



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC APPEAL NO. E005 OF 2021

INNOCENT ENOCE OMBOKO.....APPELLANT

= VERSUS =

COUNTY ASSEMBLY OF BUSIA.....1ST RESPONDENT

BUSIA COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

J U D G M E N T

1. This appeal arises from the ruling made in Busia CMC ELC No. 02 of 2020 by the Chief Magistrate's Court presided over by Hon. L. Ambasi CM and delivered on 18th May 2021. The appellant who was the Defendant in the subordinate Court raised the following grounds in their Memorandum of Appeal dated 26th January 2021 and their Supplementary Memorandum of Appeal dated 15th March 2021;

i) The trial magistrate fell into error in law and fact in holding that the court has jurisdiction to hear and determine the Respondent's suit.

ii) The magistrate grossly erred in law and fact by;

a) Completely ignoring clear, undisputed facts pleaded and admitted by the parties

b) Holding that the preliminary objection fails to meet the legal threshold because the fact of employment would still "of necessity require the court to delve into factual issues and make a finding thereof..."

c) Contradicting herself by stating that "as counsel for the Plaintiffs (Respondents) submitted, the matter herein arose from an employment contract..." and at the same time holding that it would require her to "of necessity delve into factual issues and make a finding thereof..." and

d) Failing to hold that it is plain and undisputed that the loan sought to be recovered from the Appellant was advanced to him in the course of his employment with the Respondents.

iii) The magistrate fell into gross error of law and fact by failing to hold that the Respondents are bound by their pleadings and submissions that;

a) "from the outset, the cause of action in this suit is for the recovery of the outstanding loan and interest from the Defendant following the disbursement of the said loan by the Plaintiffs" and

b) "the plaintiffs humbly submit that indeed the matter herein arose out of an employment contract between the plaintiffs and the defendant."

iv) The trial magistrate grossly erred in law and fact by;

a) Failing to appreciate the basic, elementary confines or limitations of her jurisdiction being "title (ownership), possession and use of land"

b) Holding by craft and endeavours that she has jurisdiction over the matter because "it's a dispute over an issue of land generally.."

c) Crafting jurisdiction over "a dispute over an issue of land generally.." which is conferred neither by the Constitution nor

any known law; and

d) Arrogating to herself and clinging onto jurisdiction by judicial craftsmanship and craft of interpretation.

v) The magistrate fell into error in law and fact and was

biased having ignored relevant laws, facts and precedents, more particularly;

a) Completely ignoring and disregarding the appellant's compelling filed written submissions;

b) Completely ignoring and disregarding the appellant's binding authorities on record;

c) Ignoring the doctrine of stare decisis and binding precedent being rules of great, esteemed judicial ancestry and pedigree; and

d) Making biased reference only to the Respondent's irrelevant authorities.

vi) The magistrate fell into error in law and fact by completely failing to appreciate and distinguish the distinguishable and irrelevant authorities cited by the appellant by merely terming them as 'useful' while completely ignoring the defendant's rebuttal and distinction thereof.

vii) The magistrate fell into error in law and fact by misdirecting herself on, misconceiving and misapplying, the pre-dominant issue or purpose test more particularly by;

a) Failing to categorically identify and scalpel the dominant issue versus peripheral issues;

b) Implying that the transaction in issue was a transaction 'involving both (sic) a sale of land' in her misdirection on the predominant issue/purpose test;

c) Implying that 'the transaction is predominantly for land'

d) Failing to hold that the issues to be categorized as either dominant or peripheral is the issue of 'employment dispute' versus that of 'dispute over an alleged intended but non-existing charge';

e) Failing to hold that neither the dominant issue of employment dispute nor the peripheral issue of an alleged intended but non-existing charge could confer jurisdiction to the Environment and Land Court even vice versa.

viii) The magistrate erred in law and fact by failing;

a) To appreciate that it was undisputed or admitted by both parties that there already exists Kisumu Employment and Labour Relations Petition No. E005 of 2020 before the superior court in Kisumu between the parties herein.

b) To hold that it is the employment court and not the land and environment court which has jurisdiction, having already found that the dispute 'arose from an employment contract'

c) To hold that the Environment and Land Court has no jurisdiction over alleged breach of contract of employment or dispute arising out of employment.

ix) The magistrate grossly erred in law and fact by misdirecting herself in holding that the preliminary objection fails to meet the legal threshold.

x) The magistrate erred in law and fact by descending into the arena of irrelevancy in holding;

a) That the defendant purported to impose himself in the plaintiffs' case and altered its course, and

b) That the transaction was "a transaction involving a sale of land."

xi) The magistrate erred in law and fact by delivering a verbal/oral ruling and/or in the chamber in absence of the defendant or his advocate instead of written ruling in open court in presence of both parties.

xii) The magistrate erred in law and fact by failing to hold that the Respondents' suit is fatally incompetent and a nullity in law.

xiii) The magistrate was clearly, openly biased and heavily struck her hammer of bias against the defendant for daring to file a corruption complaint against her.

