



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.254 OF 2013

CAPITAL FISH KENYA LIMITED PLAINTIFF

VERSUS

MONNATZ LIMITED 1ST DEFENDANT

SILVERTONE LIMITED 2ND DEFENDANT

SILVERSTONE QUARRY LIMITED 3RD DEFENDANT

RULING

1. The Plaintiff commenced this suit by way of a Complaint dated 18th June, 2013. In it, the Plaintiff alleged, *inter alia*, that it is the registered owner of a piece of land known as Land Reference Number 24627 measuring 8.094 Hectares (hereafter “*the Suit Property*”). That the 1st Defendant is the registered owner of the Land Parcel known as Land Reference Number 24636 IR. No.91077, which borders the suit property and where the 2nd and the 3rd Defendants operate the quarry for mining of ballast for sale (hereafter “*the Adjacent Property*”). It was pleaded that in disregard to the Plaintiff's proprietary rights, the Defendants encroached on the suit property and have continued to excavate ballast therefrom which they store in the adjacent property.
2. The Plaintiff therefore contended that due to the Defendants' actions, the Plaintiff had suffered massive losses and damage which particulars included, the excavation of the Plaintiff's ballast worth Kshs.500,000,000/= without consent and the destruction of the suit property by the use of explosives and heavy machinery significantly altering its character and thereby devaluing the same substantially. The Plaintiff therefore, *inter alia*, claimed compensation of Kshs.500,000,000/=, general damages, special damages of Kshs.2,064,800/= for the surveying and valuation costs of the suit property and injunctive Orders against the Defendants. Together with the Complaint, the Plaintiff filed an injunction Application which is yet to be determined.
3. Article 165 (5) of the Constitution of Kenya limits the jurisdiction of this Court as follows:-

“(5) The High Court shall not have jurisdiction in respect of matters-

a)

b) Falling within the jurisdiction of the Courts contemplated in Article 162 (2).”

A reading of the above provision reveals that the same is couched in mandatory terms. Further Article (162 (2) states thus:-

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

a)

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

4. The Environment and Land Court Act, 2011, (hereinafter “*the Act*”) was enacted to give effect to Article 162 (2) of the Constitution. That Act established the Environment and Land Court under Section 4 thereof. In Section 13 of that Act, that Court’s jurisdiction is set out in sub-section (2) to include disputes:-

“ a) Relating to environmental planning and protection, trade, 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, chooses in action or other instruments granting any enforceable interests in land, and

e) Any other dispute relating to environment and land.” (emphasis mine)

5. As a result of the above provision and those contained in Article 162 (2) and Article 165 (5) of the Constitution, once a matter touches on the use and occupation of and title to land, the High Court ceases to have jurisdiction. The Court must down its tools and leave the relevant Court to exercise that jurisdiction as per the law provided.

6. It is against this background that the 3rd Defendant raised a preliminary objection on notice against the Plaintiff’s suit dated 19th September, 2013. It was contended that this Court lacked jurisdiction to hear and determine this suit in light of the provisions of Section 150 of the Land Act, 2012 and Section 13 (1) (2) and (7) of the Environment and Land Court Act No.19 of 2011. That further, the Plaintiff’s suit and all consequential Orders should be struck off with costs or in the alternative, that the suit be transferred to the Environment and Land Court for further directions and hearing.

7. Mr. Billing, Learned Counsel for the 1st and 3rd Defendant submitted that by virtue of Section 150 of the Land Act and Section 13 (1) (2) and (7) of the Environmental and Land Court Act, 2011, any matter with regard to the dispute of land or the environment is the sole preserve of the Environment and Land Court. He further argued that a close examination of all the pleadings filed by the respective parties, it was apparent that the instant suit revolved around a land dispute and the issue of trespass of the suit property. That the Defendants herein had been in occupation of the suit property since 2009 until a temporary injunction was issued by the Court. That the documents annexed to the Plaint did not disclose the Plaintiff as the owner of the suit property. As such, it was contended that the copy of the title annexed to the application for injunction by the Plaintiff could be fraudulent.

8. Mr. Billing further observed that Section 7 of the Environment and Land Court Act provides for the remedies a Land Court could grant to a party and this included compensation. It was also submitted that the question on jurisdiction was raised in a timely manner taking into consideration that there was a change of Advocates by the Defendant in September, 2013.

