



REPUBLIC OF KENYA



**Mohamedali v I &M Bank Limited & 2 others (Civil Suit  
93 of 2023) [2023] KEHC 21069 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 93 OF 2023  
DKN MAGARE, J  
JULY 13, 2023**

**BETWEEN**

**NAJMUDIN NOORALI MOHAMEDALI ..... PLAINTIFF**

**AND**

**I &M BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**BAMOTO DISTRIBUTORS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. After making a ruling in the morning, I started settling the issues in this matter. I noted that there is a suit between the plaintiff and third plaintiff filed in ELC No. E 003 of 2021.
2. The statutory power of sale has already been exercised. The plaintiff amended the plaint. The subject matter, being Mombasa/block XV/47(Go down No.1) has been sold and transferred to the 3<sup>rd</sup> defendant. There is no dispute over the securities.
3. The orders sought are: -
  - a. An injunction restraining transfer of the suit land.
  - b. Declaration that the sale was premature and contrary to orders given in Mombasa High Court CC no E 011 of 2022.
  - c. Transfer To the 3<sup>rd</sup> defendant of the suit land was illegal, null and void.
  - d. Cancellation of title and reverting to the Plaintiff.
4. There is a challenge over the said title in the ELC court. Exercise of the statutory power of sale, the dispute reverted to be a land matter. The dispute is thus over number Mombasa block XV go down No.



1, which is in the name of the 3<sup>rd</sup> defendant. Regarding prayers related to HCCC E 011 of 2020, those are disputes on obeying orders or execution of those orders. Under section 34 of the [Civil Procedure Rules](#), this court cannot engage in orders being handled in another matter. The section provides as doth: -

“

“ 34. Questions to be determined by court executing decree

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

5. Therefore, this court cannot handle prayer b of the amended plaint. The remainder of the payers are land court matters. This is because the sale had already taken place through the exercise of the statutory power of sale. The plaintiff and the 3<sup>rd</sup> defendant are dueling in ELC over possession.
6. The orders sought herein are not related to securities. A dispute over land should be dealt with in a different court under article 162(2) of the [Constitution](#). As held in held in the case of in [Mohamed Ali Baadi and others v Attorney General & 11 others](#) [2018] eKLR, the court stated as doth: -

“ 100. The Supreme Court in *Republic v Karisa Chengo & 2 others*<sup>[47]</sup> amplified and pertinently held that each of the Superior Courts established by or under the [Constitution](#) has jurisdiction only over matters exclusively reserved to it by the [Constitution](#) or by a statute as permitted by the [Constitution](#). The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status Courts under article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case.

7. The court continued that in cases of maze issues or denial of rights, then the high court has jurisdiction as well as the courts of equal status, the court stated: -

“ 103. After a wide-ranging analysis and consideration of the applicable provisions of the [Constitution](#) and in particular, articles 165(3), 162(2) and (3), and



section 13 of the *Environment and Land Court Act*, and the amendments thereto, the five Judge Bench of the High Court held as follows: –

In its strict sense the “jurisdiction” of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the *Constitution* or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by the *Constitution*. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the *Constitution*. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the *Constitution* further confirmed that the High Court’s jurisdiction could be extended further pursuant to any statutory provision. For example, the *Judicature Act* which conferred the specialized admiralty jurisdiction. The *Constitution* however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the *Constitution* nor the ELC Act limited the High Court’s jurisdiction in that respect ....

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner’s constituents.

8. In *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR,

“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.”



9. Jurisdiction is the authority to decide therefore, where the Court has jurisdiction it must take, jurisdiction while where it has no jurisdiction it must down its tools. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA (as then he was) stated as doth: -

“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 a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

10. The Supreme Court has had an opportunity in numerous occasions and it has never squandered such to clarify the extent of jurisdiction of this Court and Courts of equal status. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the supreme court posited as doth: -

“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from article 165(5) of the *Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in article 162(2).”

11. *In Re-Interim Election Commission* Petition No. 2 of 2011, the Supreme Court rendered itself as doth: -

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard



is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“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.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.

12. The supreme court succinctly continued to require, nay demand that the *Constitution* be interpreted in Manner that promotes the rule of law and holistic interpretation of the *Constitution*. In the case of *in the Matter of Interim Independent Electoral Commission* [2011] eKLR. The supreme court posited as doth: -

[86] In common with other final Courts in The Commonwealth, Kenya’s Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). the *Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. the *Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

13. In *S.K Macharia v KCB*, the Supreme Court, the Court was particular that there must be jurisdiction and the same cannot be conferred by consent by connivance or by craft. The Court was precise and held as doth: -

“As held in the matter of Advisory opinion of the Court under Article 163 of the Constitutional Petition No. 2 of 2011 at para 30, the Court stated, “A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where legislation is clear and there is no ambiguity.”

14. On the other hand, also the Court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In support of that contention, Justice Nyarangi quoted in *Motor Vessel, 1989eKLR Lillian S*. Justice Nyarangi JA laid with approval words and phrases legally defined – Vol 3: I to N page 113.

“By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute Charter or Commission under which the Court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction



is an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the Court or tribunal has been given the power to determine conclusively whether the facts exist. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given.”

15. There is no mixed question to be dealt with. Even if there is, there is already a suit in the land court. Transferring this suit there will create issues of subjudice. If there are issues that are raised, they should be raised in that suit field in the ELC Court, because the predominant question is land.

16. Article 165(5) of the Constitution give the jurisdiction of the high court as doth: -

“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.

17. Article 165(5) of the Constitution, referred, restricts the jurisdiction of the high court as doth: -

5. The High Court shall not have jurisdiction in respect of matters
  - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).

18. This is but raised by article 162 of the Constitution which provides as follows: -

- “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.”

19. Jurisdiction is everything. The court either has or doesn't have jurisdiction. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi, JA as then he was stated as doth:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. There can be no two ways in this matter the matter. The matters raised in the amended plaint dated March 20, 2022 are purely land issues. There is no issue of the predominance question and there is no commercial issue raised.

21. In the circumstances the suit is unsustainable in this court. luckily for the plaintiff he has another suit which you can raise all those impugned issues. the order sought are the domain of section 13 of the *Environmental and Court Act*, which provides as follows: -

“ 13. 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 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.

22. There will be no utility served in transferring the suit from a court without jurisdiction and when there is already a matter seeking similar orders and over the same subject matter.

23. There would be more useful use of judicial time than dealing with matters that have already been dealt with by other judicial officers over the same issue.

24. Consequently, this suit is begging and I do allow that it be struck out.



**Determination**

- a. The plaintiff's suit is consequently struck out with costs of Ksh 250,000/= to the 3<sup>rd</sup> defendant
- b. First and 2<sup>nd</sup> defendants to bear their own costs.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 13<sup>TH</sup> DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Miss Gatimu for the plaintiff

Miss Maiga for 1<sup>st</sup> defendant

Court Assistant - Brian

