



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 40 OF 2015

MACHAKOS COUNTY GOVERNMENT.....PLAINTIFF

VERSUS

KAPITI PLAINS ESTATE LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 18th September, 2015, the Defendant has prayed for the following orders:

a. That the Plaintiff dated 18th August, 2015 be struck out.

b. That the costs of this Application and of the suit be borne by the Plaintiff.

2. The Application is supported by the Affidavit of the Defendant's Intellectual Property and Legal Counsel who has deponed that from its own pleadings, the Plaintiff has averred that this suit is in respect to rates which are due and owing; that the levy and payment of rates are as a consequence of the provisions of the Valuation for Rating Act and that a rateable owner of a property cannot dispose of the property without a rates clearance certificate.

3. According to the Defendant's Intellectual Property and Legal Counsel, the suit as pleaded in the Plaintiff is an abuse of the process of the Court as it seeks a superfluous order of injunction from this Court; that the averments as pleaded in the Plaintiff and the prayers sought are contradictory and mutually exclusive of each other and that the jurisdiction for recovery of rates in the first instance is vested in the subordinate Court.

4. The Plaintiff filed Grounds of Opposition in response to the Application and deponed that the Plaintiff raises triable issues and should be allowed to proceed to trial and that this court has the requisite jurisdiction.

5. In his submissions, the Defendant's advocate submitted that the Plaintiff has in its Plaintiff averred that the properties alluded to in its Plaintiff are properties in respect of which rates are chargeable under the provisions of the Rating Act; that if the said property is rateable as alleged by the Plaintiff, then no interest in the said property can be disposed off without the issuance of rates clearance certificates by the Plaintiff by reason of Section 38 of the Land Registration Act, No. 3 of 2012 and that the Plaintiff cannot be heard to plead that the subject properties are rateable and in the same breath argue that there is need to grant an order restraining the Defendant from disposing of any interest in the suit property.

6. The Defendant's counsel relied on the case of ***African Banking Corporation Limited vs. Elijah Gathatwa Njoroge HCCC No. 923 of 2009***, where the High Court found that pleadings which are contradictory are scandalous, and/or frivolous, vexatious and embarrassing. The Court further found that contradictory averments is evidence of lack of seriousness and in the premises, the Court proceeded to strike out the pleading.

7. The Defendant's counsel submitted that the jurisdiction for recovery of rates in the first instance is vested in the subordinate court; that the Plaintiff has in its Plaintiff prayed for recovery of Kshs. 4,818,988,535 in respect of what it refers to as rates arrears and that under the *Rating Act*, the jurisdiction to hear and determine suits for the recovery of rates under the Act are by virtue of Section 25 of the Act is vested upon the subordinate court of the first class.

8. Counsel submitted that Section 25 of the Rating Act which donates jurisdiction to the subordinate court to hear suits for recovery of rates arrears specifically grant that jurisdiction irrespective of the pecuniary amount claimed; that Section 65 of the Civil Procedure Act donates power to the High Court to hear appeals from the subordinate courts and that by the Plaintiff filing these proceedings in the High Court, the Defendant is denied and therefore prejudiced the right of two Appeals, firstly to this court and then to the Court of Appeal.

9. The Defendant's counsel relied on the case of **Adero & Anor. vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577**, in which Ringera J, while considering a matter filed in the High Court instead of the Cooperative Tribunal, held *inter alia* as follows:

a. *Jurisdiction either exists or does not ab initio...*

b. *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that the parties have acquiesced in actions which assume existence of such jurisdiction.*

c. *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.*

d. *Where a cause is filed in Court without jurisdiction, there is no power in that Court to transfer it to a Court of competent jurisdiction.*

10. Counsel also relied on the case of **Narok County Council vs. Transmara County Council, [2000] 1EA 157**, where the Court of Appeal held as follows:

