



**Bank of Africa Kenya Limited v Chief Land Registrar & another; TSS Investments Limited (Intended Interested Party) (Miscellaneous Application E119 of 2022) [2024] KEHC 1081 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1081 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E119 OF 2022  
DKN MAGARE, J  
FEBRUARY 7, 2024**

**BETWEEN**

**BANK OF AFRICA KENYA LIMITED ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**ASSETTS RECOVERY AGENCY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TSS INVESTMENTS LIMITED ..... INTENDED INTERESTED PARTY**

**RULING**

1. This matter has been before me seeking the following orders in the application dated 24/6/2022: -
  - a. This application be certified as urgent and heard ex-parte in the first instance.
  - b. The 1st Respondent be forthwith compelled by an order of this honourable court to lift the Restrictions placed on the following Charged properties:
    - i. Mombasa Block/XVII/586;
    - ii. Mombasa Block/XXI/526;
    - iii. Mombasa Block/XXI/527;
  - c. After lifting of the Restrictions aforesaid, the 1st Respondent be forthwith compelled to register Mombasa Block/XVII/586 in the joint names of Peter Nyaga Njoka and Helen Wanjiru Nyaga.
  - d. Costs of the application be borne by the 1st and 2nd Respondents jointly and severally.



2. There have been subsequent applications filed, including one dated 10/8/2023. This application is for Ruling for an application dated 15/5/2023. The said application seeks the following orders: -
  - a. The application be certified urgent and heard ex-parte in the first instance.
  - b. Pending the hearing and determination of this application inter-partes, the County Land Registrar, Mombasa Land Registry be compelled to produce the Deed File in respect of Land Parcel Number Mombasa Block/XVII/586.
  - c. In the event Order No. b above is not complied with within seven [7] days of issuance and service, the said County Land Registrar be summoned by this Honourable court to explain why the file in respect of Land Parcel Number Mombasa Block/XVII/586 cannot be traced.
  - d. In the event Order No. c above is not fully complied with to the satisfaction of this honorable court, an order be issued compelling the said County Land Registrar to reconstruct the file in respect of Land Parcel Number Mombasa Block/XVII/586.
  - e. Costs of this application be borne by the 1st Respondent.
3. The application was opposed. Several other parties applied to be joined to the proceedings.
4. In order to determine this matter, I must satisfy myself that I have jurisdiction to handle this matter.
5. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

6. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as doth: -

“This Court dealt with the question of jurisdiction extensively, in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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.”

7. It is my considered view that I cannot interpret the matter in a matter that I assume jurisdiction. I don't have or eschew jurisdiction that I have. The original application is a Misc. application under Order 3 Rule 1 a suit should be commenced by way of a plaint. This one is commenced by way of a Misc. application. It has given rise to several applications. There is nothing for me to determine. Under Order 3, rule 1, a suit can only be determined by way of a plaint. This provides as follows: -

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”

8. The subject matter is restrictions. This is the province of the land court. The law provides as doth: -

“13. Jurisdiction of the Court

- (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.

9. Section 76 of the land registration Act provides as doth: -

“Restrictions. 76.

- (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
  - (a) for a particular period;



- (b) until the occurrence of a particular event; or
- (c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

10. On removal 78 provides as follows: -

“Removal and variation of restrictions. 78.

- (1) The Registrar may, at anytime and on application by any 40 No. 3 Land Registration 2012 person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.
- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

11. Section 3 of the [Land registration act](#), states that “Court” means the Environment and Land Court established under the [Environment and Land Court Act](#), 2011, No. 19 of 2011; then, where does the High Court come in?

12. The nearest is under section 94 of the [Proceeds of Crime and Anti-Money Laundering act](#), which provides as doth: -

“Exclusion of interests in property

- (1) The High Court may, on application—
  - (a) under section 90(3); or
  - (b) by a person referred to in section 91(1), and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.
- (2) The High Court may make an order under subsection (1) in relation to the forfeiture of the proceeds of crime if it finds, on a balance of probabilities, that the applicant for the order—
  - (a) has acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and
  - (b) where the applicant had acquired the interest concerned after the commencement of this Act, that such person neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of crime.