2. The Appellant prayed that the appeal be allowed and the ruling of the subordinate court dated 18th May 2021 and all consequential orders

be set aside and substituted with a ruling allowing the appellant's preliminary objection with costs and an order dismissing the Respondents' suit as fatally incompetent. He also prayed that this court makes a declaration that interlocutory ex-parte orders made by the subordinate court without jurisdiction are of no legal consequences and stand vacated and costs of this appeal and the preliminary objection and the suit before the subordinate court be awarded to the appellant.

3. The parties were supposed to file their written submissions within 21 days. The Appellant filed his submissions on 24th August 2021 where he first submitted that parties are bound by their pleadings and from the respondents' pleadings in the subordinate court especially paragraphs 5-18 of the plaint point out that the dispute therein arose out of an employment relationship. The second thing the appellant submitted was that the preliminary objection as raised met the threshold of raising a pure point of law being the jurisdiction of the subordinate court to deal with the dispute before it. Thirdly, the appellant submitted that jurisdiction is everything and a suit filed before a court of no jurisdiction is fatally incompetent. He cited the Court of Appeal in the case of **Cooperative bank of Kenya Limited v. Patrick Kangethe Njuguna & 5 others (2017) eKLR** where the jurisdiction of the Environment and Land Court was discussed at length. He further cited the decision in **Paramount Bank Limited v. Vaqvi Syed Qamara & another (2017) eKLR** where the Court of Appeal discussed the jurisdiction of the Employment and Labour Relations Court at length. Fourth, he submitted that the subordinate court in its ruling ignored his compelling written submissions and the binding authorities on record and was biased making reference to the respondent's authorities only. Lastly, he submitted that the predominant issue before the subordinate court is 'recovery of the outstanding loan and interest from the defendant'. He stated that this is a matter for the Employment and Labour Relations Court and for those reasons only the Employment and Labour Relations Court has original jurisdiction and there is already a suit before the ELRC Kisumu Petition No. E005 of 2020 arising from the dispute therein. The appellant attached various authorities to his submissions.

4. The Respondents filed their submissions on 7th October 2020 where they submitted that the preliminary objection as raised falls short of the requisite legal threshold for upholding a preliminary objection. That the issues as raised cannot be disposed of preliminarily unless the court is invited to delve into factual issues surrounding the dispute as the learned magistrate held. They further submitted that the subordinate court had jurisdiction to determine the dispute before it as was donated to it vide Gazette Notice no. 5178 and Section 9 of the Magistrates Court Act, 2015. They relied on the decision in **Lydia Nyambura Mbugua v. Diamond Trust Bank Kenya Limited & another (2018) eKLR** where the learned Sila Munyao, J, discussed the jurisdiction of the Environment and Land Court at length. He further stated that the appellant has filed a counterclaim to the respondents' suit hence he cannot allege that the court does not have jurisdiction to hear and determine the respondents' suit yet he is seeking relief from the same court. The Respondents attached various authorities to their submissions.

5. A brief background of the appeal herein is that the Respondents (the plaintiffs in the subordinate court) sued and prayed for judgment against the appellant (defendant therein) for;

a) *The outstanding loan balance and interest being Kshs.7,487,922.59/=*

b) *An order compelling the defendant to surrender the title deed for the property known as Bukhayo/Mundika/2842 to the plaintiffs for purposes of securitization of the charge*

c) *An order directing the county land registrar, Busia County to register a charge over the property known as Bukhayo/Mundika/2842 in favour of the County Assembly of Busia*

d) ...

6. The appellant (defendant) filed a preliminary objection challenging the jurisdiction of the Chief Magistrates' Court to hear and determine the suit as matters raised were disputes that should be determined by the Employment and Labour Relations Court according to Section 3 of the Employment Act 2007 and Section 4 and 12(1)(a) of the Employment and Labour Relations Act. The preliminary objection was dismissed with costs for lack of merit and prompting the appellant to file the present appeal being dissatisfied with the ruling.

7. The court has read and considered the submissions together with the memorandum and record of appeal and the law applicable. The main issue for determination is whether the subordinate court constituted as an environment and land court has jurisdiction to hear and determine the dispute before it. If a court proceeds to hear a dispute without jurisdiction, then the result will be a nullity *ab initio* and any determination made by such court will be amenable to being set aside *ex debito justitiae*. This was the stand taken by the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)**:

"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."

