

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HIGH COURT COMMERCIAL CASE NO. E 043 OF 2020

(FORMERLY HCCC NO. 40 OF 2020, FORMERLY HCCC CIVIL NO. 253 OF 2019 & (FORMERLY HCCC NO. 6542 OF 1991)

NGENGI MUIGAL.....PLAINTIFF

VERSUS

GEORGE KANGETHE WARUHI 1st DEFENDANT

GRACE WANJIKU GITHU.....2nd DEFENDANT

SAMUEL KAMAU MACHARIA3rd DEFENDANT

JOSEPH GILBERT KIBE.....4th DEFENDANT

SOLOMON WILSON KARANJA.....5th DEFENDANT

SCENERIES LTD 6thDEFENDANT

KENYA RE INSURANCE CO. LTD7th DEFENDANT

RULING

Introduction

1. This case has a chequered history. For starters, it has been pending in court for the last 30 years. Three decades is a long period by any standards. Second, trial delays are the bane of our legal system. Such a long period should prick the conscience of any one who cares about the need for speedy resolution of court disputes, a dictate under Article 159 of the Constitution. The case was initially filed in the Civil Division of the High Court in 1991. The case number appears to have changed several times. In a Ruling dated 25th July 2019, rendered 28 years after the suit(s) was filed, the court noted the delay in prosecuting this case. (See paragraphs 33 and 34 of the Ruling). After rendering the said ruling the court (Njuguna J) ordered that this case be transferred to the Environment and Land Court for hearing and determination. However, at the Environment and Land Court, the 1st, 3rd, 4th, 5th and 6th defendants (herein after referred to as the applicants) filed the application dated 16th October 2019 the subject of this ruling raising a raft of issues as detailed below.

2. On 18th February 2020, Dr. Kamau Kuria informed the Environment and Land Court judge (Bor J), that the issue for determination in this case related to shares held in Sceneries Limited, the 6th defendant, hence the dispute was commercial in nature fit to be determined by the Commercial Division of the High Court. The learned judge directed Dr. Kamau Kuria to apply for the review of the orders transferring the matter from the Civil Division to the Environment and Land Court. In compliance with the said directions, the parties appeared before justice Njuguna on 9th March 2020 and recorded a consent transferring this case to the Commercial Division.

The application

3. In the application dated 16th October 2019 referred to above, now the subject of this ruling which was filed when the matter was still before the Environment and Land Court, the 1st, 3rd, 4th 5th & 6th defendants raised three core grounds. *First*, they objected to the jurisdiction of the Environment and Land Court to entertain the dispute citing Article 162 of the Constitution on grounds that the jurisdiction of the said court does not extend to adjudicating commercial disputes between shareholders and directors and the assets of a company. *Second*, they argued that this suit is an abuse of court process because the issues raised herein are the subject of the disputes in pending identical suits before the National Land Commission and Nairobi ELC Judicial Review Application No. 80 of 2018.

4. *Third*, that, this suit is *res judicata* because in High Court Misc. Civil Application No. 356 of 2000, it was determined that the only immoveable property known is LR. No. 12236 and not LR. No. 216/ 8 and that the Plaintiff admitted that LR. No. 216/ 8 does not exist.

5. *Fourth*, a litigant is not allowed to amend its pleadings so as to cause injury to the other. The applicants contend that in amending his plaint, the Plaintiff exceeded the power which the law has given a party to amend its pleadings. They contend that in the amended Plaint, dated 10th September 1992, the Plaintiffs claim concerns shareholding in the 6th defendant and LR No. 216/8, and, that the purported further Amended Plaint discloses no cause of action against the applicants. *Fifth*, that under Section 6 of the Civil Procedure Act, this court has

jurisdiction to stay further proceedings pending the hearing and determination of the Plaintiff's complaint filed in the National Land Commission; and Nairobi ELC Judicial Review Application No. **80** of 2018.

