



**Elmonice International Ltd & another v Kagia (Civil Suit E148 of 2023)
[2024] KEHC 1359 (KLR) (Civ) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E148 OF 2023**

JN MULWA, J

FEBRUARY 15, 2024

BETWEEN

ELMONICE INTERNATIONAL LTD 1ST PLAINTIFF

SKINSOL LTD 2ND PLAINTIFF

AND

JEAN WAMAITHA KAGIA DEFENDANT

RULING

1. The Plaintiffs' before this Court filed a Notice of Motion Application dated 16/8/2023 under Articles 28 and 31 of the *Constitution* and Sections 1A, 1B and 3A, 63 of the *Civil Procedure Act* as well as Order 40 and 51 of the Rules. The Applicants seek orders that:
 1. Spent
 2. That pending the Hearing of the Application herein a Temporary Injunction does issue restraining the Defendant/Respondent by herself and/or through her Advocates, proxies, agents servants or employees from interference of any sort, manner or kind with the Plaintiff's clients' privacy, the Plaintiffs' peaceful conduct of business, the plaintiffs' business premises and client whether by way of photography, incitement of persons, physical or verbal harassment or intrusion and/or any other activities adverse to the Plaintiffs' peaceful conduct of its business.
 3. That pending the hearing of the suit herein an injunction does issue restraining the Defendant/Respondent by herself and/or through her Advocates, Proxies, agents servants, or employees, from interference of any sort, manner or kind with the Plaintiff's clients' privacy, the Plaintiff's peaceful conduct of business, the Plaintiff's business premises and clients whether by way of



photography, incitement of persons, physical or verbal harassment and/or any other activities adverse to the Plaintiff's peaceful conduct of its business.

4. That the Officer Commanding the Muthangari police Station does assist in effecting of the Court Orders granted herein.

5. That the costs of this application be borne by the Defendant/Respondent.

The Application is supported by the grounds on its face and the Affidavits of Domiana Mwangangi and Vanice Morwabe.

2. In opposition the Respondent filed a Preliminary Objection dated 7/09/2023 which touches on this Court's (High Court) jurisdiction to entertain the suit. As a matter of principle a question on court's jurisdiction ought to be considered and determined as soon as it is raised, see *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* 1989 KLR.

The objection raises two grounds that:

1. The Honourable Court has no jurisdiction over the subject matter as the substratum of this suit revolves around Environmental and Land matters which are not within the jurisdiction of this Honorable court.

2. The instant Application and Suit raise no reasonable cause of action within this Honorable Court's jurisdiction as spelt out under Article 165 (5) (b) of *the Constitution* of Kenya, 2010.

The Applicant has filed submissions on the Preliminary Objection. I have considered the same against the respective parties pleadings.

3. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, had the following to say on circumstances when a Preliminary Objection may be raised.

“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.”

4. It is trite that the issue of jurisdiction is one that goes to the substratum of a case and as such must be determined before a court can take any further action in the matter. Jurisdiction of a court flows from *the Constitution* or statute. A court cannot confer jurisdiction on itself as held in *Owner of the Motor Vessel "Lilian S." V. Caltex Oil Kenya Ltd* (1989) KLR (supra) and a court of law will down its tools the moment it realizes that it has no jurisdiction as whatever it may do without jurisdiction amounts to naught.

5. The issue therefore that falls for determination is whether the Preliminary Objection raised by the Defendant has merit. Article 162 (2)(b) and 165(5) of *the Constitution* established a system of courts, and donates jurisdiction to each court.

6. Section 13(2) of the *Environment and Land Act* provides the jurisdiction of the ELC to be:

(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.
7. The court has interrogated the materials filed in the main suit and observes that the core subject matter of the case revolves around the procedural aspects of altering the usage of L.R. no.330/992(Block 14/273) on Kingara Road, Lovington, and the manner in which the property is currently being utilized. As clearly submitted by the Applicant/Defendant, together with others, they have filed a suit before the ELC court and although no sufficient material has been adduced before this Court on ELC Suit No.E184 of 2023: Beatrice Mbuli Kipkemoi, Jena Wamaitha Kagai & Others v Elmonice International Limited & Others, the Defendant confirms that the case before the Environment and Land Court is in regard to the process of the Change of User of the subject property which is the fundamental genesis of the dispute presented in this suit.
8. In respect therefore, the dispute before this court is in respect to matters of use of land, environmental planning and protection, as well as land administration and management all which fall under Article 162 (2) (b) of *the constitution*. Equally, *the Constitution* at Article 165 (3) provides the jurisdiction of the High Court. I therefore find that the Plaintiffs' pleadings in the suit and in the Motion under review dated 16/8/2023 are for determination by ELC court under Article 162 (2) of *the Constitution*. And not the High Court.
9. In the absence of the necessary jurisdiction, which I have determined to be lacking, the High Court is prohibited by both *the Constitution* and Statutory Law from considering this case. Entertaining such a case would constitute an attempt by the court to assume jurisdiction it does not possess. Referring to the precedent set by the "Owners of the vessel 'Lilian' case," it would be futile for this court to engage in an exercise that would ultimately yield no lawful meaning outcome.
10. In light of the above the Preliminary Objection dated 7/09/2023 succeeds. The Court therefore downs its tools and having done so the Court cannot determine the Notice of Motion dated 16/8/2023 for want of jurisdiction.
11. In the interest of justice and in furtherance of access to justice as envisaged under Article 159(2) of *the Constitution* this Court is minded to exercise its jurisdiction and transfer this case to the Environment and Land Court for hearing and determination. The Plaintiffs shall pay the costs of the Preliminary Objection.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

