



Moughal v Moipel & another (Being Sued as the Administrators Of the Estate of William Mopel (Deceased)) (Civil Case 8 of 2020) [2023] KEHC 27325 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEHC 27325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 8 OF 2020
SN MUTUKU, J
OCTOBER 18, 2023**

BETWEEN

MOHAMMED SHAHID MOUGHAL PLAINTIFF

AND

VERONICA TAINOI MONYERE 1ST DEFENDANT

EUNICE METIAN MOIPEL 2ND DEFENDANT

**BEING SUED AS THE ADMINISTRATORS OF THE ESTATE OF WILLIAM
MOPEL (DECEASED)**

RULING

Introduction

1. This Ruling relates to a Notice of Preliminary Objection (PO) raised by the Defendant seeking to have the Plaintiff's claim dismissed with costs for reasons that it was filed in the wrong court because the subject matter in this suit is land and therefore this court lacks jurisdiction to determine the same. The PO is dated 8th June 2023 and was filed on 16th June 2023.
2. The suit in this case was initiated by the Plaintiff who sued the Defendant through an amended Plaint dated 5th December, 2019 for breach of an agreement. It is his case that the Defendant without his knowledge conspired with the liquidator of Keekonyokie Farmers Society Limited and maneuvered to transfer the property related to share No. 36 to himself contrary to the agreement dated 7th November, 2017.
3. The Plaintiff claims, further, that the Defendant refused to pay a balance provided in the agreement and more time has since expired to have this balance paid in accordance with the terms of that agreement; that the Plaintiff was deprived of his purchaser's interest worth the agreed principal sum of KShs. 6,000,000/- and the accrued increment of 1,000,000/- per every 40 days from 6th day of March,



2018 till now, totalling to Kshs. 26,000,000/- and that the Defendant refused to pay the agreed penalty payment of Kshs. 8,000,000/- as on paragraph 3 (e) of the agreement dated 7th November, 2017.

Oral submissions

4. The PO was argued orally through virtual proceedings on 21st September, 2023. Representing the Plaintiff was Mr. Kansiiime Gidion, learned counsel and representing the Defendant was Mr. Kipkirui, learned counsel.
5. Mr. Kipkirui submitted that the issue is on jurisdiction of this court vis-a vis the Environment and Land Court (ELC); that the subject matter is Kajiado/Olchoro Onyore/28765 which has been subdivided and sold to 3rd parties; that the jurisdiction of the High Court is specified under Article 165(5) of the Constitution; that matters relating to ownership of fall under the ELC by dint of Article 162(2)(b) of the Constitution which is given effect by ELC Act.
6. He submitted that Section 13 of the ELC Act is clear on the jurisdiction of that court. Counsel relied on the case of Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) eKLR and the Supreme Court of Kenya decision in S.K Macharia -vs- KCB on the issue of jurisdiction.
7. It was submitted that under paragraph 2(b) of the Amended Plaint the Plaintiff admits that share No 36 does not exist and that the Plaintiff cannot claim share No 36 without claiming the Land; that in both the agreements to sell purchaser's interest made on 25/8/2017 and on 7/11/2017 the subject matter therein is Land; that at the time of filing this suit share No. 36 did not exist, the same having translated to Land.
8. It was further submitted that the ownership issue is still a pending one and as such this court lacks jurisdiction to determine this matter. He relied on Equity Bank of Kenya Ltd- vs- Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR, to stress the point that if a court lacks jurisdiction it cannot transfer the suit because it is incompetent in nature. Counsel urged that this court ought to down its tools and dismiss the entire suit with costs.
9. Mr. Kansiiime for the Plaintiff argued that counsel for the Defendant picked a single point to raise a Preliminary Objection on and that a section of the document should be interpreted in reference to other parts of that document. He submitted that the subject of this suit is breach of agreement for sale of purchaser's interest in share No. 36 in Keekonyokie Farmers' Co-Operative Society Limited and not land. He submitted that the owner of the share is Ole Mangura and that there is a Share Certificate to that effect; that he could not buy the share as he was not a member of the of that Co-operative society and that he signed a Power of Attorney, and the share was what was sold and not land.
10. He argued that the agreements dated 25/8/2017 and 17/11/2017 related to sale of purchaser's interest and not to land; that it is sale of shares expressed by the Power of Attorney; that the subject matter is failure to pay the balance and breach of agreement; that the Plaintiff has no claim to land and therefore the matter is not an ELC matter and therefore this Preliminary Objection should be dismissed.

