



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 02 OF 2019

NJIRU MICHENI NTHIGA (SUING AS A LEGAL

REPRESENTATIVE AND ADMINISTRATOR OF THE

ESTATE OF THE DECEASED LEONARD R.I.NTHIGA).....PLAINTIFF

VERSUS

THE GOVERNOR, THARAKA NITHI COUNTY GOVERNMENT.....1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT

THE MEMBER OF COUNTY ASSEMBLY, MAGUMONI WARD.....3RD DEFENDANT

THE CHIEF OFFICER, ROADS AND INFRASTRUCTURE

THARAKA NITHI COUNTY.....4TH DEFENDANT

THE CHIEF OFFICER, LANDS, PHYSICAL PLANNING AND URBAN

DEVELOPMENT THARAKA NITHI COUNTY.....5TH DEFENDANT

WESTOMAXX INVESTMENT LTD.....6TH DEFENDANT

RULING

1. This ruling concerns a Notice of Preliminary Objection (PO) filed by the 1st, 2nd, 4th, 5th and 6th defendants which states:

NOTICE OF PRELIMINARY OBJECTION

Take notice that at the hearing of the Notice of Motion herein dated 27th February, 2019, the 1st, 2nd, 4th, 5th and 6th defendants shall object to the same and urge this honourable court to strike it out with costs on the grounds that:-

1. This honourable court has no jurisdiction to entertain this suit as its value is Kshs.15,437,000/- by virtue of section 7 of the Magistrate’s Court Act, 2015, and the rule in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017]eKLR.

2. As held in Owners of the Motor Vessel Lillian S –VS- Caltex Oil Kenya Ltd [1989]KLR 1,

Dated at Nairobi this 25th day of May 2019

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KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

2. Contemporaneously with the filing of the Preliminary Objection, the 1st, 2nd, 4th, 5th and 6th defendants filed grounds of opposition which state:

GROUND OF OPPOSING (sic) THE NOTICE OF MOTION HEREIN DATED 27TH FEBRUARY, 2019.

TAKE NOTICE that at the hearing of the Notice of Motion dated 27th February, 2019, the 1st, 2nd, 4th, 5th and 6th Defendants shall oppose the same on the following grounds:-

1. this Honourable Court has no jurisdiction to entertain this suit as its value is **Kshs. 15, 437, 000/-** by virtue of Section 7 of the Magistrate's Court Act, 2015, and the rule in **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR**;
2. as held in **Owners of the Motor Vessel Lillian S –v- Caltex Oil Kenya Ltd [1989] KLR 1**, where a court lacks jurisdiction, it must down its tools;
3. the Plaintiff has based his claim on his own wrongs taking the form of constructing a part of his building on a road reserve and also constructing buildings without obtaining the requisite approvals under the repealed Local Government Act and the Physical Planning Act;
4. the Plaintiff has not and cannot establish a prima facie case with a probability of success;
5. the Plaintiff cannot establish a case for the grant of mandatory injunctions as required by **Kamau Mucuha –v- Ripples Ltd [1993] eKLR**;
6. other reasons contained in the Replying affidavit.

DATED at NAIROBI this25th day ofMay.....2019

KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

3. The plaintiff replied to the Preliminary Objection and the Grounds of Opposition in the following manner:

REPLY TO 1ST, 2ND, 4TH, 5TH AND 6TH RESPONDENTS'/DEFENDANTS' NOTICE OF PRELIMINARY OBJECTION AND GROUND OF OPPOSITION FILED ON 25TH MARCH 2019.

