



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO. 1 OF 2018**

**KENYA RAILWAYS CORPORATION.....PLAINTIFF**

**-VERSUS-**

**UASIN GISHU COUNTY GOVERNMENT.....DEFENDANT**

**RULING**

[1] The defendant filed a Notice of Preliminary Objection herein dated **28 May 2019** contending that:

[a] This suit offends the provisions of **Section 25** of the **Rating Act, Chapter 267** of the **Laws of Kenya**;

[b] That this Court lacks the jurisdiction to hear and determine this matter;

[c] That the suit is an abuse of the Court process as it does not raise any triable issues;

[d] The Complaint herein is frivolous, vexatious, scandalous, misconceived, bad in law and an abuse of the Court process; hence should be dismissed with costs.

[2] The brief background to the defendant's preliminary objection is that, vide an Amended Complaint filed herein on **18 January 2018**, the plaintiff prayed for declaratory orders against the defendant as follows:

[a] That the issue of rates, penalties, interest and administrative charges thereto payable by the plaintiffs to the defendants in respect of all parcels of land owned by and/or in possession of the plaintiffs within Eldoret Town for the periods up to **December 2012** having been litigated upon, negotiated upon and compromised by way of a written consent dated **23 February 2011** cannot form any part of claim by the defendant and is *res judicata*.

[b] That the defendant be stopped from using and/or including the said period running up to **December 2012** to compute rates, interest, penalties and administrative charges so as to arrive at the said figure mentioned in paragraph 13 or any other figure.

[c] That the defendant can only raise fresh claims in respect of rates, interest, and administrative charges against the plaintiffs in respect of the mentioned parcels of land after following due process as provided for by the provisions of the **Valuation for Rating Act, Chapter 266** of the **Laws of Kenya**, and the **Rating Act, Chapter 267** of the **Laws of Kenya** without which the defendant is estopped from making such claim.

[d] Any other relief the Court may deem fit to grant.

[e] Costs and interest at court rates.

[3] The plaintiff's cause of action was premised on the fact that it owns various rateable properties within Uasin Gishu County; and that the defendant's predecessor, the defunct Municipal Council of Eldoret, filed **Eldoret Chief Magistrate's Civil Case No. 95 of 2010** against it to recover a total of **Kshs. 386,573,903.97** together with interest; which suit was compromised by consent on **23 February 2011** and the agreed sum paid by the plaintiff. Thus, it was the contention of the plaintiff that, on account of that consent order, the rates due and payable to the defendant as at **December 2012** were settled, and therefore the defendant is estopped from making any further and/or additional demands in respect thereof.

[4] The plaintiff further averred that, even for the period between **1 January 2013** to the date of filing this suit, the defendant can only lawfully make a claim for rates after fully complying with the procedure prescribed under the **Valuation for Rating Act** and the **Rating Act**.

It therefore took issue with the fact that the defendant served it with notices dated **24 March 2017** and **6 June 2017** demanding a total of **Kshs. 2,802,438,824.14** as arrears of rates, penalties, interest and administrative charges in respect of parcels of land allegedly owned by and/or in the possession of the plaintiff for the period between **2014** and **2017**. It was on that account that it filed the instant suit.

[5] The preliminary objection was canvassed by way of written submissions. Thus, in her written submissions filed herein on **25 May 2021**, **Ms. Chesoo** for the defendant submitted that, since the claim is in connection with the recovery of rates, it ought to have been filed before the subordinate court pursuant to **Section 25** of the **Rating Act**. She relied on **R vs. Municipal Council of Mombasa & 4 Others** [2018] eKLR as well as the **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd** [1989] eKLR to underscore her submission that this Court lacks the jurisdiction to entertain this suit.

[6] It was further the submission of **Ms. Chesoo** that since the **Rating Act** has provided for a clear procedure to be followed in such matters, that procedure ought to be strictly followed. She relied on **Speaker of the National Assembly vs. James Njenga Karume** [1992] eKLR; **Stephen Nyaranga Onsomu & Another vs. George Magoha & 7 Others** [2014] eKLR and **Republic vs. National Environment Management Authority** [2011] eKLR, among other authorities, in support of her arguments.

[7] **Mr. Juma** for the plaintiff, on the other hand, took the view that, since the rates in issue were settled vide a consent order, that consent order gave rise to a fresh cause of action; and it is on the basis thereof that this suit has been brought. He pointed out that by sending fresh demand letters for the global sum of **Kshs. 2,802,438,424.14** as representing rates due as at **24 January 2017**, the defendant acted in breach of the consent order and therefore that the plaintiff is entitled to approach this Court in connection with that breach. He cited the case of **Alex Chemtai vs. David Mbugua Kuria & 4 Others** [2015] eKLR for the submission that a breach of a consent judgment constitutes a new cause of action.