6. As a consequence of the foregoing, the applicants pray for an order that the further amended Plaintiff be struck out for being an abuse of court process. The applicants also prayed for an order transferring this suit to the Commercial Division of the High Court. However, during the pendency of this application, the parties recorded the earlier mentioned consent before Njuguna J transferring the case to this division.

7. In the alternative, the applicants pray that this court be pleased to stay further proceedings in this suit pending the hearing and determination of the Plaintiff's complaint before the National Land Commission and also Nairobi ELC Judicial Review Application No. **80** of 2018: Republic v National Land Commission *ex parte* Sceneries Ltd, Samuel Kamau Macharia and Joseph G. Kibe. Lastly, the applicants pray that in the event the above prayers are declined, this court be pleased to strike out paragraphs **24A, 24B, 24C, 24D, 24E, 24F, 24G** and Prayers Nos. **4, 4A, 4C, 4D, 5A** and **8A** of the further Amended Plaintiff for exceeding the scope of the right of the Plaintiff to amend his pleadings. The applicants pray for costs of the application.

Plaintiff's Replying Affidavit

8. Mr. Ngengi Muigai, the Plaintiff herein swore the Replying affidavit dated **1st** November 2019 in opposition to the application. He deposed that the amended Plaintiff is within the confines of the law; that he is claiming $\frac{1}{4}$ share in Land Reference Number **216/8** and a nullification of the title for Land Reference Number **12236** which the defendants allege to be an amalgamation of **L.R 216/8** and **L.R 12261**; and that only the Environment and Land Court has jurisdiction to determine to the claim.

9. He deposed that the validity of **L.R 12236** was never an issue in High Court Misc Civil Application No: **356** of 2000 nor was the matter of ownership raised therein because he said suit was challenging criminal prosecution of the **3rd** and **4th** applicant in the lower court. He also deposed that the issue for determination in Nairobi ELC Judicial review application **80** of 2018 is whether the National Land Commission has powers to carry out a review of the grants to **L.R 216/8, L.R 12261** and **L.R 12236**. Further, in the said case the applicants seek to prohibit the National Land Commission from conducting any hearing, review or action in respect of parcels **L.R 216/8, L.R 12261** and **L.R 12236**.

10. He averred that the prayer to stay these proceedings pending the hearing and determination of his complaint before the National Land Commission amounts to approbation and reprobation which must not be countenanced by this court, and, that the defendants want to scuttle the final determination of the validity of **L.R 12236** at all costs. He deposed that the existence or otherwise of **L.R 216/8** can only be determined after the hearing of this suit on its merit.

11. He deposed that his claim goes beyond the shareholding to the beneficial interest of the parcel **L.R 216/8** whose acquisition was the object of the formation of the **6th** defendant. Mr. Muigai also deposed that he has never admitted that **L.R 216/8** does not exist as alleged and that he has disclosed attempts by the directors of the **6th** defendant to mislead the public and **7th** defendant that the said title was extinguished by alleged amalgamation with **L.R 12261** to make **12236**. He averred that parcel **L.R No 216/8** did not cease to exist nor was it amalgamated with **L.R No 12261** as alleged.

12. Mr. Muigai averred that the applicants including himself through the office of the **1st** defendant entered into an agreement with Her Excellency Mama Ngina Kenyatta in her capacity as personal representative of The Late President Jomo Kenyatta to buy parcel No. **L.R 216/8** and the same was transferred by the indenture marked "NM2." Further, he deposed that at no time did the applicants acquire any other parcel before 1988 or at all.

13. Mr. Muigai deposed that Constitutional Application No. **1** of 2016 sought to determine the procedural issues and the final ruling did not determine the merits or existence of **L.R 216/8** but addressed the promulgation of the rules by the National Land Commission, and it directed the Commission to investigate the legality and regularity of L.R No. **12236, 12261** and **L.R 216/8**. He averred that this suit was transferred from the Civil Division to the Environment and Land Court on **25th** July 2019 because the said court is clothed with Jurisdiction to hear and determine the dispute.

