



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 1252 OF 2013**

**PHILIP JALANG'O.....PLAINTIFF**

**VERSUS**

**RYAN PROPERTIES LIMITED.....DEFENDANT**

**RULING**

The Defendant filed the application dated 11/3/2020 seeking to have this suit struck out with costs and to have the court make orders in the interests of justice on the grounds that disputes relating to breaches of contracts and allegations of fraud fell within the purview of the High Court pursuant to Article 165 of the Constitution. In addition, that the Practice Notes on Classification of Commercial Matters of 1997 set out commercial matters as including ordinary transactions between parties. The Defendant contended that this suit arose out of an ordinary transaction for the sale of a house in Grash Gardens. The Defendant urged that this court could not arrogate itself jurisdiction to deal with a matter when it had none.

The application was supported by the affidavit of Jackson Kanyarati in which he averred that the Plaintiff filed this suit seeking a refund of the sum of Kshs. 12,000,000/= being the deposit he paid to the Defendant towards the purchase of house number 7 in Grash Gardens and damages of Kshs. 12,000,000/= for loss of investments. Mr. Kanyarati contended that these claims did not relate to the use or occupation of land. He urged that a court which had no jurisdiction could not transfer a suit to another court but could only strike it out.

The Plaintiff swore the Replying Affidavit in opposition to the application. He averred that he filed this suit on 16/10/2013 and the Defendant filed its defence on 26/11/2013 without raising any concern as to this court's jurisdiction to determine the case. He added that on 13/12/2019 this case was set down for hearing on 26/3/2020 in the presence of the Defendant's advocate who yet again did not object to the court's jurisdiction. This court delivered a ruling on 13/12/2019 regarding the Plaintiff's request for discovery and directed the Defendant to furnish to the Plaintiff various documents including minutes of the site meeting held in respect of the project, the original approved plan for the house and the Defendant's application for a loan. He averred that the Defendant did not comply with the court order. The hearing could not proceed on 26/3/2020 due to the outbreak of Covid-19 in the country.

The Plaintiff deponed that the Defendant filed this application on 13/5/2020 and only got to serve his advocates on 6/7/2020 which he contended was intended to forestall the hearing of this suit which was scheduled for 13/7/2020. He contended that the application was made in bad faith and faulted the Defendant for not raising the issue of jurisdiction at the earliest opportunity. He emphasised that his suit challenged the contract for the purchase of house number 7 in Grash Gardens which he entered into with the Defendant and that it did not relate to a charge. He added that he paid for the house in cash and the Defendant utilised the funds to develop the property and created an encumbrance over the land after he had paid it money for the construction of the house. He maintained that under Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, the Environment and Land Court (ELC) had exclusive jurisdiction to hear this case. He prayed that if the court were to find that it no longer had jurisdiction to hear the matter then the proper course was for this court to transfer the suit to the High Court and not to strike it out as the Defendant sought.

Parties filed submissions which the court has considered. The Defendant gave the chronology of events in relation to the sale transaction. It entered into an agreement for sale dated 10/10/2012 with the Plaintiff for the purchase of house number 7 on land reference number 12767/3 Nairobi at the agreed consideration of Kshs. 33,000,000/=. The purchase price was to be applied towards the construction of the house. The contract provided for rescission. The Defendant submitted that the Plaintiff purported to rescind the contract and demanded a refund of the deposit he had paid together with compensation for breach of contract. The Defendant submitted that it issued a completion notice and rescinded the contract when the Plaintiff failed to make payment. It submitted that it paid the Plaintiff Kshs. 16, 161,969/= on 7/10/2016 in accordance with clause 8.1.1 of the sale agreement. The Defendant maintained that the suit sought damages and was not a claim for title to land.

The Defendant submitted that jurisdiction was everything and that estoppel and passage of time could not confer jurisdiction. It relied on the decision in **George Omondi & 210 Others v Retirement Benefits Appeals Tribunal & 2 Others [2020] eKLR** in which the decision in **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited** was cited. It also relied on **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** in which the Supreme Court stated that a court's jurisdiction flowed from either the Constitution or legislation or both and that a court cannot arrogate to itself jurisdiction exceeding what was conferred upon it. The Defendant also cited the decision in **Republic v Karisa Chengo & 2 Others [2017] eKLR** on the separate and distinct jurisdiction exercised by the High Court, the Employment and Labour Relations Court and the Environment and Land Court.

The Defendant submitted that it was pleadings which determined the jurisdiction of the court and not the substantive merits of the case. It relied on the case of **Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another [2016] eKLR** in which Judge J. Ngugi propounded the pre-dominant purpose test when a court is faced with a controversy over whether a particular case was a dispute about land. Ngugi J. stated that in a transactions involving both the sale of land and other services or goods jurisdiction lay at the ELC if the transaction was predominantly for land but the High court had jurisdiction if the transaction was predominantly for the provision of goods, construction or works. The Defendant urged that the dispute here was about breach of a construction contract and not land ownership.

The Defendant also cited the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR** where the court stated that the jurisdiction of ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood in the context of disputes connected to use of land which did not include mortgages, charges or collection of dues and rents which fell within the civil jurisdiction of the High Court. The Defendant contended that proceedings filed before the wrong court were a nullity *ab initio* and added that this court lacked jurisdiction to transfer this suit to the High Court if it found that it did not have jurisdiction.

