



**Kiragu v Attorney General (Civil Case 297 of 2005)
[2023] KEHC 22608 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 297 OF 2005
HM NYAGA, J
SEPTEMBER 25, 2023**

BETWEEN

TITUS KIRAGU PLAINTIFF

AND

HON ATTORNEY GENERAL DEFENDANT

RULING

1. On 2nd December, 2021 the Respondent's Counsel successfully sought leave to file an Amended Plaintiff.
2. In the amended plaintiff dated 17th January, 2022 and filed on 20th January, 2022, the Plaintiff/ Respondent seeks for Judgment against the Defendant/Applicant as follows: -
 - a. That the Defendant be ordered to allocate the Plaintiff a parcel of land qualitatively and quantitatively equivalent in value to the 40 acres that the plaintiff has lost out of the property.
 - b. That the Defendant be ordered to allocate the Plaintiff a parcel of land measuring 120 acres on the adjoining property being LR 9514/R being equivalent to the 40 acres lost by the Plaintiff to ADC
 - c. That the Plaintiff be granted an easement over LR 9514/R to enable him access the remaining 80 acres on L.R 9514/6.
 - d. Compensation of the value of the Freehold Interest in LR 9514/6 (40 acres) as at 14th December, 2021 estimated at Ksh. 57,000,000
 - e. Costs incurred by the Plaintiff in HCCC 111 of 1999 Titus Kiragu v Agricultural Development Corporation and in Civil Appeal No. 54 of 2012 Titus Kiragu vs Agricultural Development Corporation.



- f. Damages for loss of use of the 40 acres with effect from the 22nd September, 2000 estimated at Ksh. 23,500,000
 - g. Costs of this suit.
 - h. Interest on (c) (d) and (e) above
 - i. Such further or other relief as this Honourable Court may deem fit and just to grant.
3. When the matter came up for hearing on 5th June, 2023 the defendant's/Applicant's Counsel told court that the issues raised in the Amended plaint are a preserve of the Environment and Land's Court (ELC).
 4. In response, the Plaintiff's/Respondent's counsel submitted that the issues are commercial save for prayer (b).
 5. The court directed parties to file submissions on the issue of jurisdiction.
 6. The Plaintiff/Applicant filed his submissions on 19th June, 2023 whereas the Defendant/Applicant submissions were filed on 8th June, 2023.

Applicant's Submissions

7. The Applicant's counsel submitted that Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case as was held in the South African Constitutional Court held in the matter between Vuyile Jackson Gcaba v Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26.
8. The Counsel argued that a perusal of the plaintiff's pleadings as well as the annexed documents reveal a land dispute. He contended that it is important for the court to take note that the parties in the previous suit between the plaintiff and ADC were different from the instant suit. That the instant suit is with regards to whether the plaintiff surrendered land to the government and whether as a result of the surrender he was compensated and further as to whether the compensation after a decision of the High Court in HCC 111 of 1999 is sufficient or not.
9. He argued that to answer the above issues definitely the issue of ownership and title to property will have to be proved and as such this court is bereft of jurisdiction to answer such issues.
10. He contended that prayer for compensation for lost land and creation of an easement lies purely within the mandate of the ELC.

Plaintiff/Respondent Submissions

11. The counsel for the Respondent submitted that the subject matter of this suit does not exceed the pecuniary jurisdiction of this Honourable Court and therefore it has jurisdiction to hear and determine it.
12. The counsel referred this court to the transitional provisions at Section 30 of *the Constitution* and stated that this suit was filed in 2005 when the ELC court was non-existent.
13. The counsel submitted that Article 159 of *the Constitution* mandates court to dispense justice expeditiously and contended that in the interest of justice and in a bid to promote the rights of the plaintiff this matter should not be transferred as it will derail its determination.



14. The respondent’s counsel argued that the instant matter is a mixture of commercial and land use in that it is not only limited to environment use, occupation and trespass but also raises questions of Damages for loss of use of 40 acres and compensation for the value of the freehold interest which cannot be determined by ELC but by the High court as it has unlimited original jurisdiction in criminal and civil matters, as provided for under Article 165(3) of *the Constitution*. To support this position the counsel referred this court to the cases of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR; Ifdid Ole Tauta & others v Attorney General [2015] eKLR; Patrick Musimba vs National Land Commission & 4 others [2015] eKLR; & Leisure Lodges Ltd v Commissioner of Lands and 767 others [2016] eKLR

Issues for Determination

15. Having considered the pleadings, the objection raised, rival submissions and the authorities cited to me, the singular substantive question for determination is whether the Court has jurisdiction to hear and determine this suit.

