



REPUBLIC OF KENYA



**Ngari & another v Join Ven Investment Limited & another (Civil Case E005 of 2021) [2023] KEHC 20866 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20866 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E005 OF 2021  
MW MUIGAI, J  
JULY 24, 2023**

**BETWEEN**

**MARY WAIRIMU NGARI ..... 1<sup>ST</sup> PLAINTIFF**

**RUTH RUGURU WAIRIMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOIN VEN INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KINGS DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Preliminary Objection Plaintiff Dated April 28, 2021**

1. Vide their Plaintiff filed on 20<sup>th</sup> April 2021, the Plaintiffs herein sued the Defendants in that on or about the year 2016, the 1<sup>st</sup> Defendant's representative/Director, approached the 1<sup>st</sup> Plaintiff with information on an upcoming construction project consisting of 2 bedroomed apartments in Syokimau area on all that piece of property known as L.R. No. 12715/289, albeit that the project was off-plan in nature.
2. Since the Plaintiffs had, previously conducted other business with the 2<sup>nd</sup> Defendant (the 1<sup>st</sup> Defendant's affiliate) there was some form of familiarity on the projects completed earlier as they were known to the management.
3. Upon visiting the site, viewing the showhouse and satisfied with the information provided as well as the familiarity of other projects as mentioned under clause 5 above, on or about 12<sup>th</sup> May 2016, the Plaintiffs and the 1<sup>st</sup> Defendant's representative duly executed an offer for the purchase of 5, two bedroomed apartments, namely 5 -24, 7-13, 2-31 3-25 & 36, at the initial purchase price of Kshs.3,800,000/- per apartment.



4. In line with the agreement entered into by the parties, the Plaintiffs in showing their commitment, made the first payments amounting to Kshs.4,000,000/- on 27<sup>th</sup> May 2020.
5. The final payments were made on 2<sup>nd</sup> September 2016 to which the Plaintiffs paid a total of kshs.19,000,000/- for the purchase of the 5 apartments.

#### **Statement of Defence dated 19/05/2021**

6. That in seeking to make such an off-plan acquisition, the 1<sup>st</sup> Plaintiff was and knew that the project sought to be undertaken was;
  - a. Subject to the issuance of the Licenses from various regulatory bodies; and
  - b. Subject to any unforeseen objections by persons legally mandated to question the nature of the development
7. In the alternative and without prejudice to the foregoing the 1<sup>st</sup> Defendant avers that:-
  - i. In or about July 2015 it sought and obtained the relevant regulatory licenses and approvals to undertake the construction of 600 low-cost housing on all those properties known as Land Reference Numbers 12715/288 and 12715/289, Syokimau area, Machakos County.
  - ii. With the issuance of the licenses and the approvals, it was legitimately expected that any party with a concern about the proposed project would seek the intervention of the relevant regulator with a right of appeal should a decision be made not favourable to such a party or the 1<sup>st</sup> defendant as the Proponent.
  - iii. One such appeal against the issuance of an EIA License for the project was lodged in NET 182 of 2016, (Nelson Mutinda & Others –vs- Join Ven Investments Limited)
  - iv. The lodging of the appeal also provoked the issuance of an Stop Order by the National Environment Tribunal on 28<sup>th</sup> June, 2016, the effect of which was to stop the project until the determination of the Appeal; and
  - v. Proceedings in NET Number 182 of 2016 are still pending.

#### **Preliminary Objection**

8. Vide amended Notice of Motion dated and filed in court on 6<sup>th</sup> March, 2023 the Applicant, 2<sup>nd</sup> Defendant herein sought inter alia orders that:
  - a. The Honorable Court remove the name of the 2<sup>nd</sup> Defendant from these proceedings.
  - b. That the Honorable Court be pleased to dismiss the suit as against the 2<sup>nd</sup> Defendant.
  - c. That in the alternative this Honorable Court be pleased to transfer this suit to the Environment and Land Court, Machakos.
9. The Notice of Motion is supported by the affidavit dated and filed in court on 6th March, 2023, sworn by Sunita Patel. The deponent herein deposed inter alia that she is advised by her advocate record



that the cause of action relates to the alleged transfer of an interest in an immovable property the determination of which is within the judicial powers of the Environment and Land Court.