TAKE NOTICE that the Counsel for the Applicant/Plaintiff **will reply and/or oppose** to the Preliminary Objections raised by the above named Respondents/Defendants on their pleadings filed on 25th March 2019, on the following grounds:-

1. **THAT** this Honourable Court has Jurisdiction to hear and determine the Applicant's/Plaintiff's Suit and the Jurisdiction thereof is expressly donated by the *Provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010 as read with Section 13 (7) of the Environment and Land Court Act*. This Jurisdiction is inherent upon this Court, and having original Jurisdiction equally as the High Court, has Jurisdiction to hear and determine the Applicant's/Plaintiff's claim of Kshs. 15,437,000.00 plus general damages pleaded thereof and other constitutional declarations and/or reliefs sought thereto as pleaded on paragraph 12 of the Plaintiff.

This Jurisdiction in respect of this matter is well founded on the anticipated complexities of the issues for determination forming and/or constituting the dispute herein.

2. **THAT** the Applicant's/Plaintiff's deceased father had obtained the requisite approvals from the then District Public Health Officer as it was the procedure then, before commencing construction works on LR. MAGUMONI/THUITA/779 **and which land is not a road reserve nor in the Ndungu report** and the Respondents/Defendants averments to the contrary have no legal basis. **(The Applicant/Plaintiff will seek leave of the Court to produce the said approvals, during the time of hearing).**

That further, the Physical Planning Act, the Respondents/Defendants are hinging their defence on, was not in force in the year 1988 and when the subject Suit properties were being approved and constructed.

3. **THAT** the Applicant/Plaintiff has ably demonstrated a *prima facie* case with high chances and/or probability of success and it is in the interest of Justice that the same do proceed to full hearing and the Respondents/Defendants be condemned for applying *draconian* litigation and/or improper practices of raising "**preliminary points of Law**" on matters that **are not demurrable** as required in Law.

4. **THAT** the Authorities cited by the Respondents/Defendants, particularly that of E.L.C Case No. 868 of 2012, Ruling delivered on 25th April 2018 by JUSTICE A. OMBWAYO and the celebrated one of MUKISA BISCUITS versus WEST END (1969) EA 696 and which JUSTICE M. K. IBRAHIM revisited on his Judgment delivered on 13th June 2007, in his Eldoret Misc. Civil Application No. 97 of 2003 **speaks volumes** that the Applicant's/Plaintiff's Suit is meritorious and deserves to proceed to full hearing and on its own merits and the Preliminary Objections raised do not deserve to see the light of the day. The Preliminary Objections raised by the Respondents/Defendants are of nature of the technicalities being barred in administration of substantive Justice under the express Provisions of Article 159 2 (d) of the Constitution of Kenya, 2010.

5. We shall rely on the above cited Authorities together with that of Justice L. N. WAITHAKA, Judgment delivered on 21st February 2014 in Nakuru Civil Case No. 489 of 2013 between SAMUEL WAWERU versus GEOFFREY MUHORO MWANGI, to demonstrate that the Respondent's/Defendant's Preliminary Objections do not deserve to see the light of the day and consequence thereof is for their dismissal for confusing issues and otherwise for being an abuse of the due Court Process.

We so pray your Lordship.

DATED at CHUKA this ...28th day ofMarch,..... 2019

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M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

4. The 3rd defendant wanted to be removed from the suit and filed an affidavit sworn on 16th July, 2019 which states as follows:-

I, JUSTIN KITHINJI S. NDERI a resident Kibugua Market in Tharaka Nithi County within the Republic of Kenya and of Post Office Box 10, Magumoni do solemnly make oath and state as follows:-

3RD DEFENDANT'S AFFIDVIT

1. That I am an adult male of sound mind and disposition, a citizen of the Republic of Kenya, the 3rd defendant herein well versed with the facts of this case and hence competent to make the following declarations under oath.

2. That the plaintiff herein made a complaint for malicious damage of property against me and other people working with the Tharaka Nithi County Executive at Chuka Police Station vide OB. 47/11/2/2019 in February, 2019.

3. That the criminal complaint against me and the others relates to and is founded on the events that precipitated the present civil suit.

4. That I was summoned sometimes in June, 2019 by the OCS and the DCIO Chuka Police Station and a statement with regard to the criminal complaint was taken.

