



REPUBLIC OF KENYA

IN THE ELC COURT AT MOMBASA

ELC. CIVIL CASE NO. 222 OF 2021

MARY MUSUKI MUDACHI.....1ST PLAINTIFF/APPLICANT

IMMANUEL MUTUA MUDACHI.....2ND PLAINTIFF/APPLICANT

VERSUS

ANTHONY MUTEKE MUDACHI1ST DEFENDANT/RESPONDENT

RICHARD KALUNDU MUDACHI2ND DEFENDANT/RESPONDENT

LAND REGISTRAR MOMBASA3RD DEFENDANT/RESPONDENT

AND

ELIJAH K. KIMANZI1ST INTERESTED PARTY

SAMWUEL KATETEL.....2ND INTERESTED PARTY

BENJAMIN KATETEL.....3RD INTERESTED PARTY

WILLIAM MUDACHI.....4TH INTERESTED PARTY

ATHMAN MBOSYO MWAKULU.....5TH INTERESTED PARTY

LAUCADIA. N. MUTEKE.....6TH INTERESTED PARTY

EAST GLOBAL LOGISTICS LIMITED.....7TH INTERESTED PARTY

RULING

I. PRELIMINARIES.

1. What is before the Honorable Court is the Notice of Preliminary Objection dated 17th November, 2021 raised hereof by the Learned Counsel for the 1st and 2nd Defendants/Respondents to dismiss the Notice of Motion application dated 2nd November, 2021 seeking temporary injunction orders and the entire suit instituted through a Plaint dated 2nd November, 2021 and filed in court on 3rd November, 2021 by the Plaintiffs.

2. It is brought under several provisions of law but in particular, Section 12 (1) of the Civil Procedure Act. Cap. 21 and Order 51 Rule 14 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

3. Indeed, on 18th November, 2021 this court granted the two Learned Counsels for the Defendants and the Plaintiffs to orally highlight their submissions in open court.

II. THE 1st & 2nd DEFENDANT'S CASE

3. The Learned Counsel for the 1st and 2nd Defendants, – Mr. Tindika fundamentally held that this Honorable Court has no jurisdiction to

hear and determined this matter. Its argument was that, the court lacked that legal capacity based on the several provision of the Law but essentially Section 12 (1) of Civil Procedure Act, cap. 21 and therefore it should down its tool.

4. The Learned Counsel anchored his contention mainly on two (2) broad grounds. Firstly, the fact that the two (2) parcels of the suit property known as Land Reference No. 28164 Plot No. Kawala “B”/10 and Mariakani/Kawala “B”/310 (Hereinafter referred to as “The Suit Properties) respectively, were situated at Mariakani, within the County of Kilifi were within the local limits of the Environment and Land Court at Malindi as opposed to that of Environment and Land Court Mombasa where the suit was instituted by the Plaintiffs.

5. Secondly, he further advanced an argument that the 1st Defendants/Respondents even as depicted from the Plaintiff’s pleadings, resided and voluntarily worked for gain at Mariakani, the County of Kilifi whereas the 2nd Defendant voluntarily worked for gain at Nairobi within the County of Nairobi.

He vehemently submitted that as result of the filing of the case before Environment and Land Court Mombasa the suit and the Notice of Motion application dated 2nd November, 2021 were both as offensive to the Mandatory provision of Section 12 (1) of the Civil procedure Act.

He emphasized that the suit should have been instituted within the local limits where the property was situated and not elsewhere. To him the provision was couched in mandatory terms and therefore had to be adhered with strictly – the letter and spirit of the law.

6. While arguing that this court had no jurisdiction, he relied on the jurisdiction of Section 15 (1) and 16 of the Civil procedure Act. Therefore, this court has no power even to transfer the suit to another court. In the long run he held the suit ought to be filed in Environment and Land Court Malindi. To buttress his argument he heavily relied on the Court of appeal decision of *Court of Appeal Civil Appeal No. 224 of 2010 – Phoenix of East Africa Assurance company Limited – Versus - S.M. Thiga T/A. Newspapers Services*” where the court held that **“.....when a suit has been filed in a court without jurisdiction, it is a nullity. To transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and it is therefore to sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be a muddle up waters and allow confusion to reign, It is settled that parties cannot even by consent confer jurisdiction on a court where no jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the Oxygen rule principle or the Overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution of Kenya can remedy the same.**

7. Ultimately, and in the long analysis, he urged the Honorable court to allow the Preliminary objection and dismiss the notice of motion application and the suit filed by the Plaintiffs herein with costs.

