



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC APPEAL NO. 12 OF 2019**

**SIMBIRI NAN-BELL COMMUNITY HEALTH CENTRE LTD.....APPELLANT**

**-VERSUS-**

**ERIC ODEDE.....1<sup>ST</sup> RESPONDENT**

**ELIJAH MIRUKA.....2<sup>ND</sup> RESPONDENT**

**SPENSER OTIENO.....3<sup>RD</sup> RESPONDENT**

**EQUITY BANK LTD. (OYUGIS BRANCH).....4<sup>TH</sup> RESPONDENT**

**THOMAS OLUOCH NYAKADO.....5<sup>TH</sup> RESPONDENT**

**(Being an appeal from the ruling and order of Honourable J.P. Nandi principal Magistrate**

**dated and delivered on 11<sup>th</sup> June 2019 in Oyugis Chief Magistrate's Court**

**Civil case no. 23 of 2019)**

**RULING**

**A.Introduction**

1. In the present appeal, **Simbiri Nan-Bell Community Health Centre Limited**, a private company in the business of providing health services (the appellant herein) claims that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents unlawfully took over its premises and started running the facility. Consequently, the Appellant instituted a suit in the Trial Court namely Oyugis Chief Magistrate's court Civil case No. 23 of 2019. By an Application dated 10<sup>th</sup> May 2019, the appellant sought inter alia, to injunct all the Respondents from accessing Equity Bank account number [...] at Oyugis Branch, held by the 4<sup>th</sup> Respondent, have them surrender the account and or any other bank account in the name of the appellant, occupation of premises situate on LR NO. Central Kasipul/Kawere Kamagak/2041 and 20143, (**hereinafter referred to as "suit premises"**) and restrain them from exercising authority over the appellant's smooth operation in the health facility and release full bank statement of the facility's account from the time they took over the health facility.

2. The respondents opposed the said application and argued that the Appellant's application was fraudulent. That it had concealed material facts in order to defeat the ends of justice. They asserted that the Appellant is a community facility and the issue of ownership could not arise.

3. On 11<sup>th</sup> June 2019, the trial Court dismissed the Application on the basis that the mandatory injunction sought was similar order prayed for in the main suit hence granting the order at the interlocutory stage, would effectively determine the main suit. It further declined to issue temporary injunction to restrain the respondents from claiming authority over the said facility and its smooth operation and management on the basis that it could not be granted on events that have already taken place. It was further the trial Court's reasoning that ownership of the health facility as well as that regarding reimbursements and or payments by National Hospital Insurance Fund, was an issue to be determined upon examination of evidence of the parties.

4. Quickly, the foregone Ruling instigated the instant appeal duly admitted on 26<sup>th</sup> June 2019. By a memorandum of Appeal dated, 11<sup>th</sup> June 2019 and filed in on even date, the Appellant through M/s O. Otieno and Company Advocates, faulted the trial court on the following

grounds;

1. *That the learned Trial Magistrate erred in law by failing to grant prayers 2,3,4,5,6,7,8 and 9 of the Application dated the 10<sup>th</sup> May 2019, or the application under consideration, notwithstanding the clear evidence that the Appellant and its directors were the sole and absolute land owners of land parcel number Central Kasipul/ Kawere Kamagak/2041 and 2043, together with developments thereon, with superior and indefeasible rights.*
2. *The learned magistrate erred in law by failing to exercise his discretion in favour of the Appellant notwithstanding strong compelling and prima facie case established and demonstrated by the appellants which called for the grant of mandatory injunction besides other orders sought by the appellant in the application.*
3. *That the learned magistrate erred in law by declining to grant the application and condoning,, furthering and perpetuating criminal and illegal activities of the Respondents which are expressly prohibited by the mandatory provisions of sections 13 & 22 of the Medical Practitioners and Dentist Act.*
4. *That the learned Magistrate erred in law when he unreasonably withheld the exercise of his discretion thereby exposing the public to risks and great danger by authorizing strangers and unlicensed amorphous group to take up the appellant's property and assumed management and misappropriation of funds contrary to the law.*
5. *That the decision by the learned magistrate is contrary to law and rights to property as coded by law and the Constitution.*
6. *That the learned Magistrate erred in law when he misapprehended the principle applicable in the grant of injunctions thereby occasioning miscarriage of justice*

