



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.300 OF 2012 CONSOLIDATED WITH 235 OF 2014

AFRITRACK INVESTMENT (E.A.)LTDPLAINTIFF

-VERSUS-

JANE WAMUYU MWAIDEFENDANT

TITLE BY WAY OF CIVIL SUIT NO. 235 OF 2014

WAINAINA & KARIMI ADVOCATES.....PLAINTIFF

VERSUS

AFRITRACK INVESTMENT (E.A.)LTD.....DEFENDANT

RULING

1. Through an application dated 19th February 2019, the applicant herein, Afritrack Investment (E.A.) Ltd seeks orders to transfer the consolidated suit and counter claim filed herein to the Environment and Land Court (ELC) for hearing and determination. The application is supported by the affidavit of the applicants Chief Executive Officer SABENA WOLD TOHANNES and is premised on the grounds that the High Court lacks the jurisdiction to hear the matter which, pursuant to the provisions of Article 162(2)(b) of the Constitution falls within the preserve of the Environment and Land Court.

2. **Jane Wamuyu Mwai**, the defendant in HCCC No. 300 of 2012 opposed the application through the grounds of opposition dated 26th February 2019 in which she outlined the following grounds:

1) The application has no merit, the same is meant to delay the speedy determination of these suits.

2) The issues before this court are based on a sale transaction and the claims by the respective parties are about payments arising out of the sale transaction. The issues are purely commercial in nature.

3) The issues before this court have nothing to do with the environment or the use or occupation of; or title to the suit property consequently, the Environment and Land Court has no jurisdiction to deal with the matter.

4) The suit HCCC300 of 2012 was filed by the applicant in this court and the applicant at its paragraph 17 of the plaint avers that this court has jurisdiction to hear and determine the matter.

5) On the premise, the application is an abuse of the court process as the applicant cannot approbate and reprobate at the same time.

3. The plaintiff in HCCC 235 of 2014 also opposed the application through the replying affidavit of **Paul Wainaina Kimani** advocate sworn on 18th March 2019 who, among other averments, states that the dispute herein revolves around the claim for the balance of the purchase price and special damages against the vendor for misrepresentation, non-disclosure and concealment of material facts and is therefore a commercial claim that falls within the jurisdiction of this court.

4. He further avers that the application is a blatant delaying tactic and an afterthought coming at least 7 years since the filing of the initial suit. The defendants in both suits filed grounds of opposition dated 18th March 2019 and listed the following grounds:

1. The claim in HCCC300 of 2012 is for breach of contract wherein the plaintiff is seeking special damages of KES 22,410,000 whereas the counterclaim is for breach of contract and the defendant is seeking the sum of KES 17,000,000/-.

2. The claim in HCCC 235 of 2014 is for breach of contract by failure to pay the balance of purchase price being KES 17,000,000 with interest thereon at 18% per annum until payment in full whereas the counterclaim therein is for professional negligence and the defendant is seeking liquidated damages of KES 6,075,000.

3. The crux of the foregoing suit is entirely contractual and therefore purely commercial in nature.

4. The claims before the court in the consolidated suit have nothing to do with environment or the use or occupation of or title to the property.

5. The application dated 19th February 2019 is an abuse of the court process and was only filed to scuttle the hearing scheduled for 21st February 2019.

5. Parties filed their respective submissions to the application which I have carefully considered and I note that the main issue for determination is whether this court has the jurisdiction to hear and determine the two consolidated suits.

6. As was stated in the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

"I think 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. 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."

7. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

8. From the above position on the issue of jurisdiction it is clear that if this Court lacks jurisdiction the matter will end there as I will have to down my tools and take no further step. The ELC is a superior court and has the same status as the High Court. It is one among equals when it stands with the Employment and Labour Relations Court and the High Court with all its divisions. It is vested with all the powers of the High Court. The High Court has extensive jurisdiction in all matters except those that fall under Article 162. As the High Court is expressly excluded by the Constitution to deal with matters under Article 162, there is a constitutional barrier thrust upon this Court to deal with the specified aspects of disputes that relate to Land wherever they arise within Kenya.

9. In the instant case, the applicant contends that by dint of the provisions of Article 162(2) (b) of the Constitution, this court lacks the jurisdiction to hear and determine this suit. The said Article stipulates as follows:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--

(b) the environment and the use and occupation of, and title to, land.

10. Article 162(3) of the Constitution provides that Parliament shall determine the jurisdiction and functions of the specialized courts. Section 13(2) of the Environment and Land Court Act provides for the jurisdiction of the Environment and Land Court as follows:

(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.

11. From the above provisions of the Constitution and the Environment and Land Court Act, it is clear that our laws specifically provide for the establishment of the Environment and Land Court as a specialized court and further stipulates on the nature of the disputes that ought to be handled by the Environment and Land Court. In effect therefore and as was rightly observed by the Court of Appeal in the case of **Cooperative Bank of Kenya Ltd –Vs- Patrick Kengethe Njuguna & 5 Others [2017] eKLR**, not every case concerning interest in land amounts to use and occupation of the land. The said court observed;

“ Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that the writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land.”

12. In the present case, I find that it will be necessary to consider the nature of the claims made by the plaintiffs in the consolidated suits in order to determine if they involve the use and occupation of land so as to justify the applicant’s position that they are claims that fall within the jurisdiction of the Environment and Land Court. I have perused the claim in HCCC 235 of 2014 and I note that the plaintiff’s claim therein is for the payment of the balance of purchase price of Kshs 17 million. The claim in HCCC 300 of 2012 on the other hand is for special damages of Kshs 22.4 million for breach of contract and a counterclaim for settlement of a balance of Kshs 17 million and special damages of Kshs 6.075 million for professional negligence.

13. Having regard to the nature of the plaintiffs’ claims as shown in the complaints filed in the consolidated suits, I note that the same is anchored on the allegation of breach contract and that nowhere in the suits do the plaintiffs make any claim for use or occupation of land. My take therefore, is that the predominant feature or theme in both suits leans on commercial transactions which this court is clothed with jurisdiction to hear and determine.

14. My finding therefore is that the application dated 19th February 2019 is not merited and the order that commends itself to me is the order to dismiss it with costs to the respondents.

Dated, signed and delivered in open court at Nairobi this 18th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyangena for plaintiff/applicant

Mr. Kiluva for Kingua for defendant/respondent

Mr. Kabugu for plaintiff in 235/2014

Court Assistant - Fred