II. The Plaintiff’s responses

8. In a quick rejoinder, the Learned Counsel for the Plaintiffs, Mr. Mark Mwanzia strongly opposed the Preliminary Objection. He held that the Environment and Land Court was a statutory creation by the Constitution of Kenya under the provision of Article 162 (b) where it vested it with original and unlimited jurisdiction. In the given circumstances, it was capable of hearing and determining cases from anywhere in the Republic of Kenya. He argued that, the court further drew its jurisdiction from the provisions of Section 3 of Environment and Land Court Act, No. 19 of 2012, Section 101 of the Land Registration Act of 2012 and Sections 150 of the Land Act of 2012. With regard to the provisions of Section 12 (1) of the Civil Procedure Act, he contended that land matters could be filed in the nearest court from where they local limits was stated or situated.

9. He referred court to the averments made under the contents of paragraph 2 of the Plaintiff which held, *inter alia*:-

***“The 1st and 2nd Defendants are male adults of sound mind working for gain in Mombasa*”**

In other words, according to the Learned Counsel, the parties were within the local limits of this court. They had already surrendered themselves to this jurisdiction. It was his further contention that the preliminary objection failed to meet the threshold set out under the famous case of **“Mukisa Biscuits Manufacturing Limited” (Supra)** as the same was mainly raising factual issues than matters purely on law.

10. He distinguished the Court of Appeal case of **“Phoenix** in that it was not applicable to the facts of instant case. The upshot of his submissions, he urged court to dismiss the preliminary objection with costs and allow the notice of motion application and the main suit by the Plaintiffs to be heard on its merit.

IV. ANALYSIS AND DETERMINATION

11. Upon hearing all the Learned Counsels for both the Plaintiffs and the Defendants with regard to the Notice of Preliminary objection dated 17th November, 2021, and having put into account all the relevant provisions of the Law and the cited authorities herein, I have proceeded to frame the following issue for consideration in order to arrive at a just and informed decision. These are:-

(a) Whether the Preliminary Objection dated 17th November, 2021 by the Defendant meets the fundamental threshold of a preliminary objection.

(b) Whether its about the ELC sitting at Mombasa having the Jurisdiction to hear the instant case or is it a matter of the suit being instituted within the “Local Limits” as defined under the provisions of Section 12 (1) of the Civil Procedure Act, Cap. 21

and whether the Defendant is entitled to the relief sought?

(c) Who will bear the costs?

ISSUE NO. a). Whether the Preliminary Objection dated 17th November, 2021 by the Defendants meets the fundamental threshold of a preliminary objection.

12. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held that *a proper preliminary objection constitutes a pure points of law*. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

13. I have further relied on the decision of *Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

14. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I therefore, affirm that the filed Preliminary objection is founded on all fours of an objection as stated hereof.

(a) ISSUE No. b - Whether its about the ELC sitting at Mombasa having the Jurisdiction to hear the instant case or is it a matter of the suit being instituted within the “Local Limits” as defined under the provisions of Section 12 (1) of the Civil Procedure Act, Cap. 21 and whether the Defendant is entitled to the relief sought?

In my own view, the fundamental issues surrounding this objection are two broad and legal philosophical substratum:-

a). Whether the Environmental and land Court sitting at Mombasa has Jurisdiction to hear and determine the instant case as opposed to the Environment and Land Court at Malindi; or

b). Whether the Environment & land Court sitting at Mombasa is within “the local Limit” to hear and determine the instant case or is it the Environment & land Court at Malindi which bears the said Limit.

On legal dictum of Jurisdiction:- Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as **“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”**

Under Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the *ELC (Malindi) in the Kharisa Kyango – Versus - Law Society of Kenya*

Further, in the now famous case of *“Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR* dealt with a court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would

be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

Additionally, still on the same point, in the case of *“County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR”* whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost....”

While I fully concur and associate myself with the ration made out under Pheonex of EA Assurance Limited case (Supra) my interpretation of the ratio on jurisdiction was where a case for instance of the Commercial or running down or Succession or employment and labour related and so forth was instituted before the Environment and Land Court or the vice versa then clearly that stated case becomes a nullity of jurisdiction and it's the one that cannot be salvaged by neither consent of parties, the Oxygen principles or the Overriding Objectives or the prepositions found under Article 159 of the Constitution of Kenya. The instant case is extremely distinguishable from what was envisaged under that decision of the Court of Appeal. For these very reason, therefore, it is completely wrong for the Defendants to emphatically state that the Environment and Land Court at Mombasa has no jurisdiction to hear and determine this case. The court is clothed with the legal jurisdiction to hear and determine the case.

On the dictum of “The Local Limits”:- As argued by the Learned Counsel for the Defendant Advocate, the ELC Act under the provisions of Section 19 (2) of the ELC Act, has mandate to use and bound by the Civil procedure rules. It was from that basis that how the provisions of Sections 12 (1), 15 and 18 (1) of the Civil Procedure Act as cited by the Learned Counsel for the Defendants comes to play. The provisions of Section 12 (1) of the Civil Procedure Act provides as follows:-

12(1) Subject to the Preliminary or other limitations prescribed by any Law Suits

(a) ...