5. That at the time of recording the statement I was informed that the complaint had resuscitated the complaint which he had seemingly lost interest in and other people including police officers and officers from the County Planning Offices had also recorded statements.

6. That after the last court attendance on the 10th July, 2019 the court having directed that we furnish it with particulars of the criminal complaint against me I visited the office of the DCIO Chuka who furnished me with details of the same but directed that the actual documents would be delivered to court subject to a court order.

7. That I am now aware that the investigation file was forwarded to the office of Director of Public Prosecution (ODPP) in Nairobi on the 17th June, 2019 vide letter Ref. DCI/CRI/6/7/Vol. IV/44.

8. That the office of the DCIO Chuka Police Station is awaiting the go-ahead from the ODPP to arrest any culpable individuals including me if there is probable cause to prosecute for malicious damage of property.

9. That it is factual that the complainant's visit to the Chuka Police Station after the court had advised on the Alternative Dispute Resolution (ADR) caused the investigation file to be forwarded to the ODPP for advice on prosecution.

10. That it is clear that the complainant's fresh impetus to follow upon the criminal aspects of this case at a time when ADR is being explored is a well calculated move to influence any form of settlement and also amounts to abuse of court process.

11. That while nothing in law bars parallel criminal and civil proceedings, the use of one process to cause interference with the other or influence the outcome of the other amounts to abuse of court process that this court should not countenance.

12. That as was recorded in my statement with the DCIO, I was not within the confines of Tharaka Nithi County when demolitions,

which were allegedly done under the supervisions of Police officers and with lawful notice were carried out.

13. That I make this affidavit in support of my application to have my name expunged from the named defendants in the present civil case that relates to the issues of compulsory acquisition of private land, repossession of public land and compensation matters that a private citizen is not ordinarily answerable to leave alone a member of a County Assembly.

14. That whatever is deposed to herein is true to the best of my knowledge, information and belief.

5. The 3rd Defendant’s counsel submitted an affidavit to support his assertions that he was not properly sued in this matter. The said affidavit states as follows:

REPLY TO THE 3RD DEFENDANT’S SUBMISSIONS ON WHETHER THE 3RD DEFENDANT IS PROPERLY SUED, IN THE INSTANT SUIT.

Your Lordship, the Plaintiff’s Counsel will reply to and/or oppose the 3rd Defendant’s Submissions filed on 24th April 2019, that the 3rd Defendant is not properly sued in the Instant Suit, on the following grounds:-

1. The 3rd Defendant **has not filed any substantive motion and/or defence** to have the 3rd Defendant expunged from the proceedings as required in law.

2. The 3rd Defendant’s Submissions are in nature of technicalities barred in administration of substantive Justice as envisaged *under Article 159 2 (d) of the Kenya Constitution, 2010.*

3. The 3rd Defendant has **rightly admitted on his paragraph 4 of the submissions filed on 24th April 2019 that this Honourable Court has Jurisdiction to hear and determine the Instant Suit**, and cannot backtrack and declare that he is wrongly sued in the Instant Suit. They should only have addressed themselves on the issue of whether they are properly sued if they believe they should not be a party in the Suit.

4. That the 3rd Defendant has not filed any Defence to the Plaintiff’s Claim to demonstrate that he is not liable to the Plaintiff’s Claim and in absence of such, they have no substratum and cannot stand under the very strong waves of the Law.

5. That the 3rd Defendant is properly sued in the Instant Suit, **courtesy to the Provisions of Order 1 Rules 3, 4 (b) and 5 of the Civil procedure Rules, Cap 21 Laws of Kenya** and the Defendant’s Submissions to the contrary ought to fall under their own sword.