5. Thus, the appellant sought inter alia;-

- a) *The ruling and order of the learned trial magistrate dated and delivered on the 11<sup>th</sup> day of June 2019 be set aside, varied and/or quashed.*
- b) *The Honourable court be pleased to reconsider the application a fresh and accordingly grant prayers 2,3,4,5,6,7,8 and 9 of the application as prayed in the application.*

6. In response to the Appeal, the Respondents filed a Preliminary Objection dated 6<sup>th</sup> October 2019. It sought to strike out the Appeal on the following grounds.

1. *That the Court herein being an Environment and Land Court is devoid of jurisdiction over this matter as the Appellants suit was a civil matter, the main issue for determination was that of accounts and not property.*
2. *There is a land matter ongoing at the Principal Magistrate's Court Oyugis vide ELC Cause No. 35 of 2019 that will be interfered with if this matter is determined by an ELC Court.*
3. *The Appellant's suit is incompetent, fatally defective, bad in law and an abuse of Court process and should be struck out with costs to the Respondents.*

7. On 9<sup>th</sup> October 2019, this court having heard counsel for the respective parties directed that hearing of the Preliminary Objection be by way of written submissions. Counsel complied accordingly.

#### **B.The gist of the Respondents' Case**

8. In their submissions dated 30<sup>th</sup> October 2019 and filed in court on 9<sup>th</sup> October 2019, learned counsel for the Respondents argued that the present appeal primarily revolved around jurisdiction and its importance on the proper functioning of courts. He relied on the binding decision in **the Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Ltd [1989] KLR 1** as well as the case of **John Kipngeno Koech & 2 others -vs- Nakuru County Assembly and 5 Others [2013] eKLR** that defined and elaborated on jurisdiction.

9. Counsel also submitted on the Constitutional distinction and autonomy of superior Courts and referred to the Supreme Court decision in **Republic -vs- Karisa Chengo and 2 Others [2017] eKLR** where the court held that the superior courts as outlined in **Article 162(1) of the Constitution of Kenya,2010**, are different Courts standing in their distinct autonomies, each exercising a special dedicated jurisdiction. That from the statutes regulating the specialized courts the jurisdictions of the specialized courts are limited to the matters provided for in the relevant statutes.

10. While emphasizing the sanctity of Jurisdiction and how the one for the environment court is guarded, it was submitted that in **David Ramogi & 4 Others -vs- The Cabinet Secretary Ministry of Energy and Petroleum & 7 Others [2017] eKLR**, the Court observed thus;

*"Sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issue or other matters falling in other High Court divisions, may on closer scrutiny reveal otherwise that the germane of the application is actually a labour dispute or land issue falling squarely into forbidden sphere of the specialized courts."*

11. It was the argument of counsel that the ruling appealed against did not fall within the Jurisdiction of this Court. That the Appellant had filed this case as a civil dispute before the Magistrates court thus the same could not come on appeal as an Environment and land Court dispute. It was submitted therefore that this matter relates to the constitutionality or otherwise of the Appellant's complaints which fall within the jurisdiction of the High Court as provided for in **Article 165(3) of the Constitution (supra)**.

12. In conclusion, counsel submitted that this court lacked jurisdiction to hear and determine the Appeal. That the issues in dispute herein revolve around accounts and leadership issues of the appellant but not ownership of property.

