



**Baraza & 27 others v Fountain Park Estate Limited (Civil Case E004 of 2023) [2024] KEHC 471 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 471 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL CASE E004 OF 2023  
SN MUTUKU, J  
JANUARY 23, 2024**

**BETWEEN**

**MAURICE BARAZA & 27 OTHERS ..... PLAINTIFF**

**AND**

**FOUNTAIN PARK ESTATE LIMITED ..... DEFENDANT**

**RULING**

**Background**

1. The Plaintiffs filed a claim against the Defendant basing it on a property sale agreement between the parties for sale and purchase of housing units erected on land reference number Kajiado/Kaputiei-North/33103. It is claimed that it is the Defendant's contractual obligation to provide water, construction of driveways, landscaping and maintenance of estate common areas, security guard house, landscaping of playing field, drainage system, garbage disposal and commercial area, among others.
2. The Plaintiffs claim that the Defendant failed to complete these works and left the estate dilapidated necessitating the Plaintiffs to undertake expensive and additional renovations. The Plaintiffs are seeking the reliefs specified in the Plaintiff.
3. The Defendant has raised a Preliminary Objection (PO) dated 16<sup>th</sup> October 2023 and filed on the same date that this court lacks jurisdiction to try this matter. This court directed that the PO be canvassed first through written submissions.

**Submissions**

4. The Defendant's submissions are dated 31<sup>st</sup> October 2023. It is submitted that the cause of action disclosed by the Plaintiffs in Paragraph 3 of the Plaintiff is over alleged property sale agreements between the Defendant and the Plaintiffs for the sale and purchase of house units on land reference number Kajiado/Kaputiei-North/33103 and matters corollary thereto of which the court vested with the



requisite jurisdiction to hear and determine such dispute is the Environment and Land Court (ELC) and not the High Court.

5. The Defendant submitted on the jurisdiction of the ELC as provided in *the Constitution* Article 162 (2) and 162 (2) (b) and section 13 of the *ELC Act* and stated that this suit clearly relates to contracts or other instruments granting enforceable interests in land which matters fall squarely within the jurisdiction of the ELC. It was submitted that the without jurisdiction, this court must lay down its tools for lack of jurisdiction and dismiss the suit for the law does not allow this court to transfer the suit to ELC.
6. The Plaintiffs filed submissions dated 20<sup>th</sup> November 2023. They cited *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd (1969) E.A 696* to the effect that a PO can only be raised on pure point of law and must not be blurred with factual details to be proved by evidence.
7. They submitted that this suit is not about ownership of land as there is no dispute on ownership of land. They cited *Suzanne Achieng Butler & 4 others v. Redbill Heights Investments Limited & another [2016] eKLR* where it was held that:

“When faced with 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.”
8. They submitted that the dispute solely concerns the Defendant’s performance in constructing units, not land ownership; that the Plaintiff’s possession and title demonstrate that the land sale aspect is not under dispute and that the focus is on the alleged breach of the construction contract and resulting damages and that this court has jurisdiction as a civil and commercial matter.
9. The Plaintiffs asked this court to find that it is equipped with the requisite jurisdiction to hear and determine this matter and dismiss the PO.

## Determination

10. The jurisdictions of the ELC and the High Court are clearly set out in *the Constitution* and the relevant legislation. Under Article 162 (2) (b) of *the Constitution*, ELC is established with equal status with the High Court but with jurisdiction on matters relating to the environment and the use and occupation of, and title to, land. The *ELC Act*, under section 13 (1) & (2), specifies the jurisdiction of the ELC 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.

11. I have read the pleadings in this case. The Applicant seems to rely on paragraph 3 of the Plaintiff to hold the view that this matter concerns land and therefore jurisdiction is with the ELC. The Respondent maintains that there is no dispute over ownership of land as they have already acquired titles and that the dispute solely concerns the Applicant's alleged breach of the construction contract and resulting damages.
12. As submitted, this matter is similar, to some extent, with the Suzanne Achieng Butler case cited above. The judge in that case had this to say on paragraph 23 of the Ruling in that case:

“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.
13. I find the above authority persuasive to this court. As submitted by the Respondent, it seems that the Applicant, through counsel, is relying on one paragraph of the Plaintiff to argue that this matter belongs to the ELC and not to this court. A perusal of the entire Plaintiff and the prayers sought in it show that the dispute is predominantly on the provision of water, construction of driveways, landscaping, security guard house, drainage system, garbage collection and other works ancillary to the construction of the housing units.
14. After giving this matter consideration of the arguments of both parties, I am inclined to agree with the court in the Suzanne Achieng Butler case that “.....Consequently, it is my finding and holding that the dispute between the Plaintiffs and the Defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this Court has jurisdiction to hear the suit”.
15. It is therefore the finding of this court that it is seized with jurisdiction to determine this matter. Consequently, the PO dated 16<sup>th</sup> October 2023 is hereby dismissed.
16. The dismissal of the PO paves the way for directions in regard to the Notice of Motion dated 8<sup>th</sup> February 2023.
17. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> JANUARY 2024.**

**S. N. MUTUKU**

**JUDGE**

