



**Republic v Uasin Gishu District Land Disputes Tribunal & another;
Kemboi (Interested Party); Keino (Exparte Applicant) (Judicial Review
Application 14 of 2019) [2023] KEHC 18920 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
JUDICIAL REVIEW APPLICATION 14 OF 2019**

JRA WANANDA, J

JUNE 16, 2023

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

**UASIN GISHU DISTRICT LAND DISPUTES TRIBUNAL 1ST RESPONDENT
CHIEF MAGISTRATE, ELDORET LAW COURTS 2ND RESPONDENT**

AND

KIPKOROM KEMBOI INTERESTED PARTY

AND

HEZEKIAH KIPCHOGE KEINO EXPARTE APPLICANT

RULING

1. Before the Court is a Preliminary Objection against an Application seeking to reinstate this suit which suit had earlier been dismissed for want of prosecution.
2. The Application being challenged is the ex Parte Applicant’s Notice of Motion dated 20/04/2021 filed through Messrs Ochieng, Onyango, Kibet & Ohaga Advocates. The Application seeks the following orders:
 - i. [Spent]
 - ii. [Spent]



- iii. The Court be pleased to set aside the orders issued by the Honourable Justice J. Mativo on 7th July 2015 by which he dismissed this Judicial Review Cause for want of prosecution.
 - iv. Consequent upon the grant of prayer Number 3 above, the Court be pleased to issue such other and/or further directions for the expeditious hearing of this Judicial Review Cause, including the substitution of the interested party to these proceedings, on its merits.
 - v. The costs of this Application be in the main Cause.
3. The grounds of the Application as read with the Supporting Affidavit are basically that the ex parte Applicant only learnt of the dismissal of the suit in April 2021, he was never given any notice in writing by the Court prior to dismissal, he was not therefore afforded an opportunity to show Cause why the suit should not be dismissed, he was in effect condemned unheard contrary to the rules of natural justice, he has a justiciable cause of action which is based on a long standing land dispute and that several factors contributed to the delay in the conclusion of this Cause.
 4. In opposition to the Application, the Hon. Attorney General, acting for the 1st and 2nd Respondents, filed the Grounds of Opposition dated 9/07/2021.
 5. On his part, the Interested Party, through his Advocates, Messrs Kenei & Associates filed Grounds of Opposition also dated 9/07/2021 together with a Notice of Preliminary Objection of the same date. The Objection was premised as follows:

“ This Honourable Court lacks the requisite subject matter jurisdiction to hear and determine the Motion and or take any further proceedings in the matter.
 6. It was then directed that the Preliminary Objection be disposed of first and the same be canvassed by way of written submissions. Pursuant thereto, the Interested Party filed his Submissions on 5/07/2022 and the ex parte Applicant filed his on 15/07/2022.
 7. Ms Tigoi, from the office of the Attorney General informed the Court that the 1st and 2nd Respondents associate themselves with the Interested Party’s Submissions and would not therefore be filing independent Submissions on the Preliminary Objection.

Interested Party’s Submissions

8. Counsel for the Interested Party submitted that the suit has a long history, it concerns ownership and title to the parcel of land known as L.R. No. Cheptiret/Cheplaskei Block 4(Saruiyot)/45, the matter was lodged by the ex parte Applicant in the year 2007 seeking to challenge the Interested Party’s right over the said property, the matter was later transferred from Nairobi to Eldoret in the year 2009, the ex parte Applicant failed to prosecute the matter for a period of 8 years or thereabouts, the Court in its discretion dismissed the suit on 7/07/2015 for want of prosecution, the present Application was lodged before this Court way after establishment and operationalization of the Environment and Land Court, this begs the question: is the High Court vested with the requisite jurisdiction to entertain an Application filed in a matter concerning ownership and title to land, the Interested Party is challenging the jurisdiction of this Court to entertain the Application.
9. Counsel cited the case of Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696 in defining what constitutes a preliminary objection, he submitted that that the Preliminary Objection is challenging the jurisdiction of this Court with respect to land related disputes which he argued are a preserve of the Environment and Land Court as envisaged under Article 162 of the Constitution as read together with Section 13 of the Environment and Land Court Act 2012. He



added that Section 4 of the Environment and Land Act establishes the Environment and Land Court as envisaged under Article 162 of the Constitution of Kenya, Section 2 and 150 of the Land Act 2012 stipulates that disputes under the said Act shall be referred to the Environment and Land Court, the same position is espoused at Section 2 and 101 of the Land Registration Act 2012.