9. Learned Counsel for the 1st and 3rd Defendants relied on the case of **Professor Daniel N. Mugendi -vs- Kenyatta University and 3 Others Civil Appeal No.6 of 2012** in support of his

submissions. Further, Mr. Billing sought to distinguish the case **Tasmak Limited -vs-Roberto Marci & 2 Others [2013] eKLR** that was relied on by the Plaintiff and stated that the same was bad in law as the Court did not refer to the Land Act or take into consideration the pronouncements made by the Court of Appeal in the Case of **Professor Daniel N. Mugendi (supra)**. Counsel, therefore, urged the Court to allow the Preliminary Objection and grant the Orders and/or the directions prayed for.

10. The 2nd Defendant, through its learned Counsel Mr. Muchiri also submitted in support of the 1st and 3rd Defendant's Preliminary Objection. He submitted that the suit revolved around two properties, that is, the suit property (LR No.24627) and the adjacent property (LR No.24636) which were located in Mavoko constituency. That the practice directions issued by the Chief Justice vide Kenya Gazette Notice No.13573 were explicit that all cases relating to the environment and the use and occupation of, and title to land should be filed in the Environment and Land Court. Mr. Muchiri therefore urged the Court to allow the Preliminary Objection.

11. In opposing the Preliminary Objection, Mr. Ng'ang'a, Learned Counsel for the Plaintiff, submitted that Article 162 (2) (b) of the Constitution qualified the matters that should fall for consideration by the Environment and Land Court. That this included matters touching on the environment, use, occupation and title to land. He argued that a close examination of paragraphs 8 and 11 of the Plaintiff's cause of action would show that the Plaintiff's cause of action was one of compensation for ballast illegally mined by the Defendants. That as such, the fact that the compensation was with regard to materials mined for the suit property did not automatically make the claim one that is contemplated under Article 162 (2) of the Constitution. Mr. Ng'ang'a observed that in paragraphs 5 (c) and 8 of the 2nd and 3rd Defendant's defence, the Defendants were asserting the ownership of the suit property where the ballast was mined which was an issue that was not in contest. That in the same paragraph, the Defendants had claimed that they were licensees of a 3rd party not before the Court. Mr. Ng'ang'a faulted the timing of the Preliminary Objection by the Defendants and argued that the same should have been brought earlier given the fact that the suit was commenced on 19th June, 2013. Distinguishing the case of **Professor Daniel -vs- Kenyatta University and 3 Others Civil Appeal No.6 of 2012** cited by the Defendants, Counsel stated that the same was not applicable in that, it involved a labour dispute and not a commercial or environment matter. He cited the Case of **Tasmak Limited -vs- Roberto Marci & 2 Others [2013] eKLR** in support of the argument that where matters touch on any of the two jurisdictions of the Environmental and Land Court and the High Court, any of the two Courts could determine the matter. In light of the above submissions, Counsel urged that the Preliminary Objection be dismissed with costs.

12. I have considered the material on record, the submissions made by counsel and the authorities cited. I will first consider the submission by the Plaintiff's Counsel that the preliminary Objection raised by the 3rd Defendant has been brought late in the day, given that it was raised on 19th September, 2013, about three months after the institution of the suit. Given that the issues raised in the Preliminary Objection concern the jurisdiction of this Court, I find the holding in **Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd [1989] KLR1, 14** to be instructive. In that Case, Nyarangi JA held that the question as to jurisdiction should be raised at the earliest opportunity and the Court seized with the matter is then obligated to decide the issue at once on the material before it. Jurisdiction is everything and without it, a Court has no power to make one more step. Did the 3rd Defendant therefore raise the issue of jurisdiction at the earliest opportune time?

13. The record shows that the suit was instituted on 19th June, 2013. Temporary injunctive Orders were issued against the Defendants on 24th June, 2013. There were allegations that the Defendants were in contempt of the Orders issued by the Court vide a Notice of Motion dated 6th August, 2013 which motion is yet to be determined. Further, I note that the Defendants changed Advocates in the Course of the proceedings. The 2nd Defendant's Advocates came on record vide a Notice of Change of Advocates dated 22nd August, 2013, while those of the 1st and 3rd Defendant came on record on 26th August, 2013. When the application for contempt came up for hearing on 27th August, 2013, the Court allowed an adjournment sought by the 1st and 3rd Defendants and directed that the Defendants respond to the allegations of contempt by the Plaintiff in nine (9) days.