The Plaintiff submitted that objections to jurisdiction ought to be raised at the earliest opportunity when a party is served with pleadings. He pointed out that the Defendant only raised the issue of jurisdiction when this suit was scheduled to be heard. The Plaintiff referred to Article 162 (2) (b) of the Constitution which mandated Parliament to establish the ELC with the exclusive mandate to hear and determine disputes relating to the environment and the use and occupation of, and title to land. He added that Parliament enacted the ELC Act and clothed it with jurisdiction to determine among others, disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

The Plaintiff maintained that this dispute involved the validity of the sale agreement dated 10/10/2012 regarding the purchase of house number 7 in Grash Gardens. In the Plaintiff's view, the issues for determination in this suit are which party breached the sale agreement, who was entitled to rescind the agreement, who between the Plaintiff and the Defendant rightly rescinded the agreement and the remedies available to the parties. The Plaintiff urged that the interest he was purchasing under the agreement was a sub-lease and that the ELC had jurisdiction to determine this dispute pursuant to Section 13(2) (d) of the ELC Act. He argued that breach of contracts over land which by law should be in writing would invariably fall within the jurisdiction of the ELC as long as the interest being passed was an enforceable interest in land.

The Plaintiff contended that his claim was not about a charge or mortgage or the recovery of unsecured debts by a financial institution. The Plaintiff distinguished the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR** as relating to a dispute regarding accounts and sums due under a charge. The Plaintiff also distinguished the other decisions the Defendant relied on.

The Plaintiff pointed out that the Practice Notes issued by the Chief Justice on 18/11/1997 were issued under the old Constitution before the establishment of the ELC and that they were superseded by the Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of and Title To Land issued vide Gazette Notice Number 1617 of 9/2/2012, Gazette Notice Number 1353 of 20/9/2012 and Gazette Notice Number 5178 of 25/7/2014.

The Plaintiff urged the court to dismiss the application and in the event that it found that it had no jurisdiction then it ought to transfer the suit to the High court.

The issue for determination is whether this court has jurisdiction to determine this dispute or whether it should strike it out as the Defendant urged. In the plaint filed on 16/10/2013, the Plaintiff referred at great length to the sale agreement dated 10/10/2012 he entered into with the Defendant for the purchase of house number 7 Grash Gardens, which the Defendant was to develop. Parties agreed on the mode of payment of the purchase price. A dispute arose over the completion of the project and the payment of the balance of the purchase price. The Plaintiff contended that the Defendant breached the contract. The reliefs sought in the suit are an order of injunction to restrain the Defendant from disposing of the house, a declaration that the letter of offer and sale agreement were obtained by fraud and should be set aside. In addition, the Plaintiff sought a refund of the deposit of the purchase price of Kshs. 17,250,000/= and Kshs. 12,000,000/= being the loss of investment bargain on the failed transaction.

The Defendant referred extensively to the terms of the sale agreement in its defence, and contended that the Plaintiff did not terminate the agreement for sale properly in line with the provisions of that agreement. It denied the allegations of fraud levelled against it and challenged the Plaintiff's claim for loss and damages. Looking at the pleadings filed by the parties it is clear that this is a dispute relating to a contract granting the Plaintiff an enforceable interest in the land which falls under Section 13 (2) (b) of the ELC Act. The orders the ELC is empowered to grant in exercise of its jurisdiction include injunctions, specific performance, compensation, damages and declarations.

Black's Law Dictionary, 10<sup>th</sup> edition defines a chose in action as a proprietary right in *personam* such as a debt owed by another person, a share in a joint-stock company or a claim for damages in tort or the right to bring an action to recover a debt, money or thing. The definition given in the dictionary based on the case of **Torkington V Magee [1902] 2 KB** was that the legal expression "chose in action" was used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession. William R. Anson in *Principles of the Law of Contract* 362 n. (b) (Arthur L. Corbin ed., 3d Am. ed.1919) expounded that by "rights of property" the court meant to include under the term *chose in action* rights under a contract and rights of action arising from breach of contract. Based on this definition then the Plaintiff's claim qualifies as a chose in action under Section 13 of the ELC Act and it would be the ELC and not the High Court to try cases relating to rights under contracts for the sale of land and rights of action arising from breaches of contracts over land.

The court agrees with the Plaintiff's submission that the Practice Notes issued by the Chief Justice on 18/11/1997 were issued under the old Constitution before the establishment of the ELC. The Defendant has not demonstrated that the dispute relates to a purely commercial transaction such as a charge over which the High Court would have the exclusive jurisdiction. Land is inextricably linked to commercial transactions for it is mainly offered as security for monies advanced to facilitate commercial dealings.

The predominant issue for determination in this suit is the rights and obligations of the parties under the sale agreement which falls within the jurisdiction of the ELC and not the High Court. None of the authorities cited by the Defendant from the Court of Appeal specifically ousted the jurisdiction of the ELC to deal with contracts relating to the purchase of land or choses in action relating to land.

The court declines to grant the orders sought in the application dated 11/3/2020. The Plaintiff is awarded the costs of that application.

Delivered virtually at Nairobi this 3<sup>rd</sup> day of December 2020.

**K.BOR**

**JUDGE**

**In the presence of: -**

Mr. Kenvine Ouma for the Plaintiff

Mr. P. Wawire holding brief for Allen Gichuhi for the Defendant

Mr. V. Owuor- Court Assistant