Analysis and Determination

11. It is trite that jurisdiction is everything and without it the court cannot proceed any further in determining the matter before it. This point is better captured in Owners of the Motor Vessel "Lillian S" case, cited above, where the Court held that:

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

12. As stated *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696, a PO 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. A PO touching on the jurisdiction of the court is one such point of law, which, if argued successfully, it has the effect of disposing of the suit because the impact of such a PO is that the court cannot proceed further with a matter for which it lacks jurisdiction.
13. Article 165(1) of the Constitution establishes the High Court whose jurisdiction is provided under Article 165(3) of the Constitution. On the other hand, the ELC is established under Article 162 (2) (b) which provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. The law contemplated under this Article is the Environment and Land Court Act, which is the legislation that gives effect to Article 162 (2) (b).
14. The jurisdiction of the ELC is provided under Section 13 which provides that:
 13.
 - (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:
 - (i) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) relating to compulsory acquisition of land;
 - (iii) relating to land administration and management;
 - (iv) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) any other dispute relating to environment and land.
15. I have considered the issues being canvassed before me. The Plaintiff, through his counsel, is insisting that his claim is not related to land but to purchaser’s interest in relation to share No. 36 that initially belonged to Patete Ole Mangura in the Keekonyokie Farmers’ Cooperative Society Limited.
16. I have turned to the Plaintiff to determine what the basis of the Plaintiff’s pleadings. It is in the pleadings that jurisdiction of the court can be determined. In Ngengi Muigai v George Kangethe Warubiu & 6 others [2021] eKLR, the court, citing a South African constitutional case *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26 stated as follows:

“Jurisdiction is determined on the basis of the pleadings, ... and not the substantive merits of the case... In the event of the court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of



the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

17. The claim is a purchaser's interest in share No. 36 in Keekonyokie Farmers' Co-operative Society Limited. Paragraph 6 of the Amended Plaintiff is clear that share No. 36 translated into land which the Defendant is accused of transferring to himself hence breaching the contract. Keekonyokie Farmers' Cooperative Society Limited is about land. Shares therein meant shares in land or put differently, purchaser's interest in land not in anything else.
18. Indeed, paragraph 2B of the Amended Plaintiff is drawn as follows:
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(B). Share Number 36 in Keekonyokie Farmers Cooperative Society Limited was later translated to mean the parcel of land Kajiado/Olchoro-Onyore/28765 which was subdivided from Kajiado/Olchore-Onyore/46 that belonged to Keekonyokie Farmers Cooperative Society Limited.
19. The subject of litigation is land. I fail to see any other interpretation of this issue. This Society was dealing with land not services or selling of goods. I am aware of the reliefs sought in this Amended Plaintiff. They are:
 - i. A declaration that the defendant breached the sale agreement dated 7th November, 2017.
 - ii. Payment of the principal sum of Kshs. 6,000,000/- being the outstanding balance, and accrued increment of Kshs. 1,000,000/- per every 40 days from 6th March, 2018, now totalling to 27,000,000/- as at the time of filing this Amended Plaintiff, and which shall keep increasing till judgement.
 - iii. General damages for breach of contract.
 - iv. Interest on (b) and (c) above at court rates.
 - v. Costs of the suit
20. My reading and understanding of section 13 of the ELC Act is that ELC is the court with jurisdiction to determine the issues before this court. I refer to section 13 (d) and (e) of the ELC Act which provide as follows:
 - (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.
21. I am of view that these two subsections cover the issue before this court. I hold the view that ELC is clothed with requisite jurisdiction to issue declaratory orders, order for payment of money as in this case and award damages for breach of contract in cases dealing with issues touching on land as provided under Section 13 above. I believe that just the same way ELC can determine a matter concerning breach



of constitutional rights in matters related to land, so can that court determine a matter relating to breach of contract in matters related to land.

22. The PO before me has merit. This court lacks jurisdiction to determine this suit. This court was asked to dismiss the suit because once the court determines and concludes that it lacks jurisdiction, then it has no business transferring the suit to ELC because the suit is incompetent. I hold a different view. This court was dealing with PO on the jurisdiction and not the merits or lack thereof of the Plaintiff's case. In the interest of substantive justice and given this court has transferred a number of matters to the ELC in the past, it is only fair that this matter be transferred to the ELC Kajiado for directions.
23. Consequently, the PO dated 8th June 2023 is hereby allowed with the effect that this Court lacks jurisdiction to hear and determine this matter as it relates to land. The file shall be placed before the Presiding Judge at the ELC, Kajiado for further directions.
24. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF OCTOBER 2023.

S. N. MUTUKU

JUDGE