Thereafter, the matter came up for hearing on 6th September, 2013, when the Court *inter alia* set aside an earlier Order for the viewing of electronic evidence produced by the Plaintiff. The parties then consented to having the Defendants' respective surveyors survey the suit property in the presence of the Plaintiff's representatives. It is after that date, that the Preliminary Objection dated 19th September, 2013 was filed.

14. With the above background, it is clear that the suit is still in the nascent stages of hearing. Two applications by the Plaintiff are yet to be heard and/or determined. I agree with the submission of Mr. Billing that owing to the fact that the Defendants changed their Advocates on 22nd August, 2013 and 26th August, 2013, respectively, the Preliminary Objection dated 19th September, 2013 was raised at the earliest opportune time by the new Advocates for the 1st and 3rd Defendant. It is clear that some ground had been covered by the time the objection was raised. Indeed, the Objection was raised on the eve of the hearing of the contempt proceedings. However, that notwithstanding, the Plaintiff has not demonstrated that it has suffered any prejudice as a result. In the circumstances, this Court's view is that although the objection was not raised in a timely manner, since it touches on jurisdiction it must be entertained and any prejudice suffered by the Plaintiff will be atoned by an award of costs.

15. I now turn to the merit of the objection itself. It is common ground that all matters relating to the environment and the use of and occupation of, and title to land is the sole preserve of the jurisdiction of the Environment and Land Court. The issue for determination is whether the present suit is one that relates to the environment and the use and occupation of, and title to land.

16. It was the Defendants' contention that this matter relates to a land dispute involving the parties. Mr. Billing, for the 1st and 3rd Defendant invited the Court to look at the prayers sought by the Plaintiff in the Plaint and submitted that the reliefs sought relate to land. The Plaintiff was however of a different view. According to Mr. Ng'ang'a, the matter revolves around compensation of the Plaintiff for illegally mined ballast in the suit property by the Defendants. He further submitted that the parties involved in the suit are corporate entities and the matter can therefore be settled by the Court.

17. As stated earlier, there are two main laws to examine in determining the issue before Court. That is, Article 162 (2) (b) of the Constitution and the Environment and Land Court Act, 2011 which came into force on 30th August, 2011. Article 162 (2) (b) of the Constitution grants the jurisdiction to a Court of equal status to the High Court to hear and determine suits, *inter alia*, relating to the environment and the use and occupation of, and title to land. To my mind, it is important to define what ***"... the use and occupation of, and title to land"*** entails in this matter. Faced with a similar issue, I held in the case of **Nairobi HCCC No.627 of 2012 Anthony Raymond Cordeiro & 2 Others -vs- Adrian Noel Carvalho & 5 Others (UR)** as follows:

"13. To my mind, as far as this case is concerned, the crucial words in Article 162 (2) are: ".....the use and occupation of, and title to land". The meaning of these three (3) terms in my view is very clear. That, apart from the issue of environment, once a matter involves the use and occupation of land or title to land, the High Court will have no jurisdiction to deal with the same. I think once the meaning of these three (3) terms is ascertained, it will be clear the extent to which Article 162 (2) intended issues touching on land not to be dealt with by the High Court.

14. In BLACKS LAW DICTIONARY 8th Edn, 2004 the term "use" has been defined at page 1577 as:-

"Use 1. The application or employment of something esp., 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..."

At page 1109, the term "occupation" is defined as:-

“2. The possession, control or use of real property.”

While at page 1522, title is defined as:-

“1. The union of all elements (as ownership, possession and custody) constituting the legal rights to control and dispose of property, the legal link between a person who owns a property and the property itself.....”

15. It should be noted that, the terms “use and occupation of” were used conjunctively and not disjunctively. In this regard, my view is that the intention in the Constitution is that if an issue arises touching on land in respect of its use, possession and control, then the High Court will have no jurisdiction. If the dispute touching on land is for anything else other than what I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court....”
(Emphasis mine).