10. Counsel submitted that looking at the parameters of the jurisdiction of the Environment and Land Court, the dispute falls squarely within the jurisdiction of that Court, the substratum of the suit is claim over ownership and title to a parcel of land, the present Application is not a separate claim but part and parcel of this instant suit, the Applicant might mistakenly seek refuge in the transition provision envisaged under Article 262 of the Constitution hoping it offers him a lifeline in the Application, unfortunately, this refuge is not available for him, Clause 22 of the 6th Schedule to the Constitution refers to matters that are pending before a Court of law, a Ruling was rendered in the instant matter dismissing this matter on 7/07/2015 hence the same was not pending before this Court at the time of filing of the present Application, the Applicant is trying to revive a matter that was closed way back in time hence this Court cannot entertain it, a matter upon which a Judgment has already been determined and has not been reopened cannot be deemed as pending, equally Section 30 of the Environment and Land Court Act 2011 does not offer a lifeline to the Applicant, the provision only vested jurisdiction upon this Court pending the establishment of the Environment and Land Court, upon the establishment of the said Court, this Court was automatically divested of jurisdiction on land matters, this Court cannot claw into the jurisdiction of the specialized Court, any land dispute pending before this Court could only be transferred to the Environment and Land Court as envisaged by law, to do otherwise would be to create parallel judicial systems which could cause a confusion. He cited the now famous Supreme Court of Kenya case of *Republic v Karisa Chengo & 2 Others* [2017] and also the Court of Appeal case of *Lawrence Musango Oketch & 2 Others V Karen Enterprises Limited* [2019] eKLR.
11. Counsel urged the Court to find that it lacks jurisdiction and dismiss the Application with costs to the Interested Party. On jurisdiction, he cited the Court of Appeal locus classicus case of *Owners of the Motor Vessel "Lilian s" v Caltex Oil (Kenya) Ltd* KLR1 and added that costs follow the event. He also cited the case of *Oduor Anode vs Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009 [2012] eKLR.

Ex-parte Applicant's Submissions

12. Counsel for the Ex-parte Applicant submitted that on 3/09/2007 the Applicant sought and was granted leave to institute Judicial Review proceedings to bring into Court the decision of the 1st Respondent for the purposes of being quashed, the Court, then sitting in Nairobi, granted the said leave, the suit was subsequently transferred to the High Court in Eldoret in whose jurisdiction the subject matter was situate, at the time when the proceedings were commenced, the Environment and Land Court had not been established, the said Court is a creature of Article 162(2)(b) of the Constitution of Kenya 2010, the Environment and Land Court No. 19 of 2011 which established the Environment and Land Court as a superior Court to hear and determine disputes relating to the environment and the use and occupation of and title to land came to force on 30/11/2011, the contention that these proceedings ought to have been filed before the Environment and Land Court are totally misplaced, these proceedings predated the establishment of the Environment and Land Court and were lodged in the High Court in the Court's proper exercise of its jurisdiction under the provisions of Order 53 of the Civil Procedure Rules, the present Application was made with the view of setting aside the orders of dismissal issued on 7/07/2015, at the moment there exists no suit that can be dismissed or transferred as the suit herein was dismissed, until the Application for reinstatement of



the dismissed suit has been heard and granted, the contention regarding any want of jurisdiction by the Interested Party remains premature.

13. According to Counsel, the Court needs to address the subject of the Motion of reinstating the dismissed suit by examining the grounds upon which the same has been brought, the Application is properly before this Court, if and when after the hearing of the Application the Court reinstates the same as sought, the Court has the liberty to then transfer the reinstated suit to the Environment and Land Court for hearing.
14. Counsel submitted that in any event, under Section 30 of the Environment and Land Act on transitional provisions, this Court still has the requisite jurisdiction to hear and determine this matter even after it reinstates it as the same was instituted under the provisions of Order 53 of the Civil Procedure Rules, the said provisions have not been abrogated, they remain in our Statute as the binding and substantive provisions of the law governing the High Court's jurisdiction to entertain judicial review applications.
15. He further submitted that the Preliminary Objection is misconceived as it does not advance the overriding objectives of the jurisdiction of this Court as it has unduly resulted into the wastage of this Court's time and occasioned parties' unnecessary expense.

Issues for Determination

16. I have considered the Preliminary Objection, the Application, Submissions presented and other Pleadings filed herein. In my view, the issue that arises for determination in the present case is "whether this Court can, despite the existence of the Environment and Land Court, proceed to hear and determine the Application seeking the reinstatement of this suit".
17. It would be important to first outline what constitutes a Preliminary Objection in our jurisprudence. It is worth noting that the Objection, if allowed, may dispose of the entire Application without giving the Applicant the opportunity to be heard substantively. Therefore, the same has to be handled with the caution that ordinarily, the Court has a duty to hear and determine matters on merit.
18. The definition of a Preliminary Objection was well set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 (Supra)* 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 objection 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."
19. In respect of jurisdiction, the Supreme Court in *Samuel Kamau Macharia vs. KCB and Others [2012] eKLR* has held 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."
20. The present objection challenges the jurisdiction of this Court. The Interested Party contends that this Court is divested of jurisdiction in view of Article 162(2)(b) of the Constitution of Kenya 2010



and Section 13 of the Environment and Land Court Act, 2011. Indeed, in the celebrated case of *The Owners of the Motor Vessel "Lillian's" -V- Caltex Oil Kenya Ltd* [1989] KLR 1, Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