Where the property is situate in Kenya, shall be instituted in Kenya in the court within the local limit of whose jurisdiction the situate”

It is very unfortunate the Civil Procedure Act or any other stature has defined what exactly **“Within Local Limits”** means. Would it be the geo – political horizons of the County, Wards, Sub – County or location levels within the Republic of Kenya? I wonder loudly. For that reasons, perhaps the provisions of the Interpretation General Act, Cap. 2, would come to play as it calls for deep interpretation. Neither, did the Learned Counsel for the Defendants also assisted court here. To me it means, a matter of logistical convenient and a suit would be instituted within the local limits where the parties reside or work for gain or land is situated. For instance, from the filed Plaint in the instant case it has been held that:- **“The 1st and 2nd Defendants are male adults of sound mind working for gain in Mombasa**”. This being an issue of facts is uncontroverted nor opposed so to speak taking the they have not field any statement of Defence. The provisions of Order 2 Rule 6 of the Civil Procedure Rules hold that parties are bound by their own pleadings. From a fact, before this court there are numerous land cases filed from all over the Coastal region and the County of Mombasa. It was only recently some of these cases which were being handled before this courts were to arrest the ever increasing cases of backlogs and administratively transferred to different courts upon their new creation, for instance, the newly created Environment & Land Court at Kwale. Unfortunately, if this court was to be guided by this legal parameter, it would tantamount to what the English Philosopher Thomas Hobbes described as a state of **“Solitary, Nasty, Brutish and Short”** as hardly any single suit would remain in the court. In other terms, to allow this objection would be setting a very dangerous precedents where these cases filed by parties from the near or within the local locations would be dismissed contrary to the principle of access to justice as provided for under Article 48 of the Constitution of Kenya. It would be understandable if this case was filed in a far off geographical jurisdiction say at the Environment & Land Court at Milimani Nairobi, Nakuru, Eldoret, Kitale or elsewhere away from the County of Mombasa. But this is within the local limits of the County of Mombasa.

In this case, it appears that the Defendants strongly feels their case should be heard and determined before Environment & Land Court at Malindi as it is the court within the local limits of their land, then let it be. This court has no objection whatsoever to that desired proposal. Indeed, it has obliged and granted the request.

III. DETERMINATION

From my own assessment and the analysis made hereof, I find that the Preliminary Objection hereof has no merit. For avoidance of any doubts, I proceed to order as follows:-

a) THAT the preliminary objection dated 17th November, 2021 lacks merit and thus it be and is hereby dismissed with costs to the Plaintiffs.

b) THAT taking that the Summons to Enter appearance dated 9th November, 2021 were on 17th November, 2021 served upon the 1st, 2nd, & 3rd Defendants and all the Interested Parties herein as per the filed Affidavit of Served, they are directed to:-

i) have duly filed their Defence and/or Counter Claim within the next thirty (30) days under Orders 7 and 11 of the Civil Procedure Rules, 2010 from today.

ii) Plaintiff shall be at liberty to file a Reply to the filed Defence and/or Counter Claim within Fifteen (15) days of service. Failure to adhere with these conditions, Interlocutory Judgement to be entered under Order 10 Rule 10 of the Civil Procedure Rules.

c) THAT this suit be transferred to the Environment and Land Court, Malindi within the local limits where the suit land is situated.

d) THAT in order to preserve the suit property, the Land Registrar, Kilifi is directed to register inhibition against all that parcels of land known as the Land Reference No. 28164 Plot No. Kawala "B"/10 and Mariakani/Kawala "B"/310 pursuant to the provisions of Section 68 (1) & (2) and 69 of the Land Registration Act, of 2012 and Regulation 79 (1), (2) & (3) of the Land Registration (General) Regulations within the next 30 days from this date at the costs of the Plaintiffs until this matter is heard and determined.

e) THAT this matter be mentioned before the Environment and Land Court, Malindi on 24th January, 2022 for further direction and/or orders.

IT IS ORDERED accordingly.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 15TH DAY OF DECEMBER 2021.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

IN THE PRESENCE OF:-

M/S. YUMNA – THE COURT ASSISTANT

MR. MARK MWANZIA ADVOCATE FOR THE PLAINTIFFS.

MR. TINDIKA ADVOCATE FOR THE 1ST & THE 2ND DEFENDANTS.

MR. BAGHA HOLDING BRIEF FOR MR. KAREGA ADVOCATE FOR THE 7TH INTERESTED PARTY.