### **Replying Affidavit**

10. Vide a replying affidavit dated 8th February, 2023 and filed in court on March, 2023, sworn by Mary Wairimu Ngari, the deponent herein deposed inter alia that she is advised by her advocate on record that jurisdiction is everything and that court cannot make a single step without jurisdiction and that any aggrieved party as to the jurisdiction of the court has a responsibility to bring up the issue at the earliest opportune time, and not as an afterthought to defeat the wheels of justice as being occasioned by the 2<sup>nd</sup> Defendant; that this honorable court should not entertain the 2<sup>nd</sup> Defendant's delaying tactics and as such ought to have this matter set down for hearing at the earliest to avoid miscarriage of justice.
11. The matter was canvassed vide written submissions.

### **Written Submissions**

#### **Plaintiff Submissions dated 16/05/2023**

12. It is submitted that J. A. Makau in the Civil Case No. 600 of 2015 – *Quorandum limited –vs- Invesco Assurance Limited* [2019] eKLR while quoting Nakana Trading Co. limited vs Coffee Marketing Board 1990 – 1994 EA 448 noted that;

“A breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. Since the contract was in writing the Court's duty was to look at it and determine whether it applies to the facts.”

13. The jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the *Constitution* of Kenya and Section 13(2) of the *ELC Act* No. 19 of 2011. Article 162 (2)(b) states that the ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.

#### **2<sup>nd</sup> Defendants Submissions Dated 5/05/2023**

14. It is submitted on behalf of the 2<sup>nd</sup> Defendant that in the alternative this Court transfer this suit to the Environment and Land Court, Machakos.
15. It is the case of the 2<sup>nd</sup> Defendant that the cause of action relates to the alleged transfer of an interest in an immovable property the determination of which is within the judicial powers of the Environment and Land Court.
16. Among the issues raised by the 2<sup>nd</sup> Defendant in its submissions submitted that this matter be transferred to the Environment and Land Court, Machakos.

### **Determination.**

17. The Court considered the pleadings filed particularly the application on the transfer of this suit to the Environment and Land Court, Machakos on record and the submissions of both parties.
18. The issue for determination is whether the Court has requisite legal jurisdiction to hear and determine the dispute. The land mark case-law on jurisdiction is outlined as follows;



19. In *Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited* [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance 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 cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of 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 the 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...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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

21. Supreme Court’s decision in Petition No. 5 of 2015- *Republic vs. Karisa Chengo & 2 Others* where the Apex Court expressed itself inter alia as follows:

“it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation...Article 162(3) of the constitution, Parliament enacted the *Environment and Land Court Act* and the Employment and Labor Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We



therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

22. In *Sammy Likuyi Adiemu vs. Charles Shamwati Shisikani* Kakamega HCCA No. 144 Of 2003, Ochieng, J Observed that:

“ A Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute ab initio, in which case it ought to down its tools before taking one more step as was held in Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd [1989] KLR 1.”

### **Jurisdiction**

23. The High Court jurisdiction as outlined in the *Constitution* is;

Article 165(3) of the *Constitution* provides as follows:

- (3) Subject to clause (5), the High Court shall have—
  - (a) unlimited original jurisdiction in criminal and civil matters;
  - .....
  - (e) any other jurisdiction, original or appellate, conferred on it by legislation.

24. The Environment & Land Court’s jurisdiction is provided by Article 162 (2) (b) of *Constitution* as follows;

- (2) Parliament shall establish courts with the status of the High Court to hear
  - (a) .....
  - (b) the environment and the use and occupation of, and title to, land.

25. The *Environment and Land Court Act, 2011*, provides in Section 13 (2) as follows:

- (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.

### **Analysis**

26. The Plaint filed on 20/4/2021 outlines the cause of action as the 1st Defendant's representative/ Director, approached the 1st Plaintiff with information on an upcoming construction project consisting of 2 bedroomed apartments in Syokimau area on all that piece of property known as L.R. No. 12715/289, on or about 12th May 2016, the Plaintiffs and the 1st Defendant's representative duly executed an offer for the purchase of 5, two bedroomed apartments, namely 5 -24, 7-13, 2-31 3-25 & 36, at the initial purchase price of Kshs.3,800,000/- per apartment.

In line with the agreement entered into by the parties, the Plaintiffs in showing their commitment, made the first payments amounting to Kshs.4,000,000/- on 27th May 2020.

The final payments were made on 2nd September 2016 to which the Plaintiffs paid a total of kshs.19,000,000/- for the purchase of the 5 apartments.