14. Additionally, he deposed that the questions for determination in this case are whether title **L.R 12236** is valid to the extent it purports to be an amalgamation of **L.R 216/8** and **L.R 12261**; whether the Plaintiff is entitled to $\frac{1}{4}$ share in Land Reference Number **216/8** and whether the Plaintiff is entitled to *mesne* profit for the period of time he did not make use of his land. He deposed that the instant dispute relates to ownership of Land Reference Number **216/8** and the validity of Land Reference Number **12236** which falls under the jurisdiction of the Environment and Land Court.

15. He deposed those pleadings can only be struck out if they disclose no reasonable cause of action or defence; are scandalous, frivolous or vexatious; or they may prejudice, embarrass or delay the fair trial of the action; or they are an abuse of the process of the court. Further, that, the applicants have not demonstrated by filing their defence or in their application under what limb they wish to strike the suit.

The 7th Respondents Replying Affidavit

16. Jadhiah M. Mwarania, the **7th** defendant's Managing Director in his Replying affidavit deposed that the amendments introduced new cause of action and prayers. He averred that prior to the said amendments the Plaintiff had filed two complaints before the National Land Commission challenging the legality of, among others, **L.R. No. 12236** which same challenge the plaintiff seeks to introduce and prosecute through the further amended plaintiff. He deposed that the **7th** defendant was a party to the National Land Commission proceedings in which the complaint has been stayed by the court in Nairobi ELC Judicial Review Number **80** of 2018.

17. He also deposed that **L.R. No. 12236** exists on the ground, and, that the plaintiff purported pursuit of his shares in the **6th** defendant has

dragged the 7th defendant in endless litigation at its expense and detriment. Lastly, he deposed that the 7th defendant is anxious to utilize its property, hence, it is in the interests of justice that a forum with competent jurisdiction determines the issues once and for all.

Applicant's further Affidavit

18. Mr. Joseph Gilbert Kibe, the 4th defendant in his further affidavit deposed that the Plaintiff has annexed a copy of a mistaken conveyance for **LR No.216/8** which was the subject of discussion High Court Miscellaneous Application No **356** of 2000, and that the transferee in the mistaken conveyance is the 6th defendant and not its shareholders of whom he claims to be.

19. He deposed that in the un-amended plaint, the Plaintiff was clear that he claims a quarter of **LR No 216/8**, which belongs to the 6th defendant, by virtue of his alleged membership to the 6th defendant. He also deposed that in his affidavit, the Plaintiff admitted that the issues raised in his suit are similar to his complaint before the National Land Commission and Nairobi ELC Judicial Review Application No. **80** of 2018.

20. He also deposed that the Plaintiff wholly ignored a passage in Mr. James Kamwere's letter dated **11th** August, 2014 stating that although it was the wish of H.E the Late President Jomo Kenyatta to have a consolidated title for the land bought from Joreth Limited with direct access to Kiambu Road, the statutory formalities had to be complied. Further, he deposed that Mr. Kamwere wrote that he prepared three sets of deed plans and submitted the same to the director of surveys who signed and issued them as follows: **LR No. 216/8**, Deed Plan No. **98741** measuring **38.39** dated 9/1/1976 issued to Kamwere & Associates; **LR No. 12261**, Deed Plan No. **99149** measuring **1.908 ha** dated 1/4/1976 issued to Commissioner of Lands; and **LR No. 12236** Deed Plan **98742** measuring **40.30** dated 25/3/1976.

21. Additionally, he deposed that among the Plaintiff's bundle of documents is a letter from the Commissioner of Lands dated **28th** May, 1997 explaining that LR No. **12236** is a consolidation of LR No. **216/8** with LR No. **12261** and also confirming that the Commissioner of Lands Received the Deed Plan in Respect of LR No. **12236**. He also deposed that among the Plaintiff's bundle of documents is a letter dated **30th** May, 2012 explaining that **LR No. 216/8** and **12261** were consolidated to form LR No. **12236** and consequently, **LR No. 216/8** ceased to exist. Lastly, he deposed that the Environment and Land Court lacks jurisdiction to entertain a commercial dispute, and that the Plaintiff is not allowed by law to engage this court and the National Land Commission simultaneously.