### **C.The gist of the Appellant's Case**

13. By their submissions dated 11<sup>th</sup> February 2020 and filed in court on 12<sup>th</sup> February 2020, Mr. Obach learned counsel for the appellant referred to the locus classicus case of **Mukisa Biscuit Manufacturing Company -vs- Wend End Distributors (1969) EA 696** on the proper legal description of a Preliminary Objection. Counsel was of the view that this Court has jurisdiction on the basis of **Article 162(b) (supra)** and **section 13(2)** of the Environment and Land Court Act 2015 (2011). That the cause of action was founded on the Appellant's right to protect its interests and rights concerning the use of the health facility situate on the suit premises. That the present dispute gravitates around ownership, title, use and occupation of land.

14. Counsel also made reference to Black's Law Dictionary 8<sup>th</sup> Edition as regards the following definitions:-

a) "Use" to mean the **"the application or employment of something especially long continued possession and employment of a thing for the purpose for which it is adopted as distinguished from a possession and employment that is merely temporary or occasional."**

b) "Occupation" means **"the possession, control or use of real property"**.

15. To fortify his argument that the dispute was one of land, counsel referred to the Court of Appeal decision in the case of **Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 Others (2017) eKLR** that term **"use of Land"** means:-

*"For land use to occur, the land must be utilized for the purpose of which the surface of land, air above it or ground below it is adopted.*

*"Land use connotes the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land."*

16. Counsel further drew the attention of the court to the decision in **Paul Gichuri Kariuki & Another -vs- Wangui Kariuki (2018) eKLR** where it was held in cases where **the subject of appeal is either of occupational or use of, tenure or otherwise title to land**, that Environment and Land Court is the proper Court to determine the dispute. Counsel submitted on the definition in the foregone authorities where reference was made to the definition at **Article 260** that land is the surface thereof, everything above it and below it as well. That the doctrine of *cujus set solum, eius est usque ad coelum et ad inferios* restricts the use of land to necessary and ordinary use and enjoyment of land and the structures upon it.

17. The appellant's counsel submitted that the dominant issue in the Appeal was on title and ownership of the suit land and in particular, the utilization of the health facility constructed thereon. That in the event the Court found itself to be devoid of Jurisdiction, the case ought to be transferred to a court of competent jurisdiction as opposed to dismissing it. To that end, reference was made to the case of **National bank of Kenya Limited -vs- Leonard Gethoi Kamweti [2019] eKLR** where the Court of appeal decision in **prof Daniel Mugendi -vs- Kenyatta University, Benson I Wairegi, Eliud Mathiu & Prof Oliver M. Mugenda C.A No. 6/2012**, set aside the order striking out the appellant's petition and directed the High Court to transfer it to the Industrial Court which was the right forum.

18. Counsel argued that the Respondents' contention that there was an ongoing case before the Trial Court regarding ownership of land which will be interfered with if this appeal is determined by this court, fails on the foundation that it is a question of fact that calls for evidence to ascertain the same. That the challenge fails to meet the threshold required of a Preliminary Objection. It was further submitted that in any event, this is a court that exercises appellate and supervisory jurisdiction and that the existence of the two suits cannot impede this court from addressing the appeal.

19. To that end, the appellant prayed that the Preliminary Objection be dismissed with costs and the matter to proceed to full hearing.

### **D. Issues for determination**

20. In view of foregone discourse, the extracted issues for determination are whether;

1. ***This Court has jurisdiction in respect of the instant appeal.***
2. ***The dispute herein is subjudice***
3. ***Depending on 1 and 2 above, whether the Preliminary Objection is merited in the obtaining scenario.***

## **E. Analysis and Determination**

21. At the outset, I subscribe to the *locus classicus* case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** which sets out the parameters of a Preliminary Objection in the following manner;

“..... A preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

22. In **Oraro -vs- Mbaja (2005) KLR 141**, Ojwang J. (as he then was), quoted the decision in **Mukisa Biscuit Case (Supra)** and expressed himself thus:-

***“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence.....Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....”***

***Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”***

23. Similarly, in **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** Mwita J. echoed the same position and that stated: -

***“..... that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.***

24. It is well settled that a preliminary objection is a threshold question and best taken at inception. The question calls for a definitive, determinative and prompt announcement; see **Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko and 2 others (2013) eKLR**.