18. I am still of the above persuasion. Applying the same to the current case, it is important to look at the pleadings filed by the parties to ascertain the nature of the suit. It is not contested that the two properties, LR No.24627 and LR No.24636 at the center of the dispute border each other. It is the Plaintiff's claim that, the Defendants have encroached on the suit property where they have excavated ballast which they store in the adjacent property. As such, the Plaintiff claims that, this is trespass on the part of the Defendants and has claimed compensation. The Defendants have on the other hand denied these claims. The 3rd Defendant further alleges in its Defence dated 19th July, 2013 that it has a license from the registered owner of the suit property known as Shaba Travel Agency Limited and that it had entered into a sale agreement of the suit property with the said Shaba Travel Agency in the year 2008. To my mind, these matters touching on the ownership and title of the suit property, a matter that under Article 162 (2) (b) and the Environment and Land Court Act, 2011 falls squarely on the Environment and Land Court.

19. With regard to the issues of trespass, it is important to note that trespass to land occurs where a person directly enters upon another's land without permission, or remains upon the land or place or removes any materials or objects upon the land. The same is a tort developed to protect a person's possession of land. As such, it is in my considered view that for the Plaintiff to succeed in its claim against the Defendants, it must show that it is the only party that has exclusive ownership and possession of the suit property and therefore permitted to use the same to the exclusion of other parties. A survey may also have to be carried out to determine the exact position of the boundaries between the suit property and the adjacent property.

20. In essence therefore, the primary issue to be resolved in this suit is whether the Plaintiff holds the title to the suit property which goes to the issues as to ownership, possession and legal rights of the Plaintiff with regard to the suit property. To that end, it is difficult not to see that the dispute in this suit is therefore primarily about use and occupation of or title to the suit property. Further, the authority relied on by the Plaintiff is of no assistance to the court as the same can be distinguished. In **Tasma Limited -vs- Roberto Marci & 2 Others (supra)**, the primary issue was the shareholding and ownership of the shares of a certain company that was registered as the owner of a particular piece of land. The Court noted that once the issue of shareholding was resolved, then the secondary issue of who owned the suit property would then be determined. For that reason, the High Court did have jurisdiction over the matter. In the instant suit, there is no issue as to the shareholding of either the Plaintiff or the Defendants nor any issue regarding commercial transaction between the parties.

21. With regard to the issue raised by the Plaintiff that, the suit deals primarily with corporate entities, that may be so but corporate entities as legal persons are also permitted to use, occupy and hold title to land. As such, they are not excluded from the provisions of the Environment and Land Court under Section 13 (2). Further, on the issue raised by the Plaintiff that the primary prayer in the suit is with regard to compensation for Kshs.500,000,000/= of the alleged illegally mined ballast from the suit property, it is not in dispute that the Environment and Land Court under Section 7 can

grant reliefs including injunctive Orders, award of damages and compensation. For this end therefore, I am of the view and so hold that the Environment and Land Court under Section 13 (2) is the proper forum to agitate this dispute.

22. The upshot is that, the Preliminary Objection is meritorious and is hereby allowed. What then should be the fate of the interim Orders made with regard to the suit property and the contempt proceedings initiated by the Plaintiff? I note that none of the parties addressed this particular issue during their submissions. Be that as it may, I find that the interim Orders were granted to the Plaintiff to maintain the status quo between the parties before the hearing and determination of the Plaintiff/s Application for injunction. As a court of the same status as the High Court, the Environment and Land court still has the jurisdiction to determine whether there was disobedience of an injunctive Order under Order 40, Rule 3 (1) of the Civil Procedure Rules.

23. Accordingly, I order that this suit be transferred to the Environment and Land Court in Nairobi for hearing and determination. The Deputy Registrar of this Court to ensure that this file is placed before the presiding Judge of the Environment and Land Court for mention and giving of directions within 14 days of today. In order to safeguard the position of the parties obtaining as of today, the interim Orders now in force are extended for 14 days.

Dated and Signed at Bungoma this 14th day of February, 2014.

A. MABEYA

JUDGE

Dated and Delivered at Nairobi this 4th day of March 2014.

J. B. HAVELOCK

JUDGE