



Njuguna Kahari and Kiai & Company Advocates v Gacanja (Miscellaneous Civil Application E311 of 2022) [2023] KEHC 19222 (KLR) (Civ) (19 April 2023) (Ruling)

Neutral citation: [2023] KEHC 19222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E311 OF 2022
DO CHEPKWONY, J
APRIL 19, 2023**

BETWEEN

NJUGUNA KAHARI AND KIAI & COMPANY ADVOCATES APPLICANT

AND

WILSON GACANJA RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated May 31, 2022 and the Respondent's Notice of Preliminary objection dated June 30, 2022, filed in response to the Notice of Motion.
2. The application is brought pursuant to the provisions of Section 45 of the *Advocates Act* seeking for the following Orders;
 - a. Spent;
 - b. THAT Judgment be entered for the Applicants in the sum of Kenya Shillings One Hundred and Eighty Million (Kshs 180,000,000/=) only being the agreed legal fees.
 - c. THAT this Honourable Court be pleased to grant any further orders it deems fit.
 - d. THAT the cost of this application be provided for.



3. The application is premised on the following grounds;
 - a. THAT the Applicants and Respondent entered into an agreement for payment of legal fees on September 10, 2021 for the sum of Kshs 180,000,000/=.
 - b. THAT it is mandatory under the law that judgment be entered before a decree is issued.
 - c. THAT it is in the interest of justice that the orders sought be granted.
 - d. THAT this Honourable court has powers to grant the orders sought.
4. The Respondent filed a Replying Affidavit in opposition of the prayers being sought. The crux of the Respondent's Notice of Preliminary Objection dated June 30, 2022 in opposition to the Applicant's application is that;
 - a. This Honourable Court lack jurisdiction to entertain this matter as the subject matter is sale and transfer of land whose jurisdiction by the *Constitution*, 2010 and by statute expressly and exclusively vested in the Environment and Land Court in Nakuru.
 - b. The parties by a written deed compromised the entirety of the Applicants' cause of action through adequate and valuable consideration, to wit transfer of 45 acres in LR No 19184/6 situate in Naivasha.
 - c. The parties by a written deed agreed to extinguish any and all of the Applicants' claims by the transfer of the land in No (b) above and no cause of action is therefore disclosed in the proceedings.
 - d. The parties by written deed agreed for the enforcement of their agreement to be the sale and transfer of land and not payment of money.
5. On July 19, 2022, parties agreed to canvass both the application and the Notice of Preliminary Objection by way of written submissions. Both parties complied with the directions and filed their respective written submissions. The Applicants' submissions are dated July 22, 2022, while the Respondent filed two sets of submissions dated July 7, 2022 and July 18, 2022.
6. On January 26, 2023, parties appeared before the court and highlighted their respective written submissions.
7. I have read through both the Notice of Motion application and the Notice of Preliminary Objection, the written submissions in support and in opposition, the cited authorities and the oral submissions during the hearing. All the arguments will be considered in my final analysis and determination of this matter.

Analysis and determination

8. This Court has considered the pleadings, the affidavits filed, the written submissions and the authorities relied upon in support and in opposition to the application and the Notice of Preliminary Objection. The Respondent's Notice of Preliminary Objection is to the effect that this court has no jurisdiction to entertain the current suit, hence to be determined first.



9. Preliminary Objection was discussed in the case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors [1969]EA 696*, where the Court observed that;

' A Preliminary Objection consists of a 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 objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration'.

10. Further, Sir Charles Newbold, P went on to state therein that:-

' 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 the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and on occasion, confuse the issue and this improper practice should stop'.

11. Having laid down what amounts to a Preliminary Objection, the Court finds the following as being the issues relevant for determination in this particular matter;

- a. Whether the Preliminary Objection raised is merited.
- b. Whether the Applicant has properly moved this court.

12. The Respondent's Notice of Preliminary Objection relates to jurisdiction which in this Court's view is a point of law, which if dealt with, can dispose of this matter.

13. The leading authority on jurisdiction is the Court of Appeal decision of *Owners of Motor Vessel 'Lillian S' –vs- Caltex Oil (K) Ltd (1989) KLR 1*, where (Nyarangi, JA) held as follows;

' 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 down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

14. In his Preliminary Objection, the Respondent has argued that this Court has no jurisdiction for the reasons that parties entered into a Deed of Settlement whose terms are that the Applicant agreed take 45 acres of land in LR No 19184/6 in lieu of legal fees.

15. Jurisdiction of court emanates from either the Constitution or an Act of Parliament or both. No court can confer or assume jurisdiction on its own.

16. Article 162(2) (b) of the Constitution establishes the Environment and Land Court. It provides 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.'



17. In compliance with the Constitution, Parliament enacted the Environment and Land Court Act, 2011 with jurisdiction to adjudicate disputes relating to land. Section 13 (1) and (2) thereof provides that:-
1. The court shall have original jurisdiction 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 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.'
18. Parties in this matter entered into a Deed of Settlement of legal fees which is very clear on its terms and this court has no authority to rewrite the terms of a contract between the parties. Clause (iii) of the Deed states that:-
- ' THAT in lieu of the outstanding fees, the Firm of Njuguna, Kahari & Kiai Advocates has agreed to take 45 acres of land in LR No 19184/6 situate in Naivasha as full and final settlement of all the outstanding fees at the date of this Deed of settlement.'
19. Further Clause (iv) states that:-
- ' THAT upon transfer and registration of the said 45 acres in favour of the Advocates, the Client shall be fully discharged from all financial obligations relating to the above matter.'
20. A reading of the said terms in the Deed of settlement, clearly relate to a contract between the parties with regard to outstanding fees, which was to be settled by transfer of 4.5 acres of land in favour of the Advocates. This clearly falls under the purview of Section 13(2) of the Environment and Land Court Act, 2011 .
21. In light of the provisions of Article 162 of the Constitution and Section 13 of the Environment and Land Court Act, this Court agrees with the Respondent's argument that it lacks jurisdiction to hear and determine this matter. Consequently, it is its view that it is not clothed with jurisdiction to entertain this suit.



Whether the Applicant has properly moved this court

22. The Applicant has moved this court by way of a Notice of Motion application. Order 3 Rule 1 of the [Civil Procedure Rules, 2010](#) provides that:-
- ' Every suit shall be instituted by way of a Plaint or in such a manner that may be prescribed.'
23. Further, Section 19 of the [Civil Procedure Act](#) provides that:-
- ' Every suit shall be instituted in such manner as may be prescribed by the rules.'
24. The modes of commencing a suit as per the Rules are a Plaint, Petition or an Originating Summons. Nowhere in our rules is it provided that a Notice of Motion is legally recognized as an originating process. It can however be filed within a properly instituted suit.
25. In the case of [Norah Ndunge Henry & Another -vs- Abednego Mutisya & Another \[2022\]eKLR](#),
- ' As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A Notice of Motion is not legally recognised as an originating process. A Notice of Motion can only be within a properly instituted suit.'
26. It is worth noting that even if this court had proper jurisdiction, the application could still have failed for being fatally defective as it offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules sine the Applicant has not moved this court in a recognized manner and Article 159 (2) (d) of the [Constitution](#) cannot aid the Applicant as there is no suit before court for the reasons stated above.
27. The upshot of the going is that the Notice of Preliminary Objection is merited and the same is hereby upheld. The Applicant's application dated May 31, 2022 is thus struck out with costs to the Respondent.
28. It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...19TH ... DAY OF ...APRIL... 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mrs. Wambugu counsel for Applicant

Mr. Omondi counsel for the Respondent

Court Assistant - Sakina

