



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 448 OF 2012

RAMESHCHANDRA SOMCHAND SHAH.....1ST PLAINTIFF

SAVITA RAMESHCHANDRA SHAH.....2ND PLAINTIFF

VERSUS

PALM HEALTHCARE INTERNATIONAL

LIMITED (IN RECEIVERSHIP).....1ST DEFENDANT

BERNARD ROP.....2ND DEFENDANT

SANJEEV KUMAR SHASHIKANI GADHIA.....3RD DEFENDANT

ANWAR MAJID HUSSEIN.....4TH DEFENDANT

RULING

1. Through a plaint dated 5th July 2012, the plaintiffs sued the defendants herein seeking the following orders:

a) Kshs 30,638,242.00

b) Interest thereon at market rates from the date hereof until date of payment in full.

c) Cost of this suit with interest thereon at market rates from date of taxation until date of payment.

2. The plaintiff's case is that by a lease dated 29th November 2005, they leased LR No. 209/8929 Nairobi (hereinafter "the suit property") for a term of 6 years at quarterly rents payable in advance and that the lease was to expire by effluxion of time on 14th December 2011 after which the defendants were to reinstate the suit property to its original state.

3. The breakdown of the plaintiff's claim against the defendants was as follows:-

1. Mesne profits for the period 15th December , 2011 to 31st March 2012 being the period the defendant's properties were within the suit property (108 days) @ Shs 800,000/- per month,

plus 16% VATShs 3,286,094

2. Defendants' share of site- value tax, ground rent

and Insurance costs of 108 daysShs 76,093

3. Cost of placing the suit property in the state it

was earlier Averred herein.....Shs 24,700,000

4. Legal fees so far paid by the plaintiffs to obtain possession etc.....	200, 000
5. Accrued interest on shs 3,286,094 (from December 15, 2011 to April 15, 2012) for 123 days at 16% p.a.....	176,695
6. Loss of mense profits (or any rental income) for 6 months needed to put the suit property in its original state@ Shs 800,000 Per month plus VAT	5,568,000
TOTAL.....	34,006,882
Less deposit held.....	3,368,640
Nett due.....	Shs 30,638,242

4. The defendants filed statements of defence in response to the plaint and at the same time the 3rd and 4th defendants filed notice of preliminary objection on 20th February 2019 in which it listed the following grounds of objections:-

1. That the proceedings relate to a lease dated 29th November 2005 to all that piece or parcel of land known as L.R. No. 209/8929, Nairobi and all the buildings and improvements erected and being thereon.
2. That the 3rd and 4th defendants denied that the Honourable court has jurisdiction to try and decide this suit”, at the earliest, in their defence dated 24.8.2012 at paragraph 16 thereof.
3. That the plaintiffs filed this suit in the Commercial and Admiralty “Division” in 2012 knowing well that the questions in issue (land related) are squarely within the mandate of the of the Land and Environment Court and the Commercial Court had no jurisdiction to hear the same.
4. That the suit herein is therefore fatally and incurably defective, incompetent, illegal, untenable in law and a nullity ab initio.
5. That upon finding that this Honourable court (Commercial) has no jurisdiction to entertain this matter, then there would be no basis for a continuation of proceedings – as the Honourable Court must down its tools.
6. That the plaintiffs have maintained the suit for almost seven (7) years in the wrong court inspite of the maxim “**IGNORANCE OF THE LAW IS NO EXCUSE**” and also well knowing that the “**Predominant purpose test**” sufficiently indicates that the claim is in regards to the terms and conditions of the lease dated 29.11.2005, i.e. the suit is primarily about land.

5. This ruling is therefore in respect to the preliminary objection. Parties filed their respective written submissions to the preliminary objection which they highlighted at the hearing of thereof as follows:

Defendants’ submissions

6. Mr. Waigwa, learned counsel for the defendants, submitted that the Environment and Land Court (ELC) has the exclusive jurisdiction to hear disputes relating to land as the suit emanates from breach of a lease agreement in which the obtaining words are *use and occupation* of land for which the provisions of Article 162(2) of **the Constitution** would be applicable.

7. Counsel maintained that this court lacks jurisdiction to entertain the suit and should therefore down its tools. For this argument counsel relied on the decision in the case of **Samuel Macharia & Another v KCB Limited & 2 Others** [2012] eKLR among other cases.

Plaintiffs’ submissions

8. Mr. Mwangi, learned counsel for the plaintiffs, opposed the preliminary objection and submitted that the basis of the instant suit is the claim for unpaid rent and failure by the defendants to reinstate the suit property to its original state. According to the plaintiffs’ counsel, the present suit is essentially a claim for debt tied to breach of contract and not a land matter involving the use and occupation of land as suggested by the defendants.

9. Counsel reiterated that as concerns the 3rd and 4th defendants, the plaintiffs' claim is that they signed a guarantee for the lease which has absolutely nothing to do with a claim for use and occupation of land.