6. That further, the 3rd Defendant is properly sued in the Instant suit for reasons demonstrated below:-

i. That in October 2018, the 3rd Defendant held a baraza at Kibugua market and where the subject Suit land is situated and at which he persuaded the attendants to “RESOLVE” to surrender land for road expansion “without compensation”.

ii. That on 7th December 2018, the Plaintiff met the 3rd Defendant at his private office (JUKIS Surveyor’s office) Chuka Town and acknowledged the Plaintiff’s letter dated 6th November 2018 and promised the Plaintiff that freehold Land Parcels particularly that of the Plaintiff’s deceased father won’t be affected by compulsory acquisition without compensation.

iii. That the 3rd Defendant personally directed and/or supervised Mutembei Surveyor of County Government to mark for demolition the Plaintiff’s deceased’s father LR. MAGUMONI/THUITA/779.

7. That other acts/omissions of the 3rd Defendant to warrant him being sued to be stated and argued during the time of hearing.

DATED at CHUKA this ...17th day ofMay,..... 2019

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M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

6. The Preliminary Objection was canvassed through written submissions.

7. The 1st, 2nd, 4th, 5th and 6th defendants filed written submissions in the following manner:

1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS’ SUBMISSIONS ON THEIR NOTICE OF PRELIMINARY OBJECTION DATED 25TH MARCH, 2019

PART A – THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS’ SUBMISSIONS

Part 1 – Introduction

1. These submissions are in **two** parts. **Part A** contains the 1st, 2nd, 4th, 5th and 6th Defendants’ submissions on their Preliminary Objection whilst **Part B** contains a response to the Plaintiff’s Reply to the said Preliminary Objection.

2. Before this Honorable Court is the 1st, 2nd, 4th, 5th and 6th Defendants (*hereinafter, they are referred to as the Applicants*) Notice of Preliminary Objection dated 25th **March, 2019**, to both the pending application dated 27th **February, 2019**, and the suit. The said Notice of Preliminary Objection reads as follows:-

TAKE NOTICE that at the hearing of the Notice of Motion herein dated 27th **February, 2019**, the 1st, 2nd, 4th, 5th and 6th Defendants shall object to the same and urge this Honourable Court to strike it out with costs on the grounds that:-

1. this Honourable Court has no jurisdiction to entertain this suit as its value is Kshs. 15, 437, 000/- by virtue of Section 7 of the Magistrate’s Court Act, 2015, and the rule in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR.

2. as held in Owners of the Motor Vessel Lillian S –v- Caltex Oil Kenya Ltd [1989] KLR 1, where a court lacks jurisdiction, it must down its tools.

3. On 25th **March, 2019**, this Honorable Court gave directions as regards the disposal of that application. These were that:-

- a. **the Preliminary Objection dated 25th March, 2019, be heard first and the Plaintiff is granted 7 days to respond;**
- b. **oral application by the Plaintiff to exclude the name of the 3rd Defendant, the MCA for Magumoni Ward, in the suit is allowed;**
- c. **the Plaintiff to serve the 3rd Defendant with the orders issued by the court today;**
- d. **all parties, including the 3rd Defendant, to come to court for directions on 8th April, 2019.**

4. These are the Applicants’ submissions.

5. The Applicants wish to also rely on their Grounds of Opposition dated 25th **March, 2019**, and their list of authorities dated 25th **March, 2019**.

Part 2 – The facts of the case

6. The Applicants accept, for the purposes of their objections, that all the facts stated by the Plaintiff are correct.

7. The brief facts of the case, as can be seen from both the Plaintiff dated 27th **February, 2019**, and Amended Plaintiff dated 28th **March, 2019**, are that:-

a. the Plaintiff is the legal representative of the late Leonard R. I Nthiga who is the registered proprietor of the suit property, Meru/ Magumoni/ Thuita/ 779; he died on 25th **November, 2017**; the deceased was registered as such on 3rd **July, 1987**; the acreage of the suit property is **0.037 Ha**;

b. the Plaintiff was issued with a limited grant of letters of administration for the purposes of this suit on 15th **February, 2019**; **it is worthy of note that he filed that