



REPUBLIC OF KENYA



Wahome v Wanyama (Civil Case 3 of 2020) [2024] KEHC 4622 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 3 OF 2020
SN MUTUKU, J
APRIL 8, 2024**

BETWEEN

DENIS GATUNE WAHOME PLAINTIFF

AND

SAM SAMBU WANYAMA DEFENDANT

RULING

1. Under consideration is the Notice of Motion dated 23rd February 2023 brought by the Plaintiff under Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). It seeks the following orders:
 - i. Spent.
 - ii. That the Court file for this suit be transferred to the Environment and Land Court at Kajiado for hearing and determination.
 - iii. That the costs of this application be in the cause.
2. The grounds in support of the application are found on the face of the application and in the supporting affidavit sworn by Maureen Nekesa Auma on 23rd February 2023.
3. In summary, the Applicant states that the claim against the Defendant is based on a Sale Agreement for property known as Kajiado/Kitengela/2409 and that this Honourable Court may not be able to grant the prayers sought by the Applicant in his Plaint dated 18th December 2018 because the reliefs sought are the preserve of the Environment and Land Court (ELC) by virtue of Section 13(2) and 13(7) of the [ELC Act](#), 2011.

Response

4. The Respondent has opposed this application through a Replying Affidavit sworn on the 2nd May 2023 in which the Respondent has argued that this court cannot transfer this suit to the ELC for the reason



that it lacks jurisdiction to determine this case and that a suit filed in court without jurisdiction is a nullity. He has argued that the Notice of Motion lacks merit and ought to be dismissed as well as the main suit for reasons that it was filed in the wrong court.

Applicant's Submissions

5. The Application was canvassed through written submissions. Both parties have filed their submissions. The Applicant's Submissions are dated 4th May 2023. He has raised two issues for determination:
 - i. Whether this Honourable Court has jurisdiction to determine the suit.
 - ii. Whether this Honourable Court can transfer this suit to the ELC.
6. On the first issue, it is submitted that this court may be unable to grant the prayers sought in the Plaintiff for lack of jurisdiction given that the subject matter in this case is the property known as Kajiado/Kitengela/2409 and that Section 13 of the ELC Act granted the ELC special and specific jurisdiction to deal with cases that arise from disputes relating to land as well as the granting of reliefs that are as a result of a dispute relating to land.
7. On the second issue it is submitted that this Honourable court has inherent jurisdiction to transfer this matter to the ELC. The Applicant relied on Pamoja Women Development Programme & 3 others v Jackson Kibumbu Wangombe & another [2016] eKLR and Henry Kigen & 6 others v Baringo County Governor & 2 others [2020] eKLR to support that argument.

Respondent's Submissions

8. The Respondent's Submissions are dated 2nd May 2023. He has raised the following issues for determination:
 - i. Whether this court has jurisdiction to grant orders sought.
 - ii. Whether this court can suo moto determine the issue of jurisdiction when the same is not pleaded in the main suit.
 - iii. Who bears the costs of the suit.
9. On the first issue, the Respondent submitted, while relying on Owners of Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Limited (1989) eKLR and In the Matter of Interim Independent Electoral Commission [2011] eKLR, that jurisdiction flows from either the Constitution or legislation or both and that a court of law shall only exercise jurisdiction as conferred by the Constitution or legislation.
10. The Respondent submitted that Article 165(5) of the Constitution explicitly ousts, inter alia, the jurisdiction of the High Court in matters reserved for the exclusive jurisdiction of the courts contemplated in Article 162(2) of the Constitution.
11. On the second issue, the Respondent relied on Supreme Court of Kenya decision in Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR at paragraph 154 where the Court stated as follows:
 - (154) However, as it was well elucidated in the case of Kagenyi v Musiramo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit



has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.

12. The Respondent further submitted that a decision dismissing the application herein shall be interpreted by default that the main suit also stands dismissed. He relied on *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR where the court at paragraph 25 states as follows:
 25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded. I however did not understand the Court to be saying that the Court ought not to hear the parties on the issue of jurisdiction before determining an issue raised suo moto. In fact in the said decision the Court held that as soon as the issue arises, the court should hear and dispose of that issue without further ado. It is therefore incorrect to contend that where a Tribunal raises a matter suo moto the right to hear parties is thereby dispensed with.
13. The Court in the above quoted paragraph was referring to the Court in *Owners of Motor Vessel "Lillian S"*. He submitted that both parties have been given an opportunity to submit on the issues raised in the Notice of Motion and therefore both parties have been heard on the issue of the transfer of this suit to the ELC.
14. On the issue of costs, the Respondent has submitted that the court should award costs to him after dismissing the suit in line with the legal principle that costs follow the event.

Determination

15. I have considered the Notice of Motion and the issues raised by the parties in their respective submissions. The respective jurisdictions of the High Court and the ELC are clearly specified in the *Constitution* and Legislation. The High Court exercises jurisdiction in line with Article 165 (3) of the *Constitution* of Kenya. Under Article 165 (5), the jurisdiction of the High Court is ousted in matters (a) reserved for the exclusive jurisdiction of the Supreme Court under the *Constitution* and (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). The Courts contemplated under Article 162(2) are the ELC and the ELRC.
16. Section 13 of the *ELC Act* is specific on what matters fall under the jurisdiction of the ELC.
 - (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.
- 17. Under Section 13 (7), the ELC is empowered to grant orders as follows:
 - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs
- 18. The subject matter in the main suit is breach of Sale Agreement in respect of Kajiado/Kitengela/2409. I have also noted the reliefs sought in that Plaint including transfer of the said property. The Respondent did not oppose the Notice of Motion by submitting that this Court has jurisdiction. Instead, he submitted that this Court cannot transfer the matter to the ELC for lack of jurisdiction. To my mind therefore, both parties agree on that issue that this court does not have jurisdiction to determine this matter.
- 19. In similar applications argued before this court where jurisdiction of this court comes into question, this Court has relied on authorities from the High Court and the Court of Appeal to transfer the matter to the ELC. This Court has also taken the view that this court is enjoined by the Constitution of Kenya 2010 to consider the principles of the right to access to justice, expediency in delivery of justice and substantive justice and reasoned that it would be in the best interest of justice to transfer the matter to the ELC than to dismiss it for in taking the latter action, this court would be closing the doors of justice to the parties.
- 20. On such case this Court has relied on Daniel N. Mugendi v. Kenyatta University & 3 others (2013) where the Court of Appeal had this to say on the issue:
 - “.....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....”

21. The decision of the Supreme Court in Albert Chaurembo Mumba case had not been brought to my attention. In that case, the Supreme Court, while relying on *Kagenyi v Musiramo & Another* (1968) EALR 43, held that “an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it.”
22. I need not belabour the point that decisions from the Court of Appeal and the Supreme Court are binding to this court. Given the divergent views expressed by the two superior courts as shown above, it is the decision of the Supreme Court that carries the day. I understand this to mean that this court is not able to transfer the current suit to the ELC because the suit was filed in the wrong court in the first instance. So that if this court lacks jurisdiction to try the suit, then it cannot arrogate itself jurisdiction to transfer the suit to another court.
23. Consequently, this court declines to grant the prayers sought in the Notice of Motion under consideration. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED ON 8TH APRIL 2024.

S. N. MUTUKU

JUDGE