25. The respondent has raised an objection to jurisdiction of this court over the present appeal. In **Owners of Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1**, Nyarangi JA remarked that :-

***“Jurisdiction is everything...”***

26. In the case of **Equity Bank Ltd –vs- Bruce Mutie t/a Diani Tour Travel (2016) eKLR**, the Court of appeal held :-

***“ It is settled that parties can not even by consent confer jurisdiction on a court where no such jurisdiction exists.....”***

27. It is trite law that a court’s jurisdiction flows from either the Constitution or legislation or both. That a court of law can not arrogate to itself jurisdiction exceeding that which is conferred upon it by law; see the **Supreme Court of Kenya** decision in **Samwel Kamau Macharia and another –vs- KCB Ltd and another (2012) eKLR**.

28. From a thorough assessment of the orders sought in the amended plaint of 6<sup>th</sup> May 2019 and orders sought in the notice of motion dated 10<sup>th</sup> May 2019, the central issue in dispute herein is the operation and management of the health facility of the appellant. As discerned from the particulars of fraud in page 53 of the Record of Appeal, the dominant issue in **controversy is the** taking over of management and financial control of the health facility by the Respondents.

29. Bearing in mind the nature of the pleadings filed before the trial court and the authorities cited hereinabove, this Court finds that the challenge on jurisdiction, without doubt, meets the threshold required of a Preliminary Objection. It is a pure question of law as per **Mukisa Biscuits case (supra)**.

30. It follows that this court has no jurisdiction to deal with the instant appeal; see **Article 162 (2) and Karisa Chengo case (Supra)**.

31. It is incumbent upon this Court to interrogate the decision appealed from and the nature of the dispute. In the first instance, it is clear from the record that the ruling appealed from originates from a dispute which fall outside the jurisdiction of this court.

32. The prayers sought in the amended are all aimed at securing and restoring the Appellant’s control and management of the appellant’s health facility. There is a clear and loud silence in the entire plaint including the prayers sought therein as to ownership of the land on which the health facility sits.

33. Moreover, there is no mention whatsoever in the plaint regarding fraud or illegal allocation or transfer of the suit premises as to bring the tussle within this court’s jurisdiction coined in **Article 162(b) (supra)** and **section 13(2)** of the Environment and Land Court Act 2015 (2011). It is therefore this Court’s finding that the cause of action stems from controversies far removed from the jurisdiction of this Court. On that score, the first issue is found in the negative.

34. The second issue concerns the doctrine of **subjudice**. The Respondents claim that there is a land matter in Principal Magistrates Court Oyugis vide ELC Cause No. 35 of 2019 hence the instant appeal is subjudice.

35. The doctrine of **sub judice** is codified in Section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya which reads;-

“6.No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

36. Considering the above provisions and the Respondents’ preliminary objection, it is clear that this court will not delve on the issue of subjudice. This is so informed by my opinion that dormant issues in the pleadings before the trial court and in the instant appeal are not within the domain of this court.

37. Besides, this court agrees that the aspect of subjudice ought to be raised at the earliest opportunity by way of preliminary objection before the appropriate court ; see Kakuta Hamisi case (supra).

38. Wherefore, I find that the Preliminary Objection is with merit as regards the challenge on Jurisdiction of this Court. The instant Appeal is hereby transferred to the High Court of Kenya at Migori for necessary action to meet the ends of justice.

39. It is so ordered.

**DELIVERED, SIGNED and DATED in open court at MIGORI this 10<sup>th</sup> Day of MARCH 2020.**

**G.M.A ONG’ONDO**

**JUDGE**

**In the presence of**

Ms. Apondi holding brief for Obach learned counsel for the respondents

Court Assistant – Tom Maurice