



Jeconiah (Suing as the Manager of the Estate of Adams Oseko) & another v Sospeter Nyakundi Nyang’au t/a Boston General Agencies & 4 others (Civil Case 11 of 2021 & 11 of 2019 (Consolidated)) [2024] KEHC 1267 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE 11 OF 2021 & 11 OF 2019 (CONSOLIDATED)
PN GICHOHL, J
FEBRUARY 15, 2024**

BETWEEN

SAMUEL MOTANYA JECONIAH (SUING AS THE MANAGER OF THE ESTATE OF ADAMS OSEKO) PLAINTIFF

AND

SOSPETER NYAKUNDI NYANG’AU T/A BOSTON GENERAL AGENCIES 1ST DEFENDANT

ECOBANK KENYA LIMITED 2ND DEFENDANT

SAMUEL MUTAHI GATHOGO T/A VALLEY AUCTIONEERS 3RD DEFENDANT

HELLEN KWAMBOKA KOMBO 4TH DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 11 OF 2019

BETWEEN

SOSPETER NYAKUNDI NYANG’AU (SUING ON HIS BEHALF AND AS MANAGER OF THE ESTATE OF ADAMS OSEKO) PLAINTIFF

AND

ECOBANK KENYA LIMITED 1ST DEFENDANT

VALLEY AUCTIONEERS 2ND DEFENDANT

HELLEN KWAMBOKA KOMBO 3RD DEFENDANT



RULING

1. This ruling relates to the issue of whether this Court has jurisdiction to determine the dispute between the parties herein.
2. In HCCC No. 11 of 2021), the Plaintiff sought:-
 - a. An order setting aside the auction conducted on 19/11/2013.
 - b. An order cancelling the registration of the 4th Defendant as the proprietor of the said title number Kisii Municipality Block/III/407 and directing the registration of the Plaintiff and the 1st Defendant as the joint proprietor of the suit property.
 - c. A permanent injunction restraining the Defendants either by themselves, their agents, servants and or employees from or otherwise howsoever, from dealing with all that parcel of land known as title number Kisii Municipality Block/III/407 in any manner whatsoever prejudicial to the interests of the estate of Adams Oseko.
 - d. Costs of the suit and interest.
 - e. Any other or further relief that this court may deem fit to grant.
 - f. The registration of the and rectification of title number Kisii Municipality Block/III/407, a permanent injunction together with costs.
3. In HCCC No. 11 of 2019, the Plaintiff prayed for an order that the auction conducted on 19/11/2023 was null and void and thus be set aside, cancellation and rectification of the title to the suit land, a permanent injunction, a refund or damages as ascribed in Section 99 (4) of the Land Act as well as costs of the suit.
4. By consent of parties , these two files were consolidated and the lead file being Kisii HCCC No. 11 of 2021.
5. The brief facts of the case are that the 1st Defendant charged Land Parcel No. Kisii Municipality Block II/407 (suit property) which was registered in his name and that of Adams Oseko to the 2nd Defendant and obtained a loan. Upon being unable to service the loan, the land was auctioned to the 4th Defendant.
6. In his submissions, the Plaintiff contends that the dispute between the parties is a commercial one which this court has jurisdiction to determine. In support thereof, Plaintiff placed reliance on numerous authorities among them Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others [2012] eKLR where the Supreme Court addressed the issue of jurisdiction of courts as follows:

“(68) A Court’s jurisdiction flows from either constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter,



for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where 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 constitution.....”.

7. The 1st Defendant submitted that the issue to be ascertained is whether the charge was valid and if due process was followed in exercising the statutory power of sale. He urged this court to adopt a pre-determinate purpose test and urge this Court to proceed to hear and determine the dispute.
8. He cited numerous authorities among them the case of Co-operative Bank of Kenya v Patrick Kangethe Njuguna & 5 Others [2017] eKLR where the Court of Appeal found in a nutshell that a charge does not constitute use of land within the meaning of Article 162(2) (b) of constitution of Kenya, 2010.
9. On their part, the 2nd and 3rd Defendants adopted the above submissions.

Determination

10. I have considered the submissions herein. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. A decision made by a court of law without jurisdiction is nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
11. On the issue of jurisdiction or want of it is the celebrated case of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi, J.A., (as he then was), and while relying, inter alia, on a treatise by John Beecroft Saunders titled “Words and Phrases Legally Defined” held as follows: -

“...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.”
12. Although it appears on the face of it, that there is question as to the validity of the charge and whether the power of sale was exercised lawfully, the issue revolves around the acquisition of ownership of land following an auction that took place on 19/11/2013. If successful, there will be transfer ownership of title which is within the jurisdiction of the Environment and Land Court.
13. Further, a perusal of the Court file reveals that the dispute herein was the subject of proceedings in Kisii ELC No. 341 of 2012. From the ruling of the court delivered on 19/12/2014, it can be established that the Plaintiff sued the 2nd Defendant seeking a permanent injunction to restrain the Defendant from



- selling by public auction all that parcel of land known as LR. No. Kisii Municipality/Block III/407, a declaration that the Defendant is in breach of an agreement that was entered into between the Plaintiff and the Defendant and general damages for breach of contract. The Court declined to grant temporary injunctive relief.
14. What is clear is that following the unsuccessful bid to stop the sale of the suit land, the Plaintiff has filed the present suit where the Plaintiff pleaded that “there is no other suit pending between the Plaintiff and the Defendants and, save for Kisii HCC No. 341 of 2012 between the 1st and 2nd Defendant...”
 15. There was also another case filed by Hellen Kwamboka Kombo and against Sospeter Nyakundi Nyangau and Adams Oseko in the Environment and Land Court being ECL No. 157 of 2015 seeking judgment against the Deletants for:-
 - a. An order evicting them, their agents and /or servants from the Plaintiff’s land parcel No. LR. No. Kisii Municipality/Block III/407.
 - b. An order directing the Defendants jointly and severally to pay the Plaintiff mesne profits and damages for loss of user from December 2013 to date.
 - c. Costs of the suit.
 - d. Interest on (b) and (c) above.
 - e. Any other or further relief as the Court may deem fit to grant.
 16. In her statement filed therein, the Plaintiff stated that following the auction be Ecobank Kenya Limited, the transfer could not be effected as the Defendants had obtained a stay order at High Court Nairobi. That the stay was vacated in December 2014 and registration effected in January 2015. That despite demand that the Defendants vacate the property voluntarily, they had ignored and refused to do so.
 17. This Court has had a look at the Plaintiff’s reply to 4th Defendant’s defence herein on the above issues stating that the ELC No. 341 of 2012 was withdrawn and therefore not decided on merit and that ELC No. 157 of 2015 was dismissed and therefore, it has no legal consequences to these proceedings.
 18. The Court has also looked at the 1st Defendant’s defence dated 27th July 2020 again referring to the above stated cases. It cannot be overemphasised that issues by parties herein go beyond the validity of the auction of the suit property. The issues fall under the demarcations of a specialized Court under the dictates of Section 13 of the [Environment and Land Court Act](#).
 19. This is not a commercial dispute as intimated by parties. For those reasons, this Court does not have the jurisdiction to award the reliefs sought and parties cannot agree to give this Court jurisdiction that it does not have.
 20. Consequently, this matter should be heard by the Environment and Land Court. Let parties take proactive steps to ensure that this matter is determined without further delay.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Mogire for Ratemo for the Plaintiff



Ms Ekesa for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

Laureen Njiru/ Aphline - Court Assistant

