier suit.
39. It is therefore my finding that the plaintiff’s suit filed herein is sub-judice owing to the earlier suit filed Eldoret CMCC No. 171 of 2024. Consequently, and in the interest of justice, I find that there is need to stay the instant proceedings. The Applicant in this application shall have costs of the application.
40. The principles for grant of an injunction are clear. The Applicant must demonstrate that he has a prima facie case with probability of success. If damages are adequate remedy, no injunction can be issued and finally if the court is in doubt it will decide the application on a balance of convenience.



41. In the instant suit, there was a sale agreement which was entered into by the parties herein. It is pursuant to the said agreement that 10% deposit was paid to the firm of Bundotich Korir & Co. Advocates to hold it as stakeholder until the completion of the agreement. The money is therefore held by Messers Bundotich Korir & Co. Advocates on stake holder basis. If there has been release of the money to the Respondent, then that is a story for another day for which remedies are available.
42. The court cannot order the firm of Messers Bundotich Korir to deposit the money in a joint interest earning account or in court as to do so will amount to re-writing a contract for the parties. Equally the court cannot order that there issues a garnishee order to attach monies which are held in either the Respondent's bank or Messers Bundotich Korir & Co. Advocates as prayed for by the Applicant.
43. The Applicant cannot suffer any damage which will not be compensated in damages. This court is not in any doubt as to resort to deciding the matter on a balance of convenience. I therefore find no merit in the Applicant's application which is dismissed with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER, 2024.

E. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

M/s Salim for the Plaintiff

No appearance for the Defendant

Court Assistant - Laban

