



**Ndegwa v Mwaura & another (Civil Case E248 of 2022)
[2023] KEHC 21715 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 21715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E248 OF 2022

AA VISRAM, J

APRIL 20, 2023

BETWEEN

JAMES KIGATHI NDEGWA PLAINTIFF

AND

SIMON NDUNGU MWAURA 1ST DEFENDANT

CLEMENT KIRUBI MWAURA 2ND DEFENDANT

RULING

1. A notice of preliminary objection (P.O.) dated February 21, 2023 was filed by the 2nd defendant/applicant herein. It was premised on the following legal grounds:
 - i. That this honourable court has no jurisdiction to hear and determine the suit, as the subject matter and the main prayers therein relates to a dispute on land reference No. Muguga/Muguga/385 and the same ought to be heard and determined by the Environmental and Land Court in accordance with the provisions of article 162(2)(b) of the Constitution.
 - ii. That this Honorable court has no geographical jurisdiction to hear and determine this suit as the suit land is situated within Kiambu County and in accordance with the provisions of Section 12 of the *Civil Procedure Act*, the right forum is the Environmental and Land Court Thika, Kiambu County.
 - iii. That in accordance with the provisions of sections 11 of the *Civil Procedure Act*, this suit ought to be heard and determined by the court of the lowest grade and since the amount being claimed by the plaintiff as an alternate prayer is Kshs. 9, 201,000/=, the best court with the pecuniary jurisdiction is the Chief Magistrate Court at Kiambu. This court does therefore have the pecuniary jurisdiction to hear and determine this matter.



2. This court gave directions that the preliminary objection be dispensed by way of written submissions.
3. On the first ground, the 2nd defendant submitted that the suit touches on a dispute involving land parcel No. Muguga/Muguga/3835 and that the dispute relates to the question of whether or not the 2nd defendant willingly executed a transfer in favour of the plaintiff.
4. The 2nd defendant further submitted that the plaintiff had attached a ruling from the Kiambu Chief Magistrate's Court which shows that the present matter ought to be determined by the Environmental and Land Court in accordance with article 162(2)(b) of the Constitution.
5. On the ground of geographical jurisdiction, the 2nd defendant submitted that the Kiambu Law Court is the appropriate court because the land in question is located within Kiambu County. Counsel cited section 12 of the *Civil Procedure Act* in support of the above argument and argued that an action ought to be filed at the location where the subject matter is placed.
6. On the third ground, the 2nd defendant submitted section 11 of the *Civil Procedure Act* provides that a case should be heard and decided by the court of the lowest grade. Because the plaintiff had prayed for the sum of Kshs. 9,201,000/= in his plaint, the Magistrate Court in Kiambu had requisite jurisdiction, and ought to hear this case.
7. The 1st defendant and the plaintiff opposed the Preliminary Objection. In summary, they relied on the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017)eKLR and the High Court decision in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* (2021) eKLR in support of their submission that a suit for recovery of debt secured by a charge is a commercial matter, and falls within the jurisdiction of the High Court.
8. The respondents submitted that the issue in dispute arose out of an agreement for a loan dated May 19, 2018. The terms of the said agreement created an unregistered charge over the land LR No. Muguga/Muguga/3835 providing the plaintiff with an interest in the land in order to secure repayment of the loan. Accordingly, the plaintiff submitted that the court ought to apply the 'Predominant Purpose Test' to determine the real issue before the court when considering the question of jurisdiction.
9. In support of the above argument, the plaintiff relied on the decision of the High Court in *Suzanne Butler & 4 others v Redhill Investment & another* (2016) 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 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.”
10. The plaintiff submitted that according to section 13(2)(d) of the ELC Act, an unregistered charge is recognized as a contract; therefore, the agreement dated May 19, 2018, is not an agreement for the sale of land. He submitted, that if the defendants repay the loan, the dispute will be resolved, and the 2nd defendant will continue to own the land.



11. Further to the above, the plaintiff relied on the decision of the High Court in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* (2021) eKLR, where the court stated as follows:

“it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money’s worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that the chargee was assured of the repayment of the money he had advanced the chargor.”

12. On the ground relating to the place of suing, the plaintiff submitted that according to the Civil Procedure Rules, the plaintiff may choose to file the lawsuit where the claim was made or where the defendant resides and conducts his business. Here, the claim was made in Nairobi and the 1st defendant lives and conducts his business in Nairobi. This has not been denied by the 1st defendant.
13. On the ground relating to monetary jurisdiction, the plaintiff submitted that because the amount claimed is Kshs. 9,201,000/=, the Chief Magistrate’s court has concurrent jurisdiction. Accordingly, this court has discretion under section 18 of the *Civil Procedure Act* to either hear or transfer the same to the lower court.

Analysis and determination

14. I have considered the preliminary objection and the submissions by counsel together with the relevant law and authorities cited. The issue for determination is whether this court has jurisdiction to hear and determine this case?
15. An objection on the ground that a court has no jurisdiction is ordinarily a pure point of law subject to the test in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court held as follows:

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to 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”

At page 701 Sir Charles Newbold, P added:

“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.” (emphasis mine)

16. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
17. Here, the key ground of the Preliminary Objection is about the jurisdiction of this court to entertain the dispute. The question is whether the dispute falls outside this court’s jurisdictional purview as donated by article 165 of the *Constitution*, and within the purview of the Environmental and Land



Court (ELC) as donated by article 162 of the Constitution and section 13 of the Environment and Land Court Act.

18. Article 162 (2) (b) of the Constitution. Article 162 of the Constitution provides thus:

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a) employment and labour relations; and
 - b) the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

19. Similarly, section 13 (1) and (2) of the Environment and Land Court Act confers jurisdiction on the ELC court to adjudicate all disputes relating to land. It provides thus:

Jurisdiction of the court

- 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 land administration and management;
 - c) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - d) any other dispute relating to environment and land

20. Having considered the law as stated above, and looking at the pleadings, in particular, the plaint, I am persuaded that this is a commercial dispute rather than a land-based dispute. I say this because the suit relates to a loan agreement between the parties, rather than the various issues envisaged under section 13 of the Environmental and Land Court Act as set out above.

21. Based on the decision of the Court of Appeal in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (2017) eKLR, I am satisfied that the 'Predominant Purpose' of the said agreement



is commercial in nature, and falls within the High Court’s jurisdiction, which is unlimited original jurisdiction in civil matters as donated by article 165 (3) (a) of *the Constitution*.

22. Having found that this court has jurisdiction to hear the present dispute, the Preliminary Objection accordingly fails. That however, is not the end of the matter. The question remains as to which court ought to hear and determine this case.

23. Section 11 of the *Civil Procedure Act* provides:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.

24. Further to the above, section 18(1) *Civil Procedure Act* provides:

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as has desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same;”

25. The principle is clear, a suit ought to be filed in the lowest court of competent jurisdiction. The present matter is not an exception. Because the value of the subject matter is below Kshs. 20 million, being the upper limit of pecuniary jurisdiction in the Chief Magistrate’s Court, the same ought to be heard and determined by that court.

26. The upshot of the above is that the Preliminary Objection fails. The orders of this court are as follows:

- a. This suit is hereby transferred to the Chief Magistrates Court (Milimani Commercial Court, Nairobi) for hearing and determination.



- b. The matter shall be mentioned before the Chief Magistrate for allocation and further directions.
- c. Costs shall be in the cause.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023

ALEEM VISRAM

JUDGE

