



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO. 378 OF 2017**

**MARGARET MWIKALI NGUNGU.....PLAINTIFF**

**VERSUS**

**CHINA ROAG AND BRIDGE CORPORATION (K).....1<sup>ST</sup> DEFENDANT**

**ELIJAH NGUNGU MWENGI .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. What is before this Court for ruling is the 2<sup>nd</sup> Defendant's Notice of Preliminary Objection on a point of law on the grounds that:-

**1) This court lacks jurisdiction to hear and determine this suit as the subject property in question is one of the subject matters at the Court of Appeal in Nairobi Civil Appeal No.4 of 2012, Elijah Mwenji vs. Margaret Mwikali Ngungu which is yet to be determined.**

**2) That the Court of Appeal is of higher jurisdictional status and thus the instant suit is incompetent, defective, scandalous, frivolous, and vexatious and should be struck out and/or dismissed.**

2. The Notice of Preliminary Objection is dated 22<sup>nd</sup> August, 2018 and was filed in court on 10<sup>th</sup> September, 2018. On the 12<sup>th</sup> November, 2018 the Court Directed that the Preliminary Objection be disposed off by way of written submissions. The 2<sup>nd</sup> Defendant filed his submissions on the 17<sup>th</sup> January, 2019, the same being dated 16<sup>th</sup> January, 2018. On the other hand, the Plaintiff's Counsel filed his submissions dated 26<sup>th</sup> February, 2019 and on 04<sup>th</sup> March, 2019.

3. The Counsel for the 2<sup>nd</sup> Defendant has submitted that this court has the discretion to stay the instant proceedings pending the determination of the appeal in Nairobi Court of Appeal Civil Appeal No.4 of 2012, Elijah Ngungu Mwenji vs. Margaret Mwikali Ngungu and/or strike out/dismiss the suit for being prematurely instituted by the Plaintiff. The Counsel cited the case of **Global Tours & Travels Ltd; Nairobi HC Winding Up Cause No.43 of 2000** where **Ringera J** (as he then was) stated thus:-

*“As I understand the law, whether or not to grant stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously.”*

The Counsel went on to correctly submit that the hierarchy of courts is clear and constitutionally provided for and the decisions of the Court of Appeal are binding to the High Court and courts with equal status with the High Court (emphasis are mine). That should the instant suit proceed (sic) currently and the Court of Appeal finds in favour of the Respondent in the Appeal, the entire proceedings and any judgement delivered in the instant suit would be rendered null and void and would be a pure waste of this court's time.

4. The Counsel went on to submit that the issue of ownership of the subject property is core to the instant suit which is awaiting determination by the Court of Appeal and thus the court ought to exercise its discretion in observing the superior nature of the Court of Appeal and either stay the instant proceedings pending the determination of the appeal or strike out and/or dismiss the suit for being instituted pre-maturely.

5. On the other hand, the Counsel for the Plaintiff cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] 696** where **Law, JA** stated thus regarding Preliminary Objection:-

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

Further,

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of the juridical discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”*

The Counsel submitted that there exists an appeal at the Court of Appeal that was filed by the 2<sup>nd</sup> Defendant but was quick to point out there are no orders of stay by the Court of Appeal in Civil Appeal No.4 of 2012, Elijah Ngungu Mwangi vs. Margaret Mwikali Mwangi. The Counsel added that there are vesting orders made on 26<sup>th</sup> November, 2010 by the High Court in HCCC No.24 of 2006, vesting the suit property in this matter to the Plaintiff and by virtue of the said orders the Plaintiff was and is still equitable and beneficial owner of the properties as and when the acts of trespass were committed. The Counsel submitted that the order vesting the properties is still valid since it has not been reviewed, varied or set aside nor has it been stayed after the appeal was filed and until that is done, the court needs to address the issue of trespass.