8. According to the appellant, the suit should be determined by the Employment and Labour Relations Court as the dispute arose out of an employment relationship between the parties though the said relationship has since expired. He cited paragraphs 5-18 of the plaint to show that the dispute therein is an employment and labour relations matter. Further, the prayers in the plaint filed in the subordinate court by the Respondents seek the outstanding loan balance and interest which was extended to the appellant under his employment.

9. The Respondents have argued that the dispute between the parties is an environment and land matter that should be determined by the Environment and Land Court because the subject matter in the subordinate court suit is the failure by the Appellant to surrender the title deed for the property known as Bukhayo/Mundika/2842 to the Respondents for purposes of securitization of the charge.

10. Section 13(1) of the Environment & Land Act gives this Court original an original and appellate jurisdiction to hear and determine all disputes per article 162(2) (b) of the Constitution. Section 13(2) of the Environment and Land Act provides as follows;

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have the power to hear and determine disputes relating to environment and land, including disputes;

- a) Relating to environmental planning and protection, trade, 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.

11. Section 12(1) of the Employment and Labour Relation Court Act no. 20 of 2011 provides that the Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it under Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the court relating to employment and labour relations.

12. Having highlighted where the jurisdiction of the Environment and Land Court and the Employment and Labour Relations Court originates from that is, the Constitution and Acts of Parliament, it is trite for this court to look at how various courts interpret the said law through case law. I do appreciate the extensive research done by both parties and will discuss how the various decisions cited by the parties and how they relate to the present suit in the subordinate court.

13. The Appellant placed reliance on the decisions in **Cooperative Bank of Kenya Limited vs. Kangethe Njuguna & 5 others (2017) eKLR** and **Abraham Nyambane Asiago vs. Barclays Bank of Kenya Limited (2013) eKLR** among others. The Respondent placed reliance on the decision in **Lydia Nyambura Mbugua v. Diamond Trust Bank Limited & another (2018) eKLR** among others.

14. From the above, it is clear that the Court of Appeal was of the standing that a charge/mortgage does not constitute use of land and as such does not fall within the jurisdiction of the Environment and Land Court as broken down in Article 162 of the Constitution and Section 13(2) of the Environment and Land Court Act. In the case of *Cooperative Bank of Kenya Limited v Kangethe Njuguna*, the Court of Appeal had this to say about use of land;

*“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, the air above it or ground below it is adapted. To the law, therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor **Article 260** whether expressly or by implication recognizes charging land as connoting land use.”*

The Court of Appeal further defined a charge and whether a charge fits the definition of use of land as follows;

*“By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any condition (see **Section 2** of the **Land Act**). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see **Section 80** of the **Land Act**). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.”* The Court of Appeal went on to rule that a charge does not constitute use of land within the definition in Article 162 of the Constitution.

When discussing whether a charge is an instrument granting an interest in land as per Section 13(d) of the Environment and Land Court Act, the Court of Appeal stated as below;

*“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under **Section 13** of the **ELC Act** ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”*

15. The Employment and Labour Relations Court was faced with the issue of jurisdiction in **Abraham Nyambane Asiago v Barclays Bank of Kenya Limited (2013) eKLR**. The Respondent therein challenged the court’s jurisdiction over proceedings relating to title, lease or charge under Section 2 of the Land Act (2012). The Court stated as follows on whether it had jurisdiction to touch on the Claimant application which touched on land;

“The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship? Counsel for the Respondent asked the Court to down its tools in this matter because the subject matter is land and not employment. With much respect to the learned Counsel, that is a very narrow interpretation of what constitutes an employment and labour matter and the consequential jurisdiction of the Industrial Court.

17. *By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found*

in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.

18. In this regard I am persuaded by the decision of my brother, Justice Rika in the case of **Banking Insurance & Finance Union (Kenya) Vs Consolidated Bank of Kenya Limited (Industrial Court Cause No 900 of 2012)** where he held that:

“The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum.....to determine the final issues that may arise out of this dispute.”

The Court went on to rule it had jurisdiction and issued the injunctive orders sought.

16. When the learned Justice Munyao Sila was faced with a preliminary objection on the jurisdiction in Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another (2018) eKLR, he stated as follows regarding Section 13(2)(d) of the Environment and Land Court Act;

“It will be seen from Section 13 (2) (d) above, that the ELC has jurisdiction to hear disputes relating to inter alia, “contracts, choses in action or other instruments granting an enforceable interest in land.” It cannot be argued that a charge is not an instrument that gives an enforceable interest in land, or that it is not an instrument that relates to land, or that it is not an instrument that is contractual and is over land. Charges are more elaborated in the Land Act No.6 of 2012 and the Land Registration Act No.3 of 2012, which inter alia provides for the rights of a chargee, one of which is the right of sale when there is default. It is in these statutes that the manner and process of sale for a property that is subject to a charge is provided. Inter alia, the chargee needs to give a statutory notice before embarking on selling the property and also issue other stipulated notices. A dispute over how the chargee has exercised his statutory power of sale would thus be a dispute falling within the Land Act and Land Registration Act, for one will need to scrutinize the provisions of these statutes to see whether the process of sale has been followed. These statutes also provide for the court which has jurisdiction to hear disputes that arise out of the application of these particular statutes.”

