



**REPUBLIC OF KENYA**

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

**CHUKA ELC CIVIL APPEAL CASE NO. 08 OF 2018**

**FORMERLY MARIMANTI CIVIL CASE NO. 37 OF 2017**

**M'MBOROKI THURAINÉ.....APPELLANT**

**VERSUS**

**M'IKIAO LAIKURU.....1<sup>ST</sup> RESPONDENT**

**STANELY KIRIA MITAMBO.....2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION**

**OFFICER THARAKA DISTRICT.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**(An appeal from the Order/Ruling of the Senior Principal Magistrate's court at Marimanti**

**delivered on 22.11.2018 in Marimanti SPM ELC No. 37 of 2017.)**

**JUDGMENT**

1. The Memorandum of Appeal in this appeal states as follows:

**MEMORANDUM OF APPEAL**

The appellant being dissatisfied with the decision/Ruling of the Senior Principal Magistrate's court at Marimanti in the above stated case, hereby appeals to the Environment & Land Court of Kenya at Chuka against the said court's decision and sets forth the following grounds:-

1. The learned trial magistrate erred in law and fact by upholding the Preliminary Objection dated 26.7.2018 which was without merit.
2. The learned trial magistrate's decision dealt a blow to the appellant's right to access to justice.

**Reasons wherefore** the appellant prays for the superior court to allow the appeal and set-aside the order of the lower court with an order remitting (sic) the matter back to the lower court for hearing and determination and an award of costs to the appellant.

**Dated at Meru this 7<sup>th</sup> day of December, 2018**

**FOR: MUIA MWANZIA & CO.**

**ADVOCATES FOR THE APPELLANT**

2. The appeal was canvassed by way of written submissions.

3. The Appellant's submissions are reproduced in full herebelow without any alteration whatsoever, including correction of spelling or any other mistakes.

## APPELLANT'S WRITTEN SUBMISSIONS

My lord, aggrieved by the decision of the SPM at Marimanti delivered on 22.11.2018 in MARIMANTI SPM ELC NO. 37 OF 2017, the appellant filed a Memorandum of Appeal dated 7/12/2018 and set forth 2 grounds of appeal, to wit;

1. The learned trial magistrate erred in law and fact by upholding the Preliminary Objection dated 26.7.2018 which was without merit.
2. The learned trial magistrate's decision dealt a blow to the appellant's right to Access to justice.

The Memorandum of Appeal is on page 1 of the record. The preliminary objection is dated 26.7.2018. The ruling and order giving rise to this appeal is at page 140 and 141 respectively.

Your lordship I wish to argue both grounds together.

### Grounds 1 & 2

The trial court erred my lord when it dismissed the appellant's suit on account of the preliminary objection thus dealing a blow to the appellant's right to access Justice.

My lord a preliminary objection should be on pure points of law. My lord the preliminary objection dated 26.7.2018 had 3 grounds.

- a) The court cannot grant the relief sought herein.
- b) The suit is fraudulent and intended to circumvent the law.
- c) The entire suit is incompetent as it seeks to quash the decision of the minister in charge of lands.

My lord a preliminary objection cannot be used to determine if a suit is fraudulent.

My lord, the Preliminary Objection was opposed as hereunder:

1. The 1<sup>st</sup> respondent filed a Preliminary Objection dated 26/7/2018 with intention to ensure that this suit is not heard on merits. The preliminary objection ought to have failed because of the following reasons;

- A preliminary objection should not be used to determine if a suit is fraudulent or intended to circumvent the law.
- The preliminary objection raised issues which required evidence.
- To determine if this suit is fraudulent or not evidence must be called.

The Preliminary Objection ought to have failed as it was not a pure point of law. I rely on the decision of

My lord, the case of **MUKISA BISCUIT –VERSUS- WEST END DISTRIBUTORS** (copy enclosed) which laid down the parameters of a preliminary objection to wit;

- It must be on a pure point of law
- It must not go the evidence

I also rely on the case of **MUHU HOLDINGS LIMITED–VERSUS- JAMES MUHU KANGARI [2017] Eklr ELC NO. 112 OF 2017** (Copy enclosed) states that a preliminary objection cannot be raised if any fact has to be ascertained in evidence.

This case cannot be decided on the basis of the preliminary objection. My lord this matter calls for trial to ascertain whether the suit was fraudulent or not or whether the relief sought could be granted by the trial court.

My lord we pray that the appeal be allowed and the suit be heard on merits.

We so pray.

DATED AT MERU THIS.....15<sup>TH</sup> .....DAY OF .....JULY,.....2019

FOR: M/S MUIA MWANZIA & CO.