Analysis

16. The starting point is to define what a preliminary objection is.

The case of Mukisa Biscuits v West End Distributors Ltd [1969] E.A 696 held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 ...

Justice Newbold in the said suit argues 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

17. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR held as follows:

“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 endeavors 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*.

18. In the instant suit the defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff's suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case.
19. I have perused the amended plaint in light of the prayers sought therein. The Plaintiff avers that he was the registered owner of parcel of land known as I.R No.9514/6 situated at East of Nakuru Municipality within Nakuru measuring 120 acres allocated to him by the Commissioner of Lands. That in the year 1986, the Government of Kenya requested him to surrender his parcel of land known as L.R No.10978/8 situated at Kampi ya Moto measuring 100 acres to the Government and in return, the government offered to allot him land measuring 120 acres situated in Lanet, Nakuru District from the Lanet Beef Research station. He avers that he consented to the Government's request on the express agreement and understanding that the government would allot him land measuring 120 acres situated at Lanet, Nakuru District as a consideration of surrendering L.R NO.10978/8 and in consideration of the identified shortcoming affecting L.R NO.9514/6 situated at East of Nakuru Municipality. He contends that he surrendered the land as agreed and he was allotted the parcel of land known as L.R No.9514/6 measuring 120 acres as compensation on 18th August, 1992 but in the year 1998 and 1999 the Agricultural Development Corporation(ADC) apprised him that the land that was allotted to him by the Government constituted encroachment of 40 acres of its land which was adjacent to the property and blocked him from accessing the rest of his property and as a result he filed a suit against ADC seeking orders to have it permanently restrained from trespassing or interfering with his peaceful enjoyment of his property before the high court in HCCC 111 of 1999 Titus Kiragu vs ADC but it was dismissed. Being dissatisfied with the High Court Judgement, he appealed to the Court of Appeal in Civil Appeal No. 54 of 2002 Titus Kiragu vs ADC but it was similarly dismissed as the court found that the Land allocated and granted to him as compensation by government had already been transferred to Kenya Meat Commission and hence it could not be allocated to him as it did not belong to the government at the time of allocation.
20. He avers that the court then ordered cancellation of his title to the property to excise the 40 acres claimed by ADC and as a result he lost 40 acres of land and lost access to the remainder of the 80 acres of property whose access was situated through the portion of the 40 acres claimed by ADC hence his title is now threatened with extinction because the government misrepresented itself as regards to the consideration he gave for the 100 acres it acquired from him.
21. The defendant's view is that the above matters can be addressed by the ELC while the plaintiff opine that this court has jurisdiction to determine the issues as they are within its pecuniary jurisdiction and they are a mixture of both commercial and land use.
22. 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) which states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.
23. In particular the provisions of Article 162(2) of *the Constitution* of Kenya 2012 provide as follows: -
 - “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
 - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—



- (a); and
- (b) the environment and the use and occupation of, and title to, land.

Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

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.”

24. It follows therefore that the High Court's enforcement jurisdiction does not extend to matters relating to disputes falling Under Section 13(2) of the Environment and Land Court Act.

- 25. The jurisdiction of the High Court is set out under Article 163(3) which states that the High Court shall among others, have; a) Unlimited original jurisdiction in criminal and civil matters.
- 26. Land is defined under Article 260 of *the Constitution*. It includes the surface thereof, everything above and below it.
- 27. Black’s Law Dictionary, 9th Edn; defines the word ‘use’ as being:-
 ‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.
- 28. In *Co-operative Bank of Kenya vs Patrick Kangethe Njuguna & 5 Others* (supra) the Court of Appeal stated that for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted.
- 29. The High Court in HCCC 111 OF 1999 *Titus Kiragu vs ADC* found that the plaintiff had surrendered 100 acres of his land to government in exchange of 120 acres of land from the government .However, when the plaintiff’s surveyor surveyed the land did not respect the earlier surveys and boundaries and ended up taking 40 acres of land which rightly belonged to ADC.