27. The Particulars of breach are that the projected completion date of 30<sup>th</sup> July 2018 the defendants were to hand over the 5 Apartments [ out of 600 flat/housing project] for consideration of Purchase price of Ksh 19,000,000/- [at Ksh 3,800,000/- for each of 5 Flat/Apartment /House]

28. The prayers sought are;

- a. An order to issue that 1<sup>st</sup> Defendant was in breach of the contractual obligations between parties
- b. The Defendants be held jointly and severally liable for breach of contract
- c. The Defendants to pay and reimburse the Plaintiffs, special damages Ksh 19,000,000/-
- d. General damages as compensation of loss or rental income at Ksh 25,000/- which at the time of filing suit stood at Ksh 4,000,000/-
- e. General damages for breach of contract
- f. Interest of all above
- g. Costs
- h. Any other relief that the Honorable court may deem just and fit.

29. From the pleadings outlined, whereas land LR NO 12715/289 is where the Housing Construction Project is predicated upon, out of the 600 house /flat/apartment Project, the Plaintiffs base the claim on 5 specific Apartments 5 -24, 7-13, 2-31 3-25 & 36.

30. Parties/Counsel and the Court (s) are bound by pleadings filed. In the instant case, the pleadings disclose the cause of action as money had and received as alleged in the Plaint for purchase of 5



Apartments which it is alleged have not been handed over and hence the claim for refund of such monies as alleged Ksh 19,000,000/- among other claims. The subject-matter involves land, contract money had and received. The matter would cut across ELC, Commercial & Tax Division and/or Civil Division (in this case the High Court).

31. In the case of *Thomas Mutuku Kasue vs Housing Finance Company Ltd & Anor* [2021] eKLR Hon Angote J ELC observed;

“Where the pre-dominant issue in a suit involves mortgages, charges, collection of dues and rents it is the High Court and not Environment & Land Court, that has jurisdiction to deal with the dispute. That being so, the pre-dominant issue in this matter is issuance of statutory notices by the Chargee, it is my finding that this Court does not have jurisdiction to hear and determine the suit.”

32. In the case of *Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & Others* [2017] eKLR, the Court of Appeal stated as follows;

"36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the *Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts."



33. In the case of *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Anor* [2016] eKLR Hon J.Ngugi J (as he then was) stated on Court 's jurisdiction;
- "23. 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.
24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.
25. 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."
34. In the present case, I carefully perused the pleadings herein and realized that the issue involving the parties was sale and transfer of two-bedroom apartments which is in dispute for breach. These principles as outlined in the case-law above applied to the instant case, the subject-matter relates to a contract/Agreement of Sale entered into in 2016 for purchase of Off-Plan 5 Apartments for Ksh 19,000,000/- It is alleged the money was paid and received by Defendant(s) and further alleged that the said Apartments have not been handed over to the Plaintiffs.
35. On the other hand, the 2<sup>nd</sup> Defendant in her affidavit in support of the application deposed that that the cause of action relates to the alleged transfer of an interest in an immovable property the determination of which is within the judicial powers of the Environment and Land Court. As considered above, all interest or disposition of land do not amount use of the land, and where land may be one of the issues the pre dominant factor determines jurisdiction of the Court.
36. The Defendants jointly put their Defense that in July 2015 that they sought and obtained the relevant regulatory licenses and approvals to undertake the construction of 600 low-cost housing on all those properties known as Land Reference Numbers 12715/288 and 12715/289, Syokimau area, Machakos County. An appeal against the issuance of an EIA License for the project was lodged in NET 182 of 2016, (Nelson Mutinda & Others –vs- Join Ven Investments Limited) Stop Order by the National Environment Tribunal on 28th June, 2016, was issued and awaits the determination of the Appeal.
37. Although use, title and occupation of land is an issue between the Defendants and other parties not part of these proceedings is pending at the National Environment Tribunal; the subject matter there relates to land as outlined above for contested use of 600 Low Cost Housing Project., 5 of which are the subject-matter of this suit.
38. The matter herein is different, different parties, cause of action and relief sought from the matter referred to hereinabove and the Plaintiffs are not party to the said matter.
39. The Pre- dominant issue in the instant matter is refund of money had and received following the alleged breach of contract and not land per se as from the pleadings outlined, whereas land LR NO 12715/289 is where the Housing Construction Project is predicated upon, out of the 600 house /flat/apartment



Project, the Plaintiffs base their claim on 5 specific Apartments 5 -24, 7-13, 2-31 3-25 & 36 and seek refund of monies amongst other prayers. The matter falls squarely within the High Court jurisdiction, pursuant to Article 165 (3) (a) of the constitution.

40. It is therefore clear that since this suit was instituted before this Court it is only fair and justifiable that the matter is heard and determined in the High Court.

The costs will be in cause.

Orders accordingly.

**RULING DELIVERED DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JULY 2023(VIRTUAL/PHYSICAL CONFERENCE)**

**M. W. MUIGAI**

**JUDGE**