“Section 270(b) of the Local Government Act Chapter 265 provided inter-alia, that where a part of a local government area became a part of a different local government area, the apportionment of rights, liabilities and assets between the two local authorities concerned would be undertaken on a fair and equitable basis, either as agreed between them or, in default of agreement, as directed by the Minister. Though section 60 of the Constitution gave the High Court unlimited jurisdiction, it did not clothe it with jurisdiction to deal with matters which statute had directed should be done by a Minister as part of his statutory duty. In the instant case, the statute clearly provided that in default of agreement between the two councils, the apportionment of assets and liabilities would be undertaken as directed by the Minister. The jurisdiction of the High Court could only be invoked where the Minister refused to give a direction or, in purporting to do so, arrived at a decision that was grossly unfair or perverse. Where the Minister refused or neglected to act, the proper course was for either party to apply to the High Court for an order of mandamus compelling the Minister to perform his statutory duty. The Minister's refusal to act could not confer on either party a right to initiate proceedings in court to determine the apportionment of the assets and liabilities. All the High Court could do was enforce, by way of judicial review proceedings, the implementation of section 270. The trial court therefore erred in apportioning assets between the two councils, as it had no jurisdiction to deal with the matter at that stage. The appeal would therefore be allowed, judgment set aside and the suit struck out.”

11. It was submitted that Section 43 of the Interpretation and General Provisions Act provides that where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office and that the person tasked by Section 25 of the Rating Act to hear and determine a suit for recovery of rates is the holder of the office of a subordinate court of the first class notwithstanding the pecuniary limits placed by the Magistrate's Court's Act.

12. The Plaintiff's advocate submitted that as defined by the Land Registration Act, disposition of land means the activities entailing transactions in land as well as agreements, whether registered or not, and that there is no way to police and restrain the Defendant/Applicant from executing agreements affecting the suit properties which as per the Act amount to disposition in law.

13. The Plaintiff's counsel submitted that there is no contradiction whatsoever in pleading that the suit properties are rateable and at the same time seeking an order restraining the Defendant/Respondent from disposing its interest in the said properties and that if the said orders for injunction were without merit and contradictory as claimed, the Defendant should not have opposed the Application for an injunction.

14. The Defendant's advocate submitted that Section 25 of the Rating Act proffers jurisdiction to and adds all Magistrate's Courts to the list of the courts which may hear and determine matters arising from the Rating Act; that Section 25 was enacted to open up jurisdiction to all Magistrate's courts and that the essence of the provision was mainly to address itself to the pecuniary jurisdiction of the Magistrates' Courts as outlined in Sections 5 and 6 of the Magistrates' Courts Act.

15. Counsel for the Plaintiff submitted that Section 25 of the Rating Act determines the lowest court that may handle matters touching on the Rating Act, that is the subordinate court of the first class; that there is nothing in the said Act to indicate that other Magistrates of higher ranks and pecuniary jurisdiction are excluded from hearing matters under the Rating Act and that if Parliament intended that only Magistrates' Courts of the first class handles and determines all matters in respect of the Rating Act, nothing would have been easier than to so provide so in the statute.

16. Counsel relied on the case of **Woolwich Investments Ltd vs. City Council of Nairobi [2010] eKLR** in which the High Court stated as follows:

“There is one more issue that I would want to comment on in respect of this case. Section 25 of the Rating Act aforesaid confers upon any magistrate empowered to hold a subordinate Court of the 1st class to hear and determine suits for the recovery of rates under this Act. It is common knowledge that the pecuniary jurisdiction of magistrates is determined by law and from time to time His Lordship the Chief Justice may increase that jurisdiction. In the instant case there is no jurisdiction why a Magistrate sitting at the city Court should determine a matter of this aforesaid. In any case the highest pecuniary jurisdiction that has so far been allowed under the said enhancement is that of the chief magistrate with a limit of Kshs. 3 million and therefore while respecting the provisions of this particular section, it is now desirable to address the same along the several cases filed by the defendant demanding rates against the defaulters. It would not have been appropriate for the plaintiff herein to seek reliefs under RMCC No. 10 of 2008 as suggested by Mr. Iha because the cause of action in this court goes beyond the issues before the lower court. In any case, the two Courts are not of concurrent jurisdiction.”

17. The Plaintiff's counsel submitted that it is only the High Court which has the jurisdiction to handle the present matter whose pecuniary value is more than (500) times the allowed pecuniary jurisdiction of the highest Magistrates' Courts; that the jurisdiction of the High Court cannot be ousted by a mere Act of Parliament and that the true position of the law is that the jurisdiction of the High Court is defined by and limited only by the Constitution of Kenya.

18. Counsel submitted that the general rule as regards the jurisdiction of the High Court of Kenya can be stated thus: The jurisdiction of the High Court is unlimited in all matters except as specifically limited by the Constitution.