**ADVOCATES: FOR THE APPELLANT**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes:

## **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

### **BACKGROUND**

This is an appeal from the ruling delivered by Hon. P. N. Maina, SPM in a Notice of Preliminary Objection dated 26<sup>th</sup> July 2018 in Marimanti SPM ELC No. 37 of 2017. The Objection was raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein seeking dismissal of the suit on grounds that the court could not grant the relief sought by the Plaintiff, the suit was fraudulent and intended to circumvent the law, and that the entire suit was incompetent as it sought to quash the decision of the Ministers in charge of lands. The Learned Magistrate allowed the preliminary objection and dismissed the suit with costs to the respondents. Aggrieved by the decision in, the appellant filed this appeal in a Memorandum of Appeal dated 7<sup>th</sup> December 2018, challenging the dismissal of the suit on two grounds:

**1. That the learned trial magistrate erred in law and fact by upholding the Preliminary Objection dated 26.7.2018 which was without merit.**

**2. The learned trial magistrates decision dealt a blow to the Appellant's to Access to justice**

On 12<sup>th</sup> June 2019 when the matter was coming up for mention to confirm filing and service of Record of Appeal, parties took directions that the appeal be disposed by way of written submissions and it is by these directions that we herewith wish to tender our submissions for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

### **ANALYSIS AND LEGAL PRINCIPLES APPLICABLE**

The main issue for determination my Lord, is whether the Learned Magistrate properly addressed himself to the law in deciding to allow the 1<sup>st</sup> and 2<sup>nd</sup> respondents' preliminary objection and whether the dismissal of the suit amounted to a denial of the appellant's right to access justice.

The law on what constitutes a Preliminary Objection was laid out in the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd (1969) E.A 696* wherein it was held that a Preliminary Objection must raise a pure point of law. The court said;

***"... 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...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 is the exercise of judicial discretion".***

The appellant herein has to show that the preliminary objection raised by the respondents did not meet the threshold laid out in Mukisa Biscuits case. He has to show that the preliminary objection did not raise a pure point of law.

Guided by the above principle, and having read the Memorandum of Appeal filed by the Appellant, we wish to submit on the requirements of the law on the following critical points:

1. Whether the preliminary objection raised by the respondents was merited
2. Whether the dismissal amounted to the appellant's right to access to justice

### **Whether the preliminary objection raised by the respondents was merited**

The appellant contends that the Learned Magistrate erred in law and fact by upholding the Preliminary Objection dated 26.7.2018 which was without merit. In the objection, the respondents prayed that the suit be dismissed on grounds that:

1. The court cannot grant the relief sought;
2. The suit is fraudulent and intended to circumvent the law;
3. The entire suit is incompetent as it seeks to quash the decision of the Minister in Charge of Lands.

The appellant opposed the preliminary objection on grounds that:

1. A preliminary objection cannot be used to determine if a suit is fraudulent or intended to circumvent the law
2. This is a matter of evidence

3. To determine if the suit is fraudulent of not evidence must be called.

Your Lordship, it is clear from the first ground raised by the respondent in the preliminary objection that it sought to challenge the jurisdiction of the Magistrate's Court to hear, determine and grant the reliefs sought by the appellant. What a court can and cannot grant is a matter of jurisdiction. In ***Kenyatta International***

***Convention Centre v Greenstar Systems Limited (2018) eKLR***, the Court agreed with the words of Nyarangi J.A. in ***Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd(1989) KLR*** that:

***"...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...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".***

What did the appellant seek? In the plaint dated 22/12/2009, the appellant's main prayer was for ***"a declaration that the findings and subsequent decision of the 3<sup>rd</sup> defendant were biased against the Plaintiff and for an order setting aside the same and reverting parcel No. 1851 to the plaintiff to the exclusion of all others"***

The 3<sup>rd</sup> defendant who is the 3<sup>rd</sup> respondent in this appeal is the District Adjudication and Settlement Officer Tharaka District and it is clear from the facts laid out in the plaint that the appellant was dissatisfied with the decision of the 3<sup>rd</sup> appellant in Objection No. 239 in respect of Land Parcel No. 1851 Nkondi "A" Adjudication Section. The appellant claimed that the decision was reached through fraudulent and deceitful means and he sought a declaration that the said decision was biased and the same be set aside and an order reverting the said parcel of land to him be granted. In short, you Lordship, the appellants sought to have the decision of the 3<sup>rd</sup> defendant in Objection No. 239 quashed or what is known as order for *Certiorari*. He was challenging the decision making process of the 3<sup>rd</sup> respondent on grounds that the same was biased, fraudulent and deceitful.

Can civil proceedings be commenced in the Magistrates Court to challenge the decision making process of a quasi-judicial authority? The more critical question in this scenario is whether the Magistrate's Court has the jurisdiction to quash the decisions of an Adjudication Officer acting in a quasi-judicial capacity.