10. Counsel relied on the decision in the case of *Cooperative Bank of Kenya v Patrick Kangethe & 5 Others* [2017] eKLR in which the Court of Appeal differentiated between a “**disposition of Land**” and “**land use**” when dealing with the issue of a charge and use of land. Counsel also relied on the decision in the case of *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Ltd & Another* [2016] eKLR wherein Ngugi J. considered an objection similar to the one raised by the defendants herein and held as follows:

“41. In my view, therefore, it appears clear that the parties intended that their contract involved two distinct parts- one of the sale of land and, the other, for the construction of town houses and ancillary infrastructure. It is also my finding, based on the above analysis, that the parties also intended the contract to be dynamic in nature where the pre-dominant purpose of the contract would change over the contractual period: while the contract was predominantly for sale of land at the inception, it evolved, in its present contractual form to become one for construction of town houses and ancillary infrastructure. It is, finally, my finding that the Land Acquisition price having been paid (as it is undisputed from the pleadings), and the title to the properties having been registered in the name of the plaintiffs, there is no dispute as to ownership of land- the only contest being whether there has been a breach of construction contract between the parties, and if so which party is in breach and what consequences for the breach are. Consequently, it is my finding and holding that the dispute between the plaintiffs and the defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this court has jurisdiction to hear the suit”.

Determination

11. I have carefully considered the preliminary objection raised by the defendants herein and the parties' respective submissions together with the authorities that they cited. The main issue for determination is whether this court has jurisdiction to hear and determine this suit.

12. In legal systems all over the world, *jurisdiction* is a critical concept in litigation. *Halsbury's Laws of England* (4th Ed.) Vol. 9 at page 350 thus defines 'jurisdiction' as “...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 decision.”

13. *Black's Law Dictionary*, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

14. The significance of jurisdiction cannot be gainsaid and any court acting without jurisdiction would be employing its energy, time and resources in futility. Underscoring the centrality of jurisdiction, *Nyarangi, J.A.* in the celebrated case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction:

“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...”

15. In the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank and 2 others*, Supreme Court Application No. 2 of 2011 [2012] eKLR the Supreme Court stated:

“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 upon it by law...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.”

16. From the above cited decisions, it is clear that the court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

17. **Article 165(3) and (6) of the Constitution** elaborately sets out the jurisdiction of the High Court as follows:

“(3) Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

18. **Article 162(2)** on the other hand empowers Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to-

“(a) employment and labour relations; and

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

19. Sub-Article (3) thereof authorizes Parliament to determine the jurisdiction and functions of the courts contemplated in Sub-Article (2). Pursuant to **Article 162(3)** of the **Constitution**, Parliament enacted the **Environment and Land Court Act**.

20. Section 13 of the Act establishes the ELC’s jurisdiction as follows:

“(1) The court shall have original and appellate jurisdiction to hear and determine all dispute 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.”

21. In **Karisa Chengo & 2 others v Republic**, Civil Appeal 44, 45 & 76 of 2014 [2015] eKLR, the Court of Appeal took a trip down the memory lane on the rationale behind the establishment of the ELC. The court analysed the final report of the Committee of Experts on constitutional review. The court observed-

“The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in the Constitution for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in the Constitution of a statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.”

22. In a further appeal to the Supreme Court in **Republic v Karisa Chengo & Others** Petition No. 5 of 2015 [2017] eKLR, the court rendered itself as follows-

“[50]... Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or

direction from another.”

23. **Article 165(5)** of the **Constitution** expressly prohibits the High Court from dealing with any matter reserved for the exclusive jurisdiction of the ELC. This was succinctly captured by the Supreme Court in **Republic v Karisa Chengo & Others** [Supra] as follows-

“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)”.

24. The above decision settled the confusion or doubts that previously existed on the question of the jurisdiction of the High Court and the courts of equal status. There are however borderline cases or instances where a case raises cross cutting issues that may fall within the jurisdiction of *either* court. In such instances courts have held that the determining factor should be the *dominant issue* in the litigation. This was the position adopted by the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others**, Civil Appeal No. 83 of 2016 [2017] eKLR, when considering whether a charge over land amounted to *land use* for which the High Court would have no jurisdiction. The court considered the definition of land and what constitutes land use and observed that:

“[35]...[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.”

25. The Court then held that a *charge* did not constitute *land use*. It distinguished *land use* from a *charge* and found that the latter is an interest in land purely for securing the payment of money or money’s worth limited to the realization of the security which has nothing to do with use of the land.

26. In the present case and as I have already stated in this ruling, the plaintiffs claim against the defendant is for a specific sum of Kshs. 30,638,242.00 in respect to *mesne* profits, cost of repairs on the suit property, site value tax and legal fees. My take is that even though the genesis of the claim was a lease agreement between the parties, it was not disputed that the lease agreement had long expired and I find that the claim for rent is not a claim for use or occupation of land for which the Environment and Land Court would have jurisdiction. In other words, I find that that the plaintiffs’ claim for rent and *mesne* profits cannot by any stretch of imagination be considered to be a claim for use or occupation of land.

27. I find that in the circumstances of this case, the defendants’ contention that this suit falls under the claim for use and occupation of land is far-fetched as the dominant claim is the prayer for a specific sum of money together with interest.

28. I therefore find that the preliminary objection is not merited and I consequently dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 3rd day of October 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Waigwa for the applicant

Mr. Mwangi for the plaintiffs/respondents

Court Assistant – Margaret