[8] **Mr. Juma** sought refuge in **Article 165(3)(a)** of the **Constitution** and submitted that the High Court has unlimited original jurisdiction to hear and determine disputes; and that a reading of the **Rating Act** shows that the said provision does not expressly forbid the High Court from hearing claims of this nature. He added that, should the Court find that it lacks jurisdiction under **Section 25** of the **Rating Act**, then it should consider transferring the case to the lower court pursuant to **Section 18** of the **Civil Procedure Act** rather than dismiss it. He was of the view that such a transfer would meet the ends of justice and can be done without a formal application to that effect, pursuant to **Article 159(2)(d)** of the **Constitution**. The case of **Linet Chepkemoi Masai vs. Moses Ndiema Masai & Another**, Eldoret High Court Civil Case No. 29 of 2020 was cited as one such situation in which the court declined to pay homage to procedural requirements in favour of substantive justice. Counsel also cited **Prof. Daniel N. Mugendi vs. Kenyatta University & Others** [2013] eKLR in which the Court of Appeal overturned the decision of the High Court dismissing the petition for lack of jurisdiction. Instead, the Court of Appeal referred back the matter to the High Court with directions for transfer to the Employment and Labour Relations Court for adjudication.

[9] In response to the argument that the Plaintiff raises no triable issues, counsel cited **Ternic Enterprises Limited vs. Waterfront Outlets Limited** [2018] eKLR, **DT Dobie & Co. (K) Ltd vs. Joseph Mbatia Muchina & Another**, Civil Appeal No. 37 of 1988 for the proposition that the power to strike out a pleading should be used sparingly and only on the clearest of cases where the impugned pleading is beyond redemption and not curable even by amendment. Thus, the Court was urged to dismiss the preliminary objection with costs to the plaintiff.

[10] In the case of **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd** [1969] E.A 696, it was held that a preliminary objection consists of:

**"...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."**

[11] In this matter, an objection has been made to the jurisdiction of the Court on the ground that this suit offends the provisions of **Section 25** of the **Rating Act**. It is noteworthy too that the issue of jurisdiction was raised by the defendant per paragraph 14 of the Defence. Where that is the case, the Court is obliged to make a determination on the issue before taking any further steps in the matter. This was aptly expressed by the Court of Appeal in the **Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**, thus:

**"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] And there is no gainsaying that the question of jurisdiction is one that must be taken *in limine*. In **the Owners of MV "Lilian S" Case**, the Court (per **Nyarangi, JA**) held 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..."**

[13] While it is true that this Court is imbued with unlimited original jurisdiction to handle civil matters, that jurisdiction is circumscribed. For instance, **Article 165(5)(b)** of the **Constitution** stipulates that the High Court shall not exercise jurisdiction in matters falling within the jurisdiction of the courts contemplated in **Article 162(2)** of the Constitution. Accordingly, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others** [2012] eKLR, the Supreme Court held that:

**"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the**

very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

[14] The parties are in agreement that there exists a rating dispute between them, pursuant to which the respondent filed **Eldoret Chief Magistrates Civil Suit No. 95 of 2010**. The parties are further in agreement that the said suit was compromised and a consent order recorded therein dated **22 February 2011**. It is manifest from the instant proceedings that the consent order did not finally settle the dispute; and that the defendant has proceeded to issue two fresh demands for rates to the tune of **Kshs. 2,802,438,424.14**; and the issue that now arises is whether this Court is the proper court to handle this matter.

[15] **Section 25** of the **Rating Act** is explicit as to the court with jurisdiction to handle disputes arising under the Act. It provides that:

**“Notwithstanding anything to the contrary in the Magistrate’s Courts Act (Cap.10), any magistrate empowered to hold a subordinate court of the first class shall have jurisdiction to hear and determine suits for the recovery of rates under this Act.”**

[16] The above provision is explicit enough as to the court with jurisdiction to handle disputes in connection with the **Rating Act**. It matters not, in my view, that the initial dispute was compromised and a consent order recorded. Accordingly, and without further ado, the preliminary objection raised by the defendant is hereby upheld. This suit is hereby transferred to the Chief Magistrate’s Court, Eldoret, for hearing and determination in accordance with **Section 25** of the **Rating Act**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2021**

**OLGA SEWE**

**JUDGE**