



**Kilonzo v Top Grade Logistics Ltd & 2 others (Civil Case
21 of 2020) [2024] KEHC 472 (KLR) (15 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 21 OF 2020
SN MUTUKU, J
JANUARY 15, 2024**

BETWEEN

JULIUS KYALO KILONZO PLAINTIFF

AND

TOP GRADE LOGISTICS LTD 1ST DEFENDANT

EQUITY BANK (K) LIMITED 2ND DEFENDANT

ANTIQUA AUCTIONEERS AGENCIES 3RD DEFENDANT

RULING

1. The Plaintiff sued the Defendants through a Plaint dated 19th March, 2023 basing its claim on a joint venture agreement dated 13th November, 2013 between the Plaintiff and the 1st Defendant with a view to financing and developing 26 residential properties for residential purposes on land titles named in the Plaint.
2. The Plaintiff claims that he was defrauded by the 1st and 2nd defendants by charging his properties without his knowledge and that he learned, on 12th January 2019, of a notice where the 3rd Defendant intended to auction the suit properties. It is on that basis that he filed this suit seeking:
 - a. A declaration that the properties Numbers Kajiado/Kaputiei North/ 54038, 54039, 54040, 54041 and 54029, belong to the Plaintiff and without any charges encumbrances, inhibitions and/or restrictions whatsoever any such registered restrictions of whatever nature upon any or all of the properties thereof be discharged, vacated and/or removed forthwith.
 - b. A permanent injunction to issue against the 2nd Defendant and/or 3rd Defendant and/or any of its servants and/or agents assigns or any such person or entity thereto restraining them from advertising for sale, selling, transferring and in any other manner dealing prejudicially with



the Plaintiff's properties being Kajiado/Kaputei North Numbers 54038, 54039, 54040, 54041 and 54029.

- c. An order that the 1st Defendant does transfer the said properties being Kajiado/Kaputei North Numbers 54038, 54039, 54040, 54041 and 54029.
 - d. Costs of his suit with interest at court's rate.
 - e. Such other and further relief as the Honourable court shall deem fit and just to grant.
3. The 1st and 2nd Defendants have raised a Preliminary Objection (PO) dated 21st July 2023 challenging the jurisdiction of this hear this matter and seeking to have the matter dismissed. It is claimed that the substratum of the main suit relates to allegations of ownership of the suit properties.
 4. The Court directed that the preliminary objection be canvassed by way of written submissions. The 1st Defendant, through its legal counsel told the court that it will not be filing any submissions. The 2nd and 3rd Defendants filed submissions. The Plaintiff's has not filed submissions as at the time this ruling was being written. Counsel for the Plaintiff indicated that he required an additional 7 days to file submissions, but the additional time allocated to him was not honoured.
 5. The 2nd and 3rd Defendant's submissions are dated 24th October, 2023. They have argued on one issue, that of jurisdiction. They relied on the case of *Owners of Motor Vessels "Lillian S" v Caltex Oil (Kenya) Ltd.* [1989] where it was stated that:

“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..... where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

6. They further submitted that section 13 of the *Environment and Land Act* empowers the Environment and Land Court to hear and determine disputes relating to, *inter alia*, rents, contracts choices in action or other instruments granting any enforceable interest in land and any other disputes relating to environment and Land.
7. It is their case that the reliefs sought by the Plaintiff in the Plaint cannot be granted by this Honourable Court as it lacks jurisdiction to deal with land disputes. They submitted that the matter filed before this court is nullity ab initio and is incapable of being transferred to another court of a separate division. This was set out in *Boniface Waweru Mbiyu v Mary Njeri & another* [2005] eKLR where the court held that:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore, it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court.”



Analysis and Determination

8. I have considered this matter. From the pleadings (Plaint) and the reliefs sought, it is clear to me that this matter revolves around ownership of the disputed parcels of land, sale and transfer of the same.

9. What constitutes a PO has been discussed in case law. In *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696, the court stated 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

10. In my considered view, the issue of jurisdiction is a point of law which if argued as a preliminary point may dispose of the suit. From case law, a court cannot arrogate to itself jurisdiction. It either exists under the [Constitution](#) and the laws made thereunder or not. The principles from [Owners of Motor Vessel ‘Lillian S’](#) [1989] KLR 1” case were explained further by the Supreme Court of Kenya in its advisory opinion reported as [In Re The Matter of the Interim Independent Electoral Commission](#) [2011] eKLR at paragraph 30, as follows:

“*The Lillian ‘S’ case* [1989] KLR 1 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 endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

11. The jurisdiction of the High Court and the ELC Court are clearly demarcated in the [Constitution](#) and legislation. The jurisdiction of the ELC is found under Article 162 (2) (b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#). Article 162 (2) of the [Constitution](#) provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

12. Section 13 specifies the extent of that jurisdiction as follows:

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.

13. I am persuaded that this matter, going by the reliefs sought, clearly falls under the jurisdiction of the ELC as specified under Section 13 of the *Environment and Land Act*.

14. The 2nd and 3rd Respondents have urged that this matter be declared defective ab initio and be struck out for having been filed in the wrong court. They relied on Boniface Waweru case cited above. I hold a different view and I am persuaded otherwise. Instead of taking that drastic action of striking out the suit for reasons that it is filed in the wrong court and is therefore null and void ab initio, I take the action of transferring the matter to the right court, the ELC. In so doing, I find support and I am indeed bound by the Court of Appeal decision in *Daniel N. Mugendi v Kenyatta University & 3 others* [2013] where it was reasoned as follows:

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relation matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5) (b). And in order to do justice, in the event where the High Court, the Industrial court or the Environment and Land court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim....”

15. As reasoned by Justice Githua in *Barnabas Kiprono & 5 others v Kerio Valley Development Authority* [2016] eKLR, I bear in mind two principles which courts are enjoined by the *Constitution* to consider: the principle of access to justice to all and the principle of substantive justice.

16. Consequently, I agree with the Defendants that this suit is filed in the wrong court. It is my finding that this court lacks the requisite jurisdiction to hear and determine this matter. I will and do hereby order that this matter be transferred to the ELC Kajiado for hearing and determination. The Deputy Registrar of this court is directed to urgently place this matter before the Presiding Judge of the ELC for directions on when the same shall be heard.

17. Orders shall issue accordingly.



DATED, SIGNED AND DELIVERED THIS 15TH JANUARY 2024.

S. N. MUTUKU

JUDGE

