



Harith v Chakama Ranching Company Limited & 5 others; Kitsao & another (Interested Parties) (Civil Case 7 of 2015) [2023] KEHC 1572 (KLR) (6 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 7 OF 2015
SM GITHINJI, J
MARCH 6, 2023**

BETWEEN

AMINA MOHAMED HARITH PLAINTIFF

AND

CHAKAMA RANCHING COMPANY LIMITED 1ST DEFENDANT

NYAMU & NYAMU COMPANY ADVOCATES 2ND DEFENDANT

MINISTRY OF DEVOLUTION AND PLANNING 3RD DEFENDANT

MINISTRY OF DEVOLUTION AND PLANNING 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

THE OFFICIAL RECEIVER 6TH DEFENDANT

AND

ENG. JIRA DANIEL KITSAO INTERESTED PARTY

ALFRED MWATHETHE INTERESTED PARTY

RULING

1. This Ruling is in respect of a Notice of Preliminary Objection filed by the Official Receiver, the 6th Defendant herein. The preliminary objection is dated May 26, 2021 (Hereinafter ‘the objection’) and tailored as follows: -
 1. That the Plaintiff’s suit is in breach of section 228 of the Companies Act, Cap 486 (repealed) as read with section 432(2) of the *Insolvency Act*, 2015 and the Transitional Provisions thereto which requires that when a winding-up/liquidation order has been made legal proceedings



against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

2. That this Honourable Court lacks jurisdiction to hear and determine the further amended plaint herein since it is a dispute relating to the environment and the use and occupation of, and title to land by virtue of the provisions of Article 165 (5) (b) of the Constitution which provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2).
 3. That section 13 of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162 (2) (b) of the Constitution and shall have powers to hear and determine disputes relating to compulsory acquisition of land, among others.
 4. That by virtue of the liquidation order against the 1st Respondent and section 241 of Companies Act Cap 486 repealed and paragraph 6 of the Third Schedule of the Insolvency Act, 2015 as read with the Transitional Provisions thereto, the 6th Defendant has power to bring or defend any action or other legal proceeding in the name and on behalf of the company. Thus the Plaintiff is not a proper plaintiff in any matter relating to the 1st Defendant and therefore does not have locus to prosecute this matter in her derivative capacity since the 1st Defendant's affairs are vested with the 6th Defendant.
 5. That further, under section 445 (3) of the Insolvency Act, 2015 the 6th Defendant, under the court's direction, has locus to begin or defend, or continue any legal proceedings that relate to the property of the company or that it is necessary to begin, defend or continue for the purpose of effectively liquidating the company and recovering its property.
 6. That the Plaintiff has no cause of action against both the 1st and 6th Defendants and thus they are improperly enjoined in this matter.
 7. That the said further amended plaint is misguided, vexatious, frivolous and an abuse of the court's time.
2. The court directed that the preliminary objection be canvassed by way of written submissions. However, as at the time of writing this opinion, only the Plaintiff had complied. In the submissions filed on November 10, 2022 by the Plaintiff's advocates, Mwaure & Mwaure Waihiga Advocates, counsel submitted that by virtue of the definition of a preliminary objection enunciated in Kenya Breweries Limited and another V Keroche Breweries Limited [2020] eKLR the preliminary objection was misconceived for lack of a defence on record.
 3. Counsel added that section 228 of the Companies Act does not provide for striking out of a suit but stay of such a suit. That in any case, the derivative order granted by this court at the time of filing the suit granted leave to the Plaintiff to sustain the suit. That there being no appeal against the derivative order, this court is therefore functus officio.
 4. Counsel further submitted that section 432(2) of the Insolvency Act was couched in similar terms. That it does not provide for a suit to be struck out but that the court can grant leave to proceed with the suit. Counsel argued that the 6th Defendant ought to have filed an application for leave to proceed with the suit other than seeking to dismiss it yet the suit was partially in favour of the 1st Defendant Company.
 5. Counsel added that the 6th ground of objection was misguided since the 6th Defendant was joined in this suit by an order of this court. Further, and on the issue of jurisdiction, counsel argued that the



subject of this suit is performance of a contract particularly on payments thus this court is competently equipped with jurisdiction.

Analysis And Determination

6. I have carefully considered the material presented before Court by the parties and find that the following issues arise for determination: -

1. Whether the objections raised meet the threshold of pure points of law.
2. Whether this court has jurisdiction to hear and determine this suit.
3. Whether the Plaintiff has locus standi to prosecute this suit.

7. The threshold to be applied in preliminary objections is now well settled as was discussed in the case of *Mukbisa Biscuit Manufacturers Ltd vs West End Distributors Ltd [1969] EA* as follows:

' So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'

Newbold, P:

'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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.'

8. It is clear that a Preliminary Objection, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.
9. It is obvious therefore that an objection on jurisdiction is a pure point of law with the capability of disposing of a suit. I say so because where the jurisdiction of a court to hear a dispute before it is challenged, the court must determine that question first, and should it find that it lacks jurisdiction, it should down its tools. See *Owners of the Motor Vessel 'Lillian 'S' -v- Caltex Oil (Kenya) Limited [1989] eKLR*.
10. Similarly, an objection on locus standi rightly raised qualifies as a pure point of law as it was discussed by the Court of Appeal in *Troustik Union International & another v Jane Mbeyu & another [1993] eKLR* to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
11. The final ground raised was that the 1st and 6th Defendants were improperly joined to the suit as there was no cause of action against them. This argument is now stale. Order 1 Rule 9 of



the [Civil Procedure Rules \(2010\)](#) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. I reproduce the same hereunder: -

' No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.'