30. As per prayers (a) and (b) of the amended plaint, the plaintiff/respondent seeks compensation for his lost property by being allocated 40 acres of land on the adjoining property being LR 9514/R by the government. For this court to issue this order it has to ascertain whether the parcel of land LR 9514/R belongs to the government and whether it is still available. This in my view is clearly a land issue that ought to be determined at the onset and it is a dispute relating to use and occupation and title to land which falls squarely within the ambit of Article 162(2)(b) of *the Constitution*. Prayer (c) of the Amended Plaint relates to land use and its enjoyment which similarly falls within the jurisdiction of the Environment and Land Court. Other prayers are on costs and damages which on merit are grantable by the ELC.
31. From the foregoing, I agree with the Defendant's Counsel that this court is bereft of jurisdiction to determine this matter.
32. I have considered the authorities referred to me by the Plaintiff/ Respondent and in my considered view the facts of those cases are distinguishable from this case.
33. In the case of *Co-operative Bank of Kenya v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, the dominant issue was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. The court found in a nutshell that a charge does not constitute use of land within the meaning of Article 162(2) b of *the Constitution* of Kenya 2010
34. In the case of *Ifdid Ole Tauta & Others v Attorney-General* (supra) the Petitioners had inter alia sought a declaration that they, (the Petitioners) together with the Maasai Community of Ngong Hills were entitled to the suit land measuring approximately 577 Hectares or thereabouts and sought an order directing the Government to immediately survey the land and issue title deeds to them, and other bona fide Maasai residents of Ngong Hills. Among the several issues raised were the questions whether the suit ought to have been brought before the Land and Environment Court. And while acknowledging that courts have been faced with applications raising objections on their jurisdiction to entertain suits on matters that fell within the jurisdiction of the courts established under Article 162(2), that court stated that whilst the practice had not been to dismiss the suits, but to transfer them for hearing at the right forum, and concluded that –

“...having regard to the constitutional provision under Article 165(3) (b) and section 13(3) of the *Environment and Land Court Act*, in Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms as far as the same relate to the environment and land both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters and a party could bring such matters either before the High Court and/or before the Environment and Land Court... [and therefore the Environment and Land Court had the jurisdiction to deal with the Petition].”
35. In the Petition between *Patrick Musimba v National Land Commission & 4 Others* (supra), the Petitioner challenged firstly the manner in which compulsory acquisition of land had been conducted in Kibwezi Constituency and secondly, the process of the Environmental Impact Assessment (EIA) for the construction of the Standard Gauge Railway (SGR). A Preliminary Objection was raised by the Respondents challenging the jurisdiction of the court on the ground that the court empowered to hear and determine such matters was the Environment and Land Court (ELC) established under the Environment and *Land Act* (Cap 12A of the Laws of Kenya, (ELC Act) as read with Article 162 of *the Constitution*. It was submitted that both Articles 162 and 165 of *the Constitution* limited the jurisdiction of the High Court. In *Patrick Musimba vs National Land Commission & 4 others* [2015]



eKLR- the court while discussing the Concurrent and coordinate jurisdictions of the High Court and the ELC observed that:-

“High Court and the ELC have a concurrent and or coordinate jurisdiction and can determine constitutional matters when raised and do touch on the environment and land. Neither *the Constitution* nor the ELC Act limit the High Court’s jurisdiction in this respects while a closer reading of the ELC Act reveals that the ELC Court’s jurisdiction was in 2012 limited by Parliament in so far as constitutional issues touching on land and environment are concerned but the Court of Appeal in Mugendi expressed the view that the ELC when dealing with disputes concerning the environment and land may also deal with claims of breaches of fundamental rights touching on the subject at hand. We hold that in matters constitution the ELC has jurisdiction not just when it involves clean and healthy environment but also land.”

36. In the case of Leisure Lodge Limited vs Commissioner of Lands & 67 Others (supra) a three judge bench of the High Court held that the High Court and the Environment and Land Court have concurrent and coordinate jurisdiction and would determine constitutional matters when raised touching on the Environment and Land and neither *the Constitution* nor the *Environment and Land Court Act* Limited the Court’s jurisdiction.
37. It is apparent that no constitutional issue has been raised in the instant case. Even though the plaintiff states that there is an element of a commercial dispute between the parties, it is very clear to me that the predominant issue, and overwhelmingly so, relates to land. The questions raised are, in my view, to be determined by the ELC.
38. I find that the Preliminary Objection has merit and I uphold it.
39. So what happens next? Ordinarily if the court was to find that it has no jurisdiction the next logical step would be to strike out the suit. But in this case the circumstances are different.
40. The matter was filed in 2005 before the creation of the The Environment and Land Court which came into operation in October 2012. It would thus be unjust to strike out the suit. The fairest way to handle the matter is to have the matter determined by that court.
41. Therefore, I hereby direct that this file be transferred to the ELC, Nakuru for hearing and determination. The matter to be placed before the Deputy Registrar, ELC on a date that I shall give shortly.
42. Costs of the objection shall be in the cause. Orders accordingly.

Dated, signed and delivered at Nakuru this 25th day of September, 2023.

H. M. NYAGA

JUDGE

In the presence of;

C/A Jenniffer

Miss Omuya for Simiyu for plaintiff

N/A for defendant