Your Lordship, it is trite law that where a party is aggrieved by the decision making process of any authority and seeks to challenge the same, the right procedure is to commence Judicial Review proceedings seeking an order of *Certiorari*. In the case of ***Commissioner of Lands v Kunste Hotel Limited (1997) eKLR***, the Court of Appeal stated that

***"But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 ALL ER.282, at p. 285.). The Point was more succinctly made in the English case of Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155, by Lord Hailsham of St. Marylebone, thus:***

***"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."***

The plaintiff prayed for a declaration that the decision of the 3<sup>rd</sup> respondent was biased on grounds that the same was reached by fraudulent and deceitful means. In short, he was not accorded fair treatment by the 3<sup>rd</sup> respondent in Objection No 239. The recourse was for the plaintiff to file judicial review proceedings to challenge the said decision.

Order 53 Rule 3 of the Civil Procedure Rules provides that the application for Judicial Review shall be made to the High Court. This is the supervisory jurisdiction of the High Court enshrined in Articles 23, 47 and 165 (6) & (7) of the Constitution of Kenya 2010. It further flows from Sections 8 and 9 of the Law Reform Act. There has been established a Judicial Review division of the High Court to deal with judicial review proceedings. The Magistrate's Court has no jurisdiction to entertain proceedings seeking to challenge the decision-making process of an authority.

We submit that the Magistrates Court has no jurisdiction to entertain the proceedings instituted by the appellant as they sought to challenge the decision-making process of the 3<sup>rd</sup> respondent acting in quasi-judicial authority and to quash the decision therein. In the circumstances, what then was left for the Learned Magistrate to do? The guiding principle on jurisdiction was laid in the famous case of ***Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd (1989) KLR*** where the court observed:

***"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."***

In the case of ***Orange Democratic Movement v Yusuf Ali Mohammed & 5 Others (2018) Eklr*** the Learned Judges of Appeal faulted the High Court for dismissing a

preliminary objection that challenged its jurisdiction to hear and determine a nomination dispute and held:

***“For the various reasons stated above, we are satisfied that the trial court erred in dismissing the Preliminary Objections filed before it. This appeal has merit and is hereby allowed. We set aside the Ruling of the High Court dated 4th April 2018 and all consequential orders. All the preliminary objections filed before the High Court be and are hereby upheld. It is hereby declared that the High Court lacks jurisdiction to entertain, hear and determine Constitution Petition Nos. 2 and 3 of 2017 filed at the Lodwar High Court. Each party is to bear his/her/its costs in this appeal.”***

It is our submission that the Learned Magistrate was right in finding that he did not have the jurisdiction to entertain the suit and grant the relief sought by the appellant. The Learned Magistrate was right in finding that the preliminary objection was grounded on a pure point of law, that is, jurisdiction; and the only right thing to do was dismiss the suit. The court had to allow the preliminary objection and down its tools.

The plaintiff knew that he ought to have filed judicial review proceedings to challenge the decision of the 3<sup>rd</sup> respondent within 6 months from the date of that decision as per order 53 rule 2 of the Civil Procedure Rules. He failed to do so. Knowing that he was time barred and in an attempt to circumvent the law, he decided to institute civil proceedings in the Magistrates Court. This, your Lordship, was clear from the facts of the case. The suit was on its face fraudulent. There was no need to call for evidence to establish whether the suit sought to quash the decision of the 3<sup>rd</sup> defendant. It was clear from the appellant's prayer in the plaint. The preliminary objection was therefore merited and the Learned Magistrate was right in allowing it.

### **Whether the dismissal amounted to the appellant's right to access to justice**

The appellant contends that the Learned Magistrate's decision dealt a blow to his right to access to justice. Your Lordship, parties have to seek justice through the right procedure and in the right forum. That is why the Constitution of Kenya 2010 and the various statutes have established different courts with distinct jurisdiction to handle distinct matters. The justice system has also established clear rules and procedures to be followed by parties who seek justice. These courts, rules and procedures are the various doors through which to access justice. A party seeking justice must knock on the right door.

The appellant herein sought to challenge and quash the decision of the 3<sup>rd</sup> respondent. Having failed to do so in the right court and within the timelines set in the rules and procedures, he chose to institute civil proceedings. He knocked on the

wrong door of justice. The court should and must never provide a leeway for litigants who opt not to follow the right procedures when seeking justice. This would turn our justice system into an unruly horse. Justice cannot be accessed where it cannot be granted. The court could not assume jurisdiction that it did not have. It would have been a waste of judicial time for the Learned Magistrate to dismiss the preliminary objection and subject the parties to the process of litigation only to reach a finding that he had no powers to grant the relief sought. Even if the preliminary objection was dismissed and the suit was heard on merit, the trial court could not grant the relief sought. Therefore, the decision of the trial magistrate did not in any way deny the appellant access to justice.