21. Since the jurisdiction of this Court is being challenged, the Court is obligated to establish whether it has jurisdiction in this matter or not. The pertinent issue for determination is whether the present Application is properly before this Court. To understand the basis of the objection, it is worth noting the genesis of the matter.
22. On 3/09/2007 the Applicant filed Miscellaneous Civil Application No. 983 of 2007 at the High Court in Nairobi, sought and obtained leave to institute Judicial Review proceedings herein. The suit was later transferred to this High Court in Eldoret and was assigned the present case number. The matter was however subsequently on 7/07/2015 dismissed for want of prosecution vide the orders made by Hon. Justice Mativo, The Applicant now seeks to reinstate the suit.
23. In respect to the issue of separation of jurisdiction, the Constitution of Kenya establishes the Environment and Land Court and clothes it with jurisdiction in Articles 162(2)(b) as follows:
 162.
 - (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.
24. In regard to the High Court, the Constitution under Article 165(3)(a) provides as follows:
 - (3) Subject to clause (5), the High Court shall have—
 - (a) Unlimited original jurisdiction in criminal and civil matters;
25. On the other hand, Article 165(5) 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).”
26. In the discharge of the mandatory obligation placed on it by the Constitution, Parliament then enacted the Environment and Land Court Act and set out in detail, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the Court as follows:
 - 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 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 interest in land; and
 - e) any other dispute relating to environment and land.
- 3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.
- 4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court
- 5) Deleted by Act No. 12 of 2012
- 6) Deleted by Act No. 12 of 2012
- 7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
- a) interim or permanent preservation orders including injunctions;
 - b) prerogative orders;
 - c) award of damages;
 - d) compensation;
 - e) specific performance;
 - f) restitution; or
 - g) declaration; or
 - h) costs”

27. From the foregoing, it cannot be in doubt that the substantive dispute in this suit is outside the jurisdiction of this Court. In my view, the substantive dispute belongs to the Environment and Land Court. At the moment however, there is no suit to be heard by the Environment and Land Court since the same was dismissed by this Court for want of prosecution. Does this therefore mean that this Court cannot even hear the Application for reinstatement despite the order for dismissal having been made by this Court?

28. The complication in this matter caused by the fact that at the time when the proceedings were commenced in the year 2007 in Nairobi and later transferred to this Court at Eldoret in the year 2009, the Environment and Land Court had not yet been established. The suit was therefore properly before the High Court. The Environment and Land Court subsequently came into force in the year 2011. At that point, the suit could still have been transferred to the Environment and Land Court but that step does not seem to have been pursued. In a twist of events, the suit was thereafter in the



year 2015 dismissed for want of prosecution. The ex parte Applicant has now returned to this High Court with an Application seeking reinstatement of the suit. Considering that the substantive dispute clearly falls under the jurisdiction of the Environment and Land Court, does this Court still possess the jurisdiction to hear and determine the Application for reinstatement?

29. Upon considering the matter, I appreciate that the present Application was brought for the sole purpose of reinstating this dismissed suit and nothing more. I agree with the ex parte Applicant's position that at this stage, since the suit was dismissed by this Court, there exists no suit that can be struck out, dismissed or transferred to the Environment and Land Court. My view is that the issue of jurisdiction can only arise if and when the Application is heard and determined and if the Court then allows it and reinstates the dismissed suit. At this stage, the issue of want of jurisdiction is premature. I therefore find that at this stage, the Application is properly before this Court. If and when after the hearing of the Application, the Court reinstates the suit, the Court will at that point in time have the liberty to perhaps then transfer it to the Environment and Land Court for disposal.
30. In any event, the order of dismissal having been made by this Court, only this Court or an Appellate Court can have the jurisdiction to set it aside. It will be absurd to argue that the Applicant should go move to the Environment and Land Court for hearing and determination of the Application when the order of dismissal never emanated from that Court in the first place. Similarly, it will be unreasonable to ask the Applicant to file a fresh suit at the Environment and Land Court since such action will no doubt be met with a flurry of legal objections, particularly on the issue of limitation of time. Declining to entertain the Application will therefore be technically to leave the Applicant without a remedy and block his Constitutionally guaranteed right of access to justice. I therefore find that the issue of jurisdiction will and can only crystallize if and when the suit is reinstated.
31. In the end I do not find the Preliminary Objection to be meritorious. Accordingly, I overrule it.

Final Orders

32. In the premises, I order as follows:
- i. The Interested Party's Preliminary Objection dated 9/07/2021 is hereby dismissed.
 - ii. Costs of the Preliminary Objection shall be in the Cause.
 - iii. The ex Parte Applicant shall now move expeditiously prosecute its substantive Notice of Motion dated 20/04/2021

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

