



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 91 OF 2017**

**THOMAS OKWORO.....PLAINTIFF**

**VERSUS**

**JEREMIAH MATOKE NYANG'WARA.....1<sup>st</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF KISII.....2<sup>nd</sup> DEFENDANT**

**THE NATIONAL CONSTRUCTION AUTHORITY.....3<sup>rd</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. This is ruling is in respect to the Preliminary Objection filed by the 3<sup>rd</sup> Defendant dated 8<sup>th</sup> February, 2021 claiming that this court lacks jurisdiction to hear and determine the Plaintiff's suit on the grounds that;

- i. The Plaintiff's cause of action is for compensation for alleged damage to the property arising from a collapsed building on land parcel number Kisii Municipality/Block III/571. The action is thus civil in nature and does not relate to environment, use and occupation of land or title to land;
- ii. The matters in issue do not fall within the jurisdiction of the Environment & Land Court given the jurisdiction of this Court under Article 162(2) of the Constitution **Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others 2017 eKLR.**
- iii. The Court lacks jurisdiction and on this ground alone should down its tools in line with the principles set out in **The Owners of Motor Vessel Lillian S V Caltex Oil Kenya Limited (1989) eKLR.**
- iv. The Plaint dated 3<sup>rd</sup> October, 2017 is incurably bad and defective and should be struck out in limine with costs to the 3<sup>rd</sup> Defendant.

2. The Preliminary Objection was in response to the Plaintiff's claim against the Defendant. In his plaint dated 3<sup>rd</sup> October, 2017, the Plaintiff sued the Defendants for negligence and breach of duty of care and sought the following orders and reliefs jointly and severally against them;

- a) Kshs. 18, 165,965/ same being the value/cost of the building erected on the property Kisii Municipality/Block III/571 destroyed and damages resultant of negligence, omissions and commission on the part of the 1st Defendant and or Defendants jointly and severally.
- b) Loss of rental income at the rate of Kshs. 80,000/= per month from the month of November, 2016 until completion, reconstruction or erection of new building replacing the destroyed on Kisii Municipality/Block III/571.
- c) General damages for inconvenience, trauma, disruption and anxiety inflicted on the Plaintiff following the incident from inception until the situation is restored or remedied.
- d) Costs of the suit and Interest on (a) and (b) above at Court rates from the date of the suit.

e) Any other relief as the Court may deem fit.

3. The 1<sup>st</sup> Defendant filed his Statement of Defence dated 8.5.2017 denying the Plaintiff's claim. He denied the particulars of negligence and breach of duty attributed to him. The 2<sup>nd</sup> Defendant filed its Statement of Defence on 31.8.2017 denying the Plaintiff's claim. The 2<sup>nd</sup> Defendant blamed the Plaintiff and the 1<sup>st</sup> Defendant for flouting the National Construction Authority Regulations among other aspects of negligence. On its part, the 3<sup>rd</sup> Defendant filed its Statement of Defence dated 31.8.2021 denying the Plaintiff's claim. The 3<sup>rd</sup> Defendant blames the 1<sup>st</sup> Defendant for failing to comply with the provisions of the National Construction Authority Act 2011.

4. On 16<sup>th</sup> March, 2021 this court directed that the Preliminary Objection be canvassed by way of written submissions. The Plaintiff filed their submissions on 20<sup>th</sup> April, 2021 while the 3<sup>rd</sup> Defendant filed their submissions on 8<sup>th</sup> April, 2021.

## ISSUES FOR DETERMINATION

5. Having considered the Preliminary Objection and the submissions filed by both parties, I deduce that the issues of determination are:

- a) Whether the Preliminary Objection by the 3<sup>rd</sup> Defendant raises a pure point of law.
- b) Whether this court has jurisdiction to here and determine the suit filed by the Plaintiff.

## ANALYSIS AND DETERMINATION

### Whether the Preliminary Objection by the 3<sup>rd</sup> Defendant raises a pure point of law.

6. The threshold for a Preliminary Objection is set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696** which was cited in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR** [paragraph 31] as follows:

*“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.– West End Distributors (1969) EA 696:*

*‘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 has to be ascertained or if what is sought is the exercise of judicial discretion’.*”

7. It is quite clear from the above observation of the court that a Preliminary Objection should be founded upon a point of law and that its application to undisputed facts, leads to but one conclusion; that the facts are incompatible with that point of law.