22. As mentioned earlier, this suit was initially instituted in the Civil Division of the High Court. On **25th** July 2019, Hon Justice Njuguna ordered that this case be transferred to the Environment and Land Court. However, on **18th** February 2020, Dr. Gibson Kamau Kuria informed Justice Bor of the Environment and Land Court that the issues raised in this case touch on determination of shares in a company, which he argued is a commercial dispute. Noting that the order transferring the case to the Environment and Land Court was still in place, Bor J referred the matter to Njuguna J for them to apply to the learned judge to review her earlier orders transferring the case to the Environment and Land Court. Upon appearing before Njuguna J, the parties recorded a consent transferring the case to the Commercial Division.

23. From the above account, it is clear that the question of which court is seized of jurisdiction to determine this matter was never addressed substantively by the two courts who handled thus file. More important is the fact that it is an established position of law that jurisdiction cannot be conferred by the consent of the parties. Thus, even though the matter was transferred to this court by consent, the question of jurisdiction still remained unresolved.

24. On **12th** March 2021, the Parties appeared before me for directions on the way forward. Mr. Mbuti Gathenji appeared for the Plaintiff. Mr. Munyori held brief for Dr. Kamau Kuria counsel for the **1st 3rd-6th** defendants. Milimo represented the **7th** defendants. Mr. Gathenji, counsel urged the court to bear in mind that the question of this court's jurisdiction was still a live question because it had not been determined. All the counsel opted to adopt their written submissions on the application the subject of this ruling. I reserved the matter for ruling.

25. However, upon studying the entire file and the party's submissions, I formed the opinion that it was in the interests of justice that the parties be afforded an opportunity to address the court on the question of this court's jurisdiction to hear and determine this matter. My view was reinforced by the fact that the submissions on record relating to the question of jurisdiction were filed when the matter was before the Environment and Land Court. This position had drastically changed necessitating the need for the parties to align their submissions with the fact the matter was now in the Commercial Division. Accordingly, I listed the matter for mention and on **8th** March 2021 when I notified the parties on the need to address the question of jurisdiction and fixed the matter for submissions on **11th** May 2021.

The submissions

26. Dr. Gibson Kamau Kuria argued that the question of jurisdiction was resolved by the ruling in JR No **80** of 2018, hence this matter is properly before this court. He submitted that the Plaintiff's claim relates to a share in a company and a claim of a portion of immovable property owned by a company which is a commercial dispute because shareholders and directors of a company do not own the assets of a company. To fortify his argument, he cited *Salmon v Salmon*^[1] and submitted that if the Plaintiff proves that he is a shareholder, he will be entitled to the rights of a shareholder.

27. He submitted that the core dispute is whether a shareholder can claim an interest in the company's asset by virtue of the shareholding, hence it's a commercial dispute. He argued it matters not how the property is described, but what matters is that no shareholder has an interest in the company's assets.

28. Dr. Kuria urged the court to strike out the prayers in the Plaint touching on the immovable property arguing that in company law, there is no cause of action founded on assets of a company. He argued that the jurisdiction of the Environment and Land Court does not extend to the

adjudication of commercial disputes between shareholders and directors and the assets of a company. He submitted that the property claimed by the Plaintiff is an asset of the 6th defendant premised on the Plaintiff's claim that he is allegedly a holder of 25% of the shares and that he is entitled to all its assets including the property he terms as **L.R. No. 216/8**. Consequently, he argued that the Plaintiff's claim can only be entertained by the Commercial Division of the High Court.

29. Dr. Kuria also submitted that the applicants seek to strike out some paragraphs of the Plaint as listed in the application because trying the issues raised will delay or embarrass the course of justice. He submitted that the court's jurisdiction to strike out a suit is exercised in clear circumstances such as the instant case which is a claim by a shareholder.