It is our submission that the decision of the Learned Magistrate was by all means in the interest of justice for both parties. It is only by that decision that the parties were not subjected to a tedious and unfruitful process of litigation considering that the court had no jurisdiction to entertain the proceeding or to grant the relief sought by the appellant.

### **CONCLUSION**

Your Lordship, it is the court's decision to allow a preliminary objection that is the subject of this appeal. The appellant in opposing the preliminary objection chose not to address the first ground of the preliminary objection. He did not object to the fact that the court had no jurisdiction to grant the relief he sought in his plaint. We have established and we submit that the preliminary objection dated 26/7/2018 was based on a pure point of law, that is, jurisdiction of the Magistrates Court to entertain proceedings seeking to challenge the decision making process of a quasi-judicial authority (3<sup>rd</sup> respondent) and to issue orders quashing such a decision.

It is our submission that the plaintiff's recourse was to file judicial review proceedings in the High Court as provided by law. The plaintiff ought to have done so within six months of the date of the 3<sup>rd</sup> respondent decision, but he failed to do so. Your Lordship, it is our considered view and opinion and we so submit that the Plaintiff was well aware that he was out of time to file judicial review proceedings seeking an order of certiorari under Order 53 Rule 2 of the civil procedure rules but in an attempt to circumvent the law, he decided to institute civil proceedings in the Magistrates Court.

Your Lordship, we submit that the Learned Magistrate properly addressed himself to the law, in finding that the preliminary objection by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was merited, the same being on a pure point of law; jurisdiction. There was no need

to call for evidence to establish that the appellant was out of time to file judicial review proceedings hence he opted to file civil proceedings in the Magistrates Court to circumvent the law. It was clear from the facts as laid out in the pleadings of the parties. There was also no need to call for evidence to establish that the Magistrates Court has no jurisdiction to issue an order setting aside the decision of the 3<sup>rd</sup> respondent acting in quasi-judicial authority on grounds that the decision was reached in a fraudulent, deceitful and biased process. The preliminary objection reached the threshold set out in ***Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd (Supra)***.

In the upshot, Your Lordship, we urge this Honourable Court to consider these submissions and find that this Appeal is unmerited and the same be dismissed with costs to the respondent.

We have attached the following for the court's consideration;

- a) *Kenyatta International Convention Centre v Greenstar Systems Limited (2018) eKLR*
- b) *Commissioner of Lands v Kunste Hotel Limited (1997) eKLR,*
- c) *Orange Democratic Movement v Yusuf Ali Mohammed & 5 Others (2018) eKLR*

DATED AT MERU THIS .....12<sup>TH</sup> ..... DAY OF.....JULY.....2019

FOR: MURANGO MWENDA & CO

ADVOCATES FOR THE RESPONDENT

5. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not file their submissions.

6. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. I do not need to regurgitate the principles espoused by the authorities as the principles they enunciate have been elaborated upon in the parties' written submissions which have been reproduced in full in the earlier part of this judgement (op.cit). All the authorities proffered by the parties are good authorities in their facts and circumstances. However, I opine that no two cases are congruent in their facts and circumstances to a degree of mathematical exactitude. I have taken the authorities proffered by the parties into account when I have come to my decision in this appeal.

7. A preliminary objection raises a pure or pure points of law. To do that a preliminary objection cannot be seen to obfuscate issues by being nebulous. A Preliminary Objection must not allow its postulator to go on a fishing expedition.

8. Ground 1 in the Notice of Preliminary Objection is veritably nebulous. It states: **"1. The court cannot grant the relief sought herein."** This cannot be a demurrer as envisaged by pure points of law. It invites arguments which can only be fully canvassed when the suit is being heard on its merit.

9. Ground 2 states: **"2. The suit is fraudulent and intended to circumvent the law."** *Ipsa facto*, this ground is not a pure point of law. It invites arguments. For example, there is need to prove fraud.

10. Ground 3 states: "The entire suit is incompetent as it seeks to quash the decision of the minister in charge of lands." Clearly, this ground invites arguments.

11. Nowhere in the 3 grounds does the Preliminary Objection claim that the court hearing the matter had no jurisdiction. The issue of lack of jurisdiction must be stated in unequivocal terms. This was not the position in this case.

12. In the circumstances, I find that this appeal has merit.

13. This appeal is, therefore, allowed.

14. The lower court's order is hereby set aside and this suit is remitted to the Marimanti SPM's Court for hearing and determination.

15. Costs shall be in the main cause in the lower court.

16. Orders accordingly.

**Delivered in open court at Chuka this 20<sup>th</sup> day of November, 2019 in the presence of:**

CA: Ndegwa

Miss Mbogo h/b Murango Mwenda for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Kaburu Mwirigi h/b Mwanzia for the Appellant

**P. M. NJOROGE,**

**JUDGE.**