17. The Court went on to ask what one should do when they have a matter which brings forth various issues which fall within the jurisdiction of multiple courts and yet the issue cannot be severed for the issues to be heard in different courts. He quoted the decision by Ngugi, J, in the case of ***Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) eKLR***, where the learned judge, when faced with an objection to jurisdiction, was of the view that what is important in determining which court would have jurisdiction, is the “predominant purpose test”, which the judge elaborated as follows:

“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 predominant 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.”

The Court went on to rule that it had jurisdiction to determine the dispute before it and stated as follows in paragraph 31 of its decision;

“ I said earlier, that just because “charge” has been mentioned in a case, does not mean that the ELC has no jurisdiction. On the contrary, where “charge” is being mentioned, the presumption should be that it is the ELC with jurisdiction, unless it is discernible, that the case raises issues that have little or no relation to the charge. A charge is a proprietary transaction that creates a proprietary interest. It is a contract over land. It is created by an instrument that is registered in the title to the land. A charge is an instrument that affects the title. Issues relating to charges, the rights and obligations that arise in such instruments, are proprietary issues, that squarely fall within the jurisdiction of the ELC.”

18. From the foregoing, it is clear to see that the different courts had different opinions as to the issue of jurisdiction but they are all in agreement that the jurisdiction of a court stems from the Constitution and Acts of Parliament governing the various courts. Also, it is key that a court identifies the subject matter of the dispute before it so that it can determine whether it has the jurisdiction to deal with the dispute or not.

19. In the present case, there is no dispute that there was an employer-employee relationship between the parties with the appellant having been employed as a legal clerk for the respondent in 2015. According to the pleadings before the subordinate court, the respondent has broken down how that dispute came to be. The respondents approved a mortgage facility from the Busia County Assembly Members Revolving Fund for the appellant after his application to a tune of Kshs.7,000,000/= for purchase, development, renovation or repair of residential property for sole use/occupation by the appellant and/or his immediate family. The appellant was to surrender his title to the property to the respondents for securitization of the mortgage but failed to do so and it resulted in disciplinary action against him. Subsequently, the appellant left the employment with the respondents before they could secure the mortgage. The Respondents outlined the particulars of breach of the Fund Mortgage Arrangement by the Appellant in paragraph 18 of the plaint.

20. In light of the authorities cited by the parties and discussed above, it is important to note that the “charge” before the subordinate court has not yet been secured against the title to the property known as Bukhayo/Mundika/2842. In the cited authorities, the charge was registered

against the properties in dispute. Prayer number one in the plaint has the Respondents seeking payment for the outstanding loan and interest followed by an order compelling the appellant to surrender the title deed to the property known as Bukhayo/Mundika/2842 for securitization of the charge. As the prayers stand in the plaint before the subordinate court, it is more of a civil dispute for specific performance than a land dispute.

21. Further, the appellant has pointed out that the mortgage was advanced as a result of the employer-employee relationship between the parties. In the decision in **Boniface Lum Amunga Biko v. National Bank of Kenya Limited (2017) eklr**, where the learned Justice M. Mbaru was faced with the question of jurisdiction she stated as follows in paragraph 18;

“In this regard, therefore, the concept of employment and labour relations is wide and not restricted to the contract of service. With employment, there come other relations at play such as the work benefits that require the formation of relations such as the one leading to facilities such as loans, mortgage, and car and buying of agricultural land. Such relations cannot be divorced from the core employment relationship of the employer and employee. To do so would be to lose the context within which labour relations find meaning.”

22. Guided by the above-cited decisions and the law, I am convinced that the dispute before the subordinate court constituted as the Environment and Land Court by how the heading and registration of the impugned pleadings suggest lacks jurisdiction to hear and determine the dispute.

23. In conclusion, I hold that the appeal is merited and the same is hereby allowed in the following terms;

(i) An Order be and is hereby given setting aside and substituting the ruling allowing the Appellant’s Preliminary Objection with costs with an order striking out the Respondent’s suit as fatally incompetent.

(ii) This court hereby makes a declaration that interlocutory ex-parte orders made by the subordinate court without jurisdiction are of no legal consequences thus stand vacated.

(iii) Costs of this Appeal and of the Preliminary Objection and half of the suit before the subordinate court are awarded to the Appellant.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 28TH DAY OF OCTOBER 2021.

A. OMOLLO

JUDGE