19. I have considered the pleadings, submissions and the authorities filed by the parties. The only issue for determination is whether this court has jurisdiction to entertain the claim herein.

20. The requirement that a Court or Tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction cannot be overemphasized. In the case of **Lillian "S" vs. Caltex Kenya Limited [1989] eKLR**, the Court of Appeal held as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance 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 cognizance, 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."

21. In **Republic vs. Karisa Chengo & 2 Others [2017] eKLR**, the Supreme Court held as follows:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance 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 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 cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

22. In **Kibos Distillers Limited & 4 others vs. Benson Ambuti Atega & 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. This court's jurisdiction emanates from the provisions of Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act (the ELC Act). Article 162(2)(b) of the Constitution provides as follows:

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title to, land."

24. Parliament enacted the Environment and Land Court Act in compliance with the provisions of Article 162(3). Section 13 of the Environment and Land Court Act provides 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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

25. Article 165(5) of the Constitution divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the Constitution. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of the High Court in great detail in the case of **Republic vs. Karisa Chengo & 2 Others [2017] eKLR** in which it held as follows:

“[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act... From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui 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 ELC or ELRC is the High Court or vice versa...”

26. The reading of the Constitution and the Environment and Land Court Act shows that it is this court that has the unlimited jurisdiction to resolve disputes relating to land and the environment, including disputes relating to rates, rent and valuations. However, this court’s jurisdiction is subject to the jurisdiction donated to the subordinate court and Tribunals by statutes, whose decisions are appealable to this court (See *Kibos Distillers Limited-supra*).

27. This suit was commenced by way of a Plaint dated 18th August, 2015. In the Plaint, the Plaintiff averred that the Defendant owns parcels of land known as L.R. No. 7374, L.R. No. 8332 and L.R. No. 1731/1 (*the suit properties*); that the suit properties are occupied by the Defendant; that the suit properties are within the its jurisdiction and that the Defendant has accumulated rates in respect to the suit properties to the tune of Kshs 4,818,988,535.

28. In the suit, the Plaintiff has sought for the payment of Kshs. 4,818,988,535; interest on the said amount from the date of non-payment until payment in full and for an order for an injunction restraining the Defendant from selling or charging the suit properties until the outstanding rates are paid in full. In its Defence, the Defendant pleaded that it is the Magistrates’ Courts that have the jurisdiction to hear this suit in the first instance.

29. The Defendant’s Application is premised on the provisions of Section 25 of the Rating Act which provides as follows:

“*Notwithstanding anything to the contrary in the Magistrates’ Courts Act (Cap. 10), any magistrate empowered to hold a subordinate court of the first class shall have jurisdiction to hear and determine suits for the recovery of rates under this Act.*”

30. It is trite that the Rating Act is the substantive law that provides for the imposition of rates on land and buildings in Kenya. Indeed, it is clear from the Plaint that the only issue before this court between the Plaintiff and Defendant is whether any rates in respect to the suit properties are due from the Defendant, and if so, the amount payable.

31. The reading of Section 25 of the Rating Act gives the Magistrates’ Courts, and not this court, the jurisdiction to hear disputes relating to suits for the recovery of rates at the first instance. Indeed, Section 25 of the Act gives all the Magistrates of first class, notwithstanding their pecuniary jurisdiction as stipulated under the Magistrate’s Court Act, jurisdiction to hear and determine suits for the recovery of rates under the Act.

32. That being so, it does not matter that the Plaintiff’s claim herein is in respect to rates amounting to more that Kshs. 4 billion. The law allows the Magistrates to hear all disputes relating to recovery of rates at the first instance. As was held by the Court of Appeal in the case of **Kibos Distillers Limited & 4 others vs. Benson Ambuti Adegga & 3 others [2020] eKLR**, 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.

33. The Court of Appeal further stated that 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.

34. That being the case, and the dispute herein being in respect of the payable land rates by the Defendant, it is my finding that this suit should have been filed in the subordinate court at the first instance, and not in this court. This court does not have jurisdiction to determine the dispute at the first instance. For those reasons, I allow the Defendant’s Application dated 18th September, 2015 as follows:

a) The Plaint dated 18th August 2015 and amended on 28th October, 2015 is hereby struck out with costs.

b) The Defendant to pay the costs of the Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O.A. ANGOTE

JUDGE