- (3) The High Court may make an order under subsection (1), in relation to the forfeiture of property which has been used or is intended for use in the commission of an offence, if it finds, on a balance of probabilities, that the applicant for the order had acquired the interest concerned legally and—
  - (a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held has been used or is intended for use in the commission of an offence; or (b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned in connection with the commission of an offence. 62 [Rev. 2022] Proceeds of Crime and Anti-Money Laundering No. 9 of 2009
- (4) If an applicant for an order under subsection (1) adduces evidence to show that he did not know or did not have reasonable grounds to suspect that the property in which the interest is held is tainted property, the Agency Director may submit a return of the service on the applicant of a notice issued under section 90(3) in rebuttal of that evidence in respect of the period since the date of such service.
- (5) Where the Agency Director submits a return of the service on the applicant under subsection (4), the applicant shall, in addition to the facts referred to in subsections (2)(a) and (b), also prove on a balance of probabilities that, since such service, he has taken all reasonable steps to prevent the further use of the property concerned in the commission of an offence.
- (6) The High Court making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order upon the conditions that the High Court deems appropriate, including a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the High Court may determine, to prevent the future use of the property in connection with the commission of an offence.

13. This thus relates to a dispute on whether a property is a proceed of crime. A claim by other parties on ownership and the security has already been realised. The issue of restrictions is not part and parcel of the statutory power of sale. The dispute related to the restrictions dealing with ownership. This court has justification to determine whether an asset has been lawful or unlawful actually in terms of the asset recovery Agency.

14. However, the court has no jurisdiction to direct them to serve an inhibit without breaching Article 165 (5), which provides as doth: -

- “(5) The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

15. The Court has no jurisdiction to grant order sought. The next question is what to do with the case? It is commenced by a Misc. application. It serves no purpose to transfer the same, as it is not a suit. The only time a suit is transferred is when there are mixed questions. In this case there are no questions.



The Asset recovery has no issue on proceeds of crime. It is not an issue falling for determination. In the case of *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the high court, sitting as a 5 judge bench, stated as doth: -

“105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another*, the Court stated the test in the following words:

“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.

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.

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.”

16. In the case of *Petro Somoni Motoki v Jeremiah Matoke Nyang'wara & 2 others* [2021] eKLR, the court stated as follows: -

“18. Even though the provisions are clear that jurisdiction in land-related matters belongs to this court, I note that the said provisions are less clear on what “land-related” means. The determination on what land related means 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 in 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 the remedies sought by the Plaintiff” (emphasis mine).
19. From the above case and using the Predominant Purpose Test, it will be paramount for me to determine the gravamen of the dispute between the parties herein and determine 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 to the ownership, occupation or use of the Plaintiff 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 whom he accuses of negligence. It is also clear that the remedies sought are based on the alleged breach of duty of care that resulted from the alleged negligence of the Defendants. As rightfully submitted by counsel for the 3<sup>rd</sup> Defendant, this claim is an ordinary civil claim for the tort of negligence that ought to be handled by the High court as it is not related to land. This court therefore has no jurisdiction and henceforth it must down its tools.”
17. 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 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.”

18. It should be recalled that no long as the Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR stated as doth: -

‘In numerous decided cases, courts, including this Court has 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.....’

19. In the circumstances, I strike out the entire case with each party bearing their own costs. The Applicant should file a proper case in aa proper court.

#### **Determination**

20. ...

- a. The Misc. Application No. E119 of 202 is hereby struck out.
- b. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Kemei for the 1<sup>st</sup> Respondent

No appearance or the Applicant

Mr. Kinyua for the Interested party

Court Assistant - Brian