12. Moreover, the rules on preliminary objection are clear that when preliminary points are raised, they should be capable of disposing the matter summarily. In the circumstances, this ground fails to pass the test.
13. What is left is for this court to interrogate whether the objections on jurisdiction and locus standi are sustainable.
14. The objection on jurisdiction was raised under two limbs. Firstly, that the dispute herein was in relation to environment, use and occupation of land thus within the ambit of the Environment and Land Court as per section 13 of the [Environment and Land Court Act](#), and Article 162 (2) (b) as read with Article 165 (5) (b) of the [Constitution](#) of Kenya. Secondly, that there was no leave of the Court to institute the suit as enunciated under section 228 of the Companies Act, Cap 486 as read with section 432 of the [Insolvency Act](#), 2015.
15. I will first address the former. Jurisdiction is the heart and soul of judicial work. A court cannot legitimately function without it. (Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [supra]. The Constitutional implication of this is that since the Court is vested with authority to exercise on behalf of the people Kenya, the Court can only exercise the limited authority it has been vested with by statute. A court cannot by invention or innovation magnify its jurisdictional reach as it was explained by the Supreme Court in *Samuel Kamau Macharia -v- KCB and Others [2012] eKLR* as follows:

' A Court's jurisdiction flows from either the [Constitution](#) or Legislation or both. Thus a Court 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 the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.'
16. It is important at this point that I lay down the provisions that confers jurisdiction to the two courts, that is, the High Court and the Environment and Land Court.
17. Article 165(5) of the [Constitution](#) of Kenya, 2010 provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).
18. Article 162(2) of the [Constitution](#) provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land. Article 162(3) further provides that Parliament shall determine the jurisdiction and functions of the Courts contemplated in Article 162(2). It was on the basis of this provision that Parliament enacted the Environment and Land Court [ELC] Act, No 19 of 2011, which came into effect on August 30, 2011. The object of the Act is stated as follows:

' An Act of Parliament to give effect to Article 162(2)(b) of the [Constitution](#); to establish a superior court to hear and determine disputes relating to the



environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.'

19. Section 13, the ELC Act provides that: -

- ' 13. 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(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.

20. The jurisdiction of the High Court on the other hand is anchored in Article 165(3) which states: -

' Subject to clause (5), the High Court shall have-

- a) Unlimited original jurisdiction in criminal and civil matters;
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
 - i) The question whether any law is inconsistent with or in contravention of this Constitution;
 - ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.



- iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- iv) A question relating to conflict of laws under Article 191; and
- e) Any other jurisdiction, original or appellate, conferred on it by legislation.'

21. I have perused the amended plaint and defence filed in this suit. It is averred in the amended plaint that the Plaintiff commenced these proceedings having been granted leave to file a derivative suit against the 1st Defendant. That the dispute relates to a contract of sale of land between the 1st Defendant and the 2nd, 3rd and 4th Defendants (the government). According to the Plaintiff, the 1st Defendant agreed to sell to the said Defendants the parcels of land identified as LR 13472/5 and 13472/6 for a consideration of Kshs 108,000,000/-.
22. That out of that sum, the government has since paid the sum of Kshs 13,000,000/- only and has equally taken possession of the said parcels. The reliefs sought by the Plaintiff in the amended plaint are inter alia an order for specific performance to pay the balance of the purchase price, general damages for breach of contract and an alternative order compelling the government to surrender back the land to the 1st Defendant and forfeiture of the paid deposit and a declaration that the government failed to put in use the intended purpose of the land compulsorily acquired.
23. In my considered view, for the Court to determine whether or not to grant the above reliefs, it will have to address itself to matters concerning the validity of the alleged contract of sale, laws relating to compulsory acquisition of land which in the spirit of the foregoing provisions of Article 162 of the *Constitution* of Kenya, 2010 as read with section 13 of the *Environment and Land Court Act*, 2011, these aspects are matters that fall principally within the jurisdiction of the Environment and Land Court.
24. I am persuaded by the reasoning in *Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR* where the court stated as follows:

' 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.'

25. Although the preliminary objection in that case was dismissed for reasons that the contract had evolved to one for provision of construction works hence the high court found to have jurisdiction, the facts in this case are distinctive in nature. The predominant purpose of the alleged contract in the present case was solely the sale and purchase of land. I am therefore convinced that this Court lacks the requisite jurisdiction to entertain this suit. The prayers sought can adequately be considered and granted by the Environment and Land Court as intended by the Constitution.
26. The court in the Owners of the Motor Vessel 'Lillian S' case [supra] stated:

' 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.'
27. Jurisdiction is conferred by law, in particular the Constitution and statutes. With regard to land, the Constitution and the Environment and Land Court Act have conferred jurisdiction to the Environment and Land Court. The High Court has no jurisdiction over matters of which the Environment and Land Court has been conferred with jurisdiction by the said statutes. The High Court cannot and should not confer jurisdiction upon itself over such matters. Having said so, this court will at this point down its tools and take no further steps in these proceedings.
28. The outcome is that the preliminary objection is merited as far as the jurisdiction of this Court is challenged. The matter is therefore dismissed for want of jurisdiction with no order as to costs. File is closed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of: -

1. Mr Githungo holding brief for Mr Korir for the official receiver.

2. Other parties absent.

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S.M. GITHINJI

JUDGE

6.3.2023