8. The 3<sup>rd</sup> Defendant has based his Preliminary Objection on the ground that that this court lacks jurisdiction to hear and determine the Plaintiff's suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It really will not matter whether the facts of the Plaintiff's case as outlined are true or not because without jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court stated in the matter of **Interim Independent Electoral & Boundaries Commission [2011] eKLR** as follows:

*Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):*

*“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.”*

*[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.*

9. Counsel for the Plaintiff argued that the Preliminary Objection is an afterthought, since the 3<sup>rd</sup> Defendant before filing the same submitted to the jurisdiction of the Court and fully participated in the process of this court culminating in the matter being certified for hearing. He further argued that the 3<sup>rd</sup> Defendant had in fact filed a statement of Defense in which he did not raise the issue of the court not having Jurisdiction.

10. The question that emerges is whether this court can proceed to entertain a matter in which it has no jurisdiction for reasons that a

Defendant did not raise it at the inception of this court. Without any doubt, the answer to this question is in the negative. The issue of jurisdiction is key. Without jurisdiction a court has no powers to proceed to entertain the matter and it has to down the tools. The court cannot assume it has jurisdiction in a matter just because the Defendant did not challenge its jurisdiction in his Defense. Since this matter is yet to be heard, the 3<sup>rd</sup> Defendant is within the law to raise his Preliminary Objection challenging the jurisdiction of this court.

11. From the foregoing therefore, I find that the Preliminary Objection raised by 3<sup>rd</sup> Defendant is one on pure point of law that this court needs to determine.

**Whether this court has jurisdiction to hear and determine the suit filed by the Plaintiff.**

12. Having determined that the Preliminary objection by the 3<sup>rd</sup> Defendant is based on pure of law and therefore, it will there be important to determine whether this court lacks jurisdiction to here and determine this matter.

13. Learned counsel for the 3<sup>rd</sup> Defendant submitted that the broad jurisdiction of the ELC Court is donated by Article 162 (2) (b) which provides that that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of, and title to land. The learned counsel went on to submit that the Parliament indeed established enacted the ELC Act, 2011.

14. He argued that the said Act gave this court its jurisdiction under Section 13 which elaborates on the issues which the court should deal with in relation to land use, occupation and title to land.

15. Section 13, the ELC Act provides that:

*13. (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. Counsel postulated that the alleged collapse of the building erected on the 1<sup>st</sup> Defendant's property known as KISII MUNICIPALITY/BLOCK III/236 and the alleged escape of debris and concrete blocks to the Plaintiff's property known as KISII MUNICIPALITY/BLOCK III/571 does not relate to or constitute use of or occupation of land and thus does not bring the dispute within article 162 (2) (b) and section 13 of the Environment and Land Court Act.

17. He submitted that although section 13 (2) (e) provides that jurisdiction of the court extends to '**any other dispute relating to the environment and land**' the same ought to be understood within the context of the court's jurisdiction to deal disputes connected to environment and the use and occupation of and title to land as captured under article 162 (2) (b) as well as the preamble of the ELC Act which reads as follows

*"An Act of parliament to give effect to Article 162 (2) (b) of the constitution; to establish a superior court to hear and determine disputes relating to environment and the use and occupation of and title to land, and to make provisions for its jurisdiction functions and powers and for connected purposes."*

18. Counsel submitted that there was need to consider the definition of the word use and to the extent he referred the court to the Black's Law Dictionary where the word 'use' is defined as being;

*"The application or employment of something esp. a long continued possession of a thing for the purpose for which it is adapted, as distinguished from possession or enjoyment that is merely temporary or occasional."*

19. He submitted that from the above definition, for land use to occur, the land must be utilized for purposes for which the surface of the land, air above it or ground below it is adapted. To qualify his understanding of land use, counsel considered the definition of land under article 260 of the constitution as follows;