6. Regarding the issue of jurisdiction, the Counsel cited the case of **David Thuku Ngige vs. Republic [2014] eKLR** where **Waithaka J** cited with approval the case of **Owners of Motors Vessel “Lilians” vs. Caltex Oil (Kenya) Ltd (1989) KLR** where it was so held that,

*“jurisdiction is jurisdiction and is everything.....jurisdiction is expressly conferred and cannot be inferred. It matters not that in the circumstances of this case, the Applicant submitted himself to the jurisdiction of the land dispute tribunal. Jurisdiction cannot be merely because a party acquiesces to some proceedings. Estoppel as a principle of law does not apply to confer jurisdiction. It cannot be invoked to confer jurisdiction where it has been expressly ousted. Indeed jurisdiction is a manner of law and can be raised at any stage of proceedings.”*

The Counsel submitted that the Court of Appeal does not have jurisdiction to deal with trespass which the Plaintiff is trying to prevent. Regarding jurisdiction of this Court, the Counsel cited **Article 162 (2) (b) of the Constitution 2010 and the Environment and Land Court Act, 2011** and submitted that the Court has jurisdiction by virtue of Section 13 of the latter Act which provides as follows;

*13(1) The court shall have original and appellate jurisdiction to hear and determine all disputes 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 environment 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.*

*(4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.*

*(5) Deleted by Act No.12 of 2012, Sch*

*(6) Deleted by Act No.12 of 2012, Sch*

*(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –*

- a) interim or permanent preservation orders including injunctions;*

- b) prerogative orders;
- c) award of damages;
- d) compensation;
- e) specific performance;
- f) restitution;
- g) declaration; or
- h) costs

The Counsel pointed out the pendency of the appeal in the Court of Appeal cannot deprive this court of its constitutional and statutory jurisdiction. The Counsel referred the court to the case of **Stephen Kithinji Nyaga & Another vs. Joseph Muchangi Nthiga & 2 Others [2018] eKLR** where **Angima, J** in a similar suit as this one held thus;

*“It would appear that the Defendants would like the instant suit to be stayed pending the hearing and determination of their application for revocation of grant. That may be a prudent manner of dealing with the instant situation. But that is quite different from asserting that the court has no jurisdiction at all to entertain the suit.”*

The Counsel urged the Court to find that the Preliminary Objection lacks merit.

7. I have read the Notice of Preliminary Objection as well as the submissions that were filed. I am of the view that the only issue for determination before me is whether or not this court has jurisdiction to hear and determine the instant suit. The 2<sup>nd</sup> Defendant contends that this court lacks jurisdiction by virtue of the appeal pending at the Court of Appeal in Nairobi Civil Appeal in Nairobi Civil Appeal No.4 of 2012, Elijah Ngungu Mwangi vs. Margaret Mwikali Ngungu. As was correctly submitted by the Plaintiff's Counsel, there are no orders of stay that were issued by the Court of Appeal in the aforementioned appeal. In my view, an appeal does not oust the jurisdiction of this court. The 2<sup>nd</sup> Defendant should differentiate between the issue of jurisdiction and the issue of seeking of stay of proceedings pending the determination in Civil Appeal No.4 of 2012. This court has both constitutional and statutory jurisdiction in terms of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act to hear and determine the instant suit. The point of preliminary objection has not satisfied the threshold of what constitutes a preliminary objection set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. I do concur with the holding in the case of Stephen Kithunji Nyaga & another vs. Joseph Muchangi Nthiga & 2 others [2018] eKLR.

8. The upshot of the foregoing is that the 2<sup>nd</sup> Defendant's point of Preliminary Objection lacks merit and I will dismiss it with costs to the Plaintiff.

Signed, dated and delivered at **Makueni** this 22<sup>nd</sup> day of **May, 2019**.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Muumbi holding brief for Ms. Mutinda for the 2<sup>nd</sup> Defendant

No appearance for the Plaintiff

Ms. C. Nzioka - Court Assistant

**MBOGO C.G, JUDGE**

**22/05/2019.**