



**Lexo Energy Kenya Limited v Nyanya & 3 others (Commercial Case E011 of 2022) [2023] KEHC 18992 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18992 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE E011 OF 2022  
MS SHARIFF, J  
APRIL 24, 2023**

**BETWEEN**

**LEXO ENERGY KENYA LIMITED ..... PLAINTIFF**

**AND**

**SAMUEL OTIENO NYANYA ..... 1<sup>ST</sup> DEFENDANT**

**PHOEBE ORIDO RAYORI, BETTY MAKOHA OKUTOYI & ERIC ODHIAMBO  
RAYORI SUED AS THE ADMINISTRATORS OF THE ESTATE OF EDWARD  
RAYORI OCHARI ALIAS EDWARD RAYORI OCHOR ..... 2<sup>ND</sup> DEFENDANT**

**PHOEBE ORIDO RAYORI ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a plaint dated 25.10.2022, the Plaintiff herein sought the following orders against the defendants jointly and severally.
  - a. A declaration to the effect that the proceedings conducted by the Chief Magistrate's Court in Succession Cause No. 787 of 2016 resulting in the order issued on 23<sup>rd</sup> August 2022 whose effect was to inter alia nullify the lease and charge registered over all that parcel of land known as Kisumu/Kanyakwar 'A' 112 offends the rules of natural Justice and is therefore illegal, null and void only in so far as nullification of the lease and charge in favour of the Plaintiffs are concerned.
  - b. Order of permanent injunction to issue restraining the Defendants or either of them, either in their own capacity or as representatives of the estate of Edward Royari Ochar alias Edward Royari Ochor from cancellation, terminating the registered lease and charge and or in any manner whatsoever interfering with the plaintiff's possession and operation of the leased



property known as Kisumu/Kanyakwar 'A' 112 for the remainder of the fixed fifteen years lease term.

- c. An order directing the 4<sup>th</sup> Defendant to reinstate the lease and charge over the leased property known as (sic) Kisumu/Kanyakwar 'A' 112 if the same would have been cancelled pursuant to the court order issued in Chief Magistrates Court Succession Cause No. 787 of 2016 on 23<sup>rd</sup> August 2022.
  - d. The defendants be ordered to pay costs of this suit.
2. The plaintiff simultaneously filed a notice of motion for injunction orders against the defendants to restrain them from interfering with its quiet possession of parcel No. Kisumu/Kanyakwar 'A' 112 and its operations therein. The Court granted the plaintiff interim orders when the matter came up for inter parte hearing of the plaintiff's said application.
  3. The Plaintiff's suit has been resisted by the defendants who have filed their respective defences with the 3<sup>rd</sup> defendant filing a notice of preliminary objection to the plaintiff's suit on grounds on want of Jurisdiction of this court to entertain this suit.
  4. The preliminary objection has been canvassed by way of written submissions. The 3<sup>rd</sup> Defendant posits that the plaintiff's suit falls within the ambit of the Environment and Land Court, and Probate court and that this court lacks the subject matter jurisdiction to hear and determine this case.
  5. The plaintiff on its part maintains that this suit is purely a commercial one wherefore this court has the requisite Jurisdiction to entertain it.

### **Analysis and Determination**

6. The Plaintiff has in its first prayer sought for declaratory orders invalidating the proceedings by the Chief Magistrates Court in Succession Cause No. 787 of 2016 wherein the probate court nullified the registration of the 1<sup>st</sup> defendant as the proprietor of Parcel No. Kisumu/Kanyakwar 'A' 112 and all leases and charges registered against that property. That prayer presupposes that this court is exercising either a judicial review Jurisdiction or an appellate probate Jurisdiction or an Environment and Land court jurisdiction yet from the intitution of this suit and the stand point of the plaintiff this is a purely commercial case.
7. The Plaintiff is also craving injunction orders so as to maintain possession of the suit property and reinstatement of the lease and charge in the event that the same were cancelled. I have searched high and low in the plaintiff's pleadings and I am yet to encounter a prayer of a commercial nature. I do find that indeed this suit falls under the purview of the Environment and Land Court as established under article 162 (2) (b) of *the Constitution* of Kenya 2010 which provides verbatim that:-  
  
"Parliament shall establish courts with the status of the High court to hear and determine disputes relating to
  - a) ....
  - b) The environment and the use and occupation of and title to land."
8. The preamble to the *Environment and Land Court Act* No. 19 of 2011 defines the said Act as:  
  
"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 or connected purposes.”

It is not permissible to the plaintiff to purport to challenge a Judgment of a probate court by invoking the Commercial Jurisdiction of this court. It is trite law that Jurisdiction flows from either the Constitution or statute and this court cannot assign itself Jurisdiction.

9. Article 165 (3) (b) of the Constitution of Kenya 2020 expressly provide that the High Court shall not have Jurisdiction over matters falling within the Jurisdiction of the Courts contemplated in article 162 (2), which are the Employment and Labour Relations Court and the Environment and Land Court.
10. Whereas the Plaintiff is seeking for declaratory orders on violation of its rights, it has not invoked this court’s constitutional or Judicial review Jurisdictions.
11. The court is guided by the holding in the case of Motor vessel M. v. Lillian S vs Caltex Oil (Kenya Limited) (1989) KLR, page 10 where the Court of Appeal rendered itself as follows:-

“Jurisdiction must be acquired before Judgment. It is for this reason that a question of Jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited... the moment the court determines that it has no Jurisdiction it has to down its tools and proceed no further”.
12. On the balance I do find that this court does not have Jurisdiction to entertain this suit wherefore the 3<sup>rd</sup> defendant’s preliminary objection is sustained and this suit is struck out with costs to the 3<sup>rd</sup> defendant.
13. It is hereby so ordered.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL 2023**

**MWANAISHA S. SHARIFF**

**JUDGE**

**In the presence of:**

Mr. Koech holding brief for Mr. Maundo for the Plaintiff

Ms. Omondi for 3<sup>rd</sup> Defendant

N/A for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