30. Mr. Wafula, counsel for the 7th defendant supported the application and adopted Dr. Kuria's submissions.

31. On the issue of jurisdiction, Mr. Gathenji urged the court to look at the constitutional objectives of creating courts of equal status as opposed to engaging in an essentialist, taxonomical and categorical analysis. He urged the court to consider: - (i) whether there was a breach of shareholders agreement between the Plaintiff, 3rd, 4th and 5th defendants; (ii) whether the Plaintiff was procedurally removed from Sceneries Limited; (iii) whether title L.R No: 12236 is valid; (iv) whether the Plaintiff is entitled to ¼ share of L.R 216/8; (v) whether the transfer of L.R No: 12236 to the 7th defendant is valid; and (vi) whether the Plaintiff is entitled to mesne profit/loss of user for ¼ of L.R 216/8. He argued that these issues can only be dealt with by the Environment and Land Court.

32. Mr. Garhenji referred to the amended Plaint and argued that the claim is based on a trust document which is distinguishable from the law in *Salmon v Salmon*. Additionally, he submitted that in determining the issue of jurisdiction, the court may use the pre-dominant purpose test. He argued that under the said test, the court must first determine whether the pre-dominant dispute is about land or not. He argued that in applying the said test to the facts of this case, the 6th defendant was formed for the sole purpose of acquiring land and it does not own any other asset. He also pointed out that the dispute between its shareholders is over a piece of land and the validity of a land title **L.R 12236** and its sale to the 7th defendant. He submitted that the instant dispute is predominantly land and fit to be heard by the Environment and Land Court. He submitted that the fact that there are proceedings before the National Land Commission buttresses his position that that this is a land matter.

33. Mr. Gathenji cited *Tasmac Ltd v Roberto Marci & 2 Others*^[2] which held that where a dispute raises matters which fall within the jurisdiction of the High Court and the Environmental and Land Court, any of the two courts should be able to adjudicate upon it and make a determination because a suit cannot be "dismembered" so that one limb is heard by one court and another by the other, otherwise, that would amount to an absurdity and miscarriage of justice which was not what was intended by the Constitution. He also relied on *Gitonga Kithinji Muriuki v Eleonara Cozzi & another*^[3] in which the court expressed a similar position and urged this court to find that the predominant dispute in this case is land.

34. On the invitation to this court to strike out the pleadings, Mr. Mbuthi Gathenji submitted that striking out pleadings is a draconian step and a measure of last resort. He faulted the applicants for filing an affidavit in an application to strike out a suit and argued that in such applications, evidence is not tendered. He argued that the Plaint discloses triable issues and pointed out that the 7th defendant has already filed a defence and a counter-claim. He submitted that the applicants' have not made a case for striking out.

Determination

35. I will first address the question of jurisdiction. A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[4] Article 165(1) of the Constitution vests vast powers to the High Court. However, Article 165 (5) claws back some of this vast jurisdiction. It provides in mandatory terms that the high court shall not have jurisdiction in respect of matters: - (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).

36. It is important to determine the matters contemplated in the above Article which fall outside the ambit of this court's wide jurisdiction. The preamble to the Environment and Court Act^[5] provides that the act was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes. Section 13 of the Act provides that: -

(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

37. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article **162(2) (b)** of the Constitution and Section **13** of the Act. In this regard, the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this court has no jurisdiction. In *Republic v National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*^[6] the court stated^[7] that since the determination of the *R v Karisa Chengo & 2 Others*^[8] it has become clear the matters contemplated in the above provisions ought to be dealt with by the specialized courts.