*“Unless the context requires otherwise, ‘land’ includes-*

- a) The surface of the earth and the subsurface rock;*
- b) Anybody of the water on or under the territorial surface*
- c) Marine waters in the territorial sea and exclusive economic zones;*
- d) Natural resources completely contained on or under the surface; and*
- e) The airspace above the surface “*

20. It is common ground that the jurisdiction of this court is set out in Article 162 (2) as read together with section 13 of the Environment and Land Court Act, 2011. Section 13 (2) (e) provides that this court shall have jurisdiction in determining any dispute relating to land. In the mind of the learned counsel, the jurisdiction of this court is unlimited so long the issue before it touches on land and environment. He in fact goes ahead and submits that Section 13 (3) emphatically that nothing was preclude the jurisdiction of the Environment and Land Court to hear and determine a denial, violation, or Infringement of or a threat to, rights and fundamental rights.

21. It is common ground from the submissions of both counsel that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011. Article 162(2) 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. Article 162(3) provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court Act, No. 19 of 2011, which came into effect on 30th August 2011. The object of the Act is stated as follows:

*“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment **and the use and occupation of, and title to land**, and to make provision for its jurisdiction, functions and powers, and for connected purposes”*

22. Section 13, the Environment and Land Court Act provides that:

*13. (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.*

23. However, what is in dispute is whether the cause of action of this suit which the Plaintiff has highlighted to be breach of duty or negligence on the part of the Defendants, especially the 1<sup>st</sup> Defendant that led to the collapse of his building have any relation to land use, land occupation and land title.

24. In as much as the provisions are clear that jurisdiction in land-related matters belong to this court, from my observation, the said provisions are less clear as to what “**land-related**” means. The determination on what land related cases are has been left for courts to interpret. In order to make a determination as to whether the issues before are land related, my attention has been drawn to the decision in the case of **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR**, which decision I agree with. In the said case the court stated that;

*“In all honesty, it would not be possible for such direction to come from the Constitution or statute; it would have to be supplied by the Courts on a case by case basis. Such is our task here.*

*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 pre-dominant 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.

25. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.

26. In my view, the following factors are significant in determining the nature of the contract:

a. The language of the contract;

b. The nature of the business of the vendor;

c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;

d. **The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and**

e. **The remedies sought by the Plaintiff” (emphasis mine).**

25. From the above case and using the *Pre-dominant Purpose Test*, it will be paramount for me to determine the gravamen of the dispute between the parties and make a decision as to whether the same is rooted in contests about ownership, deficiency in title, occupation or use of the land or something else. It is clear from my analysis of the plaint filed by the Plaintiff that there is no dispute as the ownership, occupation or use of the Plaintiff’s land instead the dispute is that a building constructed on the land of the 1<sup>st</sup> Defendant collapsed and its debris escaped and destroyed a building constructed by the Plaintiff on his land and as such the Plaintiff is claiming damages from the Defendants for negligence. It is also clear that the remedies sought are based on the alleged breach of duty of care that resulted from the negligence of the Defendants. As correctly submitted by counsel for the 3<sup>rd</sup> Defendant, this claim is an ordinary civil claim that ought to be handled by the High court as it is not related to land. This court therefore has no jurisdiction and it must down its tools.

26. Counsel for the Plaintiff has in the alternative requested this court to transfer the matter in case it determines that it has no jurisdiction. However, I find that it would be futile for this court to transfer the said suit to the High Court. I am of the view that jurisdiction is primordial and cannot be equated to a procedural technicality. It follows that where a court lacks jurisdiction and downs its tools, the suit cannot be cured by the provisions of Sections 1A, 1B and 18 of the Civil Procedure Act.

27. In the case of **Phoenix of East Africa Assurance Co. Ltd V S M Thiga T/A Newspaper Service (2019) eKLR** the Court of Appeal while dealing with transfer of a matter from one court to another over question of jurisdiction, held as follows:

*“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized with jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction on itself.”*

28. Furthermore, the Court of Appeal in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** stated as follows;

*‘In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.....’*

29. The upshot is that the Preliminary Objection is merited and I therefore uphold it and strike out the suit with costs to the 3<sup>rd</sup> Defendant.

**Dated, signed and delivered at Kisii this 22<sup>nd</sup> day of July, 2021.**

**J.M ONYANGO**

**JUDGE**