38. A High Court may not determine matters falling squarely under the jurisdiction of the 'status courts' namely the Employment and Labour Relations Court and the Land and Environment Court. As Mr. Mbuti Gathenji pointed out in his submissions, the core issues are:- (i) whether there was a breach of shareholders agreement between the Plaintiff, 3rd, 4th and 5th defendants; (ii) whether the Plaintiff was procedurally removed from Sceneries Limited; (iii) whether title L.R No: 12236 is valid; (iv) whether the Plaintiff is entitled to ¼ share of L.R 216/8; (v) whether the transfer of L.R No: 12236 to the 7th defendant is valid; and (vi) whether the Plaintiff is entitled to mesne profit/loss of user for ¼ of L.R 216/8. The core dispute as I see it relates to ownership of Land Reference Number **216/8** and the validity of Land Reference Number **12236**.

39. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. This position was appreciated by the South African Constitutional Court^[9] thus:-

"Jurisdiction is determined on the basis of the pleadings,^[10]... 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..."

40. Guided by the above excerpt, I spared considerable time and studied the Plaintiff's case as disclosed in the Plaintiff. A reading of the further amended Plaintiff and the prayers sought will shed more light on the nature of the dispute before this court. In fact, **6** out of the **9** declarations sought in the Plaintiff relate to land. The prayers are: -

- a. A declaration that the purported instructions by the 3rd,4th and 6th Defendants to the 1st and 2nd Defendants to dissolve the express trust were wrongful, of no effect and null and void and all steps taken by the 6th Defendant following the cessation of the express trust are invalid of no effect and are null and void.
- b. 4A. A declaration that the alleged amalgamation giving rise to the title LR 12236 and the arising title LR 12236 is null and void in so far as it includes or purports to include parcel number LR 216/8.
- c. 4B. A declaration that the Plaintiff is entitled to one-fourth share of and or beneficial interest of parcel number LR 216/8.
- d. 4C. Without prejudice to the foregoing and in the alternative to prayer 4B an order that a sum of Kenya Shillings two billion six hundred and eight million, six hundred and fifty thousand (2,608,650,000), be paid to the Plaintiff by the 1st, 3rd, 4th 5th and 6th Defendants jointly and severally being one-fourth of the current value of land parcel number LR No.216/8 as pleaded in paragraph 19(b) (2) above.
- e. 4D. Mesne profits/loss of user from 1989 to 2019 for one-fourth of LR 216/8(23.715 acres), totaling to One Billion, Seven Hundred and Seven Million, Four Hundred and Eighty Thousand (1,707,480,000) for the one-fourth of L.R 216/8 be paid to the Plaintiff by the 1st, 3rd, 4th, 5th and 6th Defendants jointly and severally as pleaded in paragraph 19(b) (3)
- f. Damages from the 3rd, 4th, and 5th Defendants for breach of the shareholders agreement as set out in paragraph 17 above for loss and damage suffered by the Plaintiff as a result of such breach including his exclusion from the management of the 6th Defendant.
- g. 5A. Damages for breach of trust by the 1st Defendant amounting to Kenya Shillings Two Billion, Six Hundred and Eight Million, Six Hundred and Fifty Thousand (2,608,650,000) being one-fourth of the current value of land parcel number LR 216/8.
- h. that the 6th Defendant do give a full account of its affairs financial and otherwise, and all its dealings since the wrongful termination of the express trust and exclusion of the Plaintiff as a shareholder thereof.
- i. A permanent injunction restraining the 6th and 7th Defendants through their servants and/or agents or otherwise howsoever

from alienating, selling, agreeing to sell, dispose off or otherwise in any way dealing with the parcel LR 216/8 Karura, its alleged amalgamated title LR 12236 or its subdivision or derivative

41. From the foregoing, the bulk of the reliefs this court is being invited to grant fall outside the jurisdiction of this court. It is also evident that the dispute between the shareholders is over a piece of land and the validity of land title in respect of **L.R 12236** and its sale to the 7th defendant. As Mr. Gathenji correctly submitted, the fact that there are proceedings before the National Land Commission buttresses the position that this is a land matter falling squarely if not predominantly in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court.

42. As is evident from the prayers sought in the Plaintiff, the bulk of the prayers relate to land. Applying the pre-dominant purpose test, it can safely be said that this case falls squarely under the jurisdiction of the Environment and Land Court. My conclusion finds support in *Mohamed Ali Baadi and others v Attorney General & 11 others* in which a 5-judge bench of the High Court applying the predominant purpose test in hybrid cases observed: -

100. The Supreme Court in Republic vs Karisa Chengo & 2 Others [47] 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.

101. In earlier cases, our superior Courts approached the question using the lens of concurrent jurisdiction. This approach is exemplified by Ledidi Ole Tauta & Others vs. Attorney General [48] where a three-judge bench of the High Court after deeply discussing the question held inter alia:

...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....

102. Similarly, in Patrick Musimba vs. National Land Commission & 4 Others [49] the Petitioner challenged the manner in which compulsory acquisition of land had been conducted in Kibwezi Constituency and the process of the Environmental and Social Impact Assessment (ESIA) for the construction of the Standard Gauge Railway (SGR), another mega-infrastructure project. 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 ELC established under the Environment and Land Court Act [50] as read with

Article 162 of the Constitution. The Respondents submitted that both Articles 162 and 165 of the Constitution limited the jurisdiction of the High Court. They further argued that the presiding Judges empanelled by the Chief Justice were not qualified to handle the Petition as they had not been appointed as ELC Judges. The Respondents further argued that the jurisdiction of the Court could only flow from the appointment of the Judge.

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.

.... It could not have been the intention of the draftsmen of the Constitution that when the Court was faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained.

104. A similar position was held by a three-judge bench in *Leisure Lodges Ltd v Commissioner of Lands & 767 others* [51] citing the above decisions.

105. Subsequent to the above decisions, our Courts have identified the correct approach to determine the appropriate superior Court to hear such hybrid cases. The Courts have resolved the issue by inquiring what the most substantial question or issue presented in the controversy is. For example in *Suzanne Butler & 4 Others v Redhill Investments & Another* [52] the Court stated the test in the following words:

"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.

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. 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."

43. In fact, a reading of the entire submissions filed by Dr. Kuria even where they cite other grounds, they all revolve around the question of land and rights over the subject parcel (s) of land. As was held in *Owners of the Motor Vessel Lillian S v Caltex Kenya*,^[11] the court will down its tools as soon as it discovers that it lacks jurisdiction to hear the dispute before it. The court stated "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."

44. I am conscious of the fact that this case was filed at the Civil Division. A judge in the said division upon appreciating the issues raised in this case transferred the matter to the Environment and Land Court. Following an issue raised by one of the parties that the dispute herein is essentially a commercial dispute, a judge in the Environment and Land Court referred the matter to the Civil Division. Justice Njuguna at the request of the parties reviewed her earlier orders and transferred this matter to the Commercial Division. Before this court, the parties for the first time substantially addressed the question of jurisdiction, hence, this is the first ruling determining the said issue.

45. Jurisdiction must be conferred by the law before it is acquired. If this court ventures into the forbidden sphere and entertain this suit without jurisdiction, the proceedings will be a nullity. I decline the invitation to venture into this forbidden sphere. This finding is sufficient to halt any further proceedings in this court. Having so found, I see no need to address the other issues raised in the application. I direct that this file be transferred to the Environment and Land Court for hearing and determination. I make no orders as to costs.

Orders accordingly

Signed, Dated and Delivered via e-mail at **Nairobi** this **6th** day of **July** 2021

John M. Mativo

Judge

[1]{1897} A C 1.

[2] Malindi ELC Miscellaneous Application No. 5 of 2013 (2013) e KLR.

[3] {2017} e KLR.

[4] *Samuel Kamau Macharia v Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[5] Act No. 19 of 2011.

[6]{2018} e KLR.

[7] {2018} e KLR

[8] Supreme Court in Petition No. 5 of 2015.

[9] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[10] *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[11] {1989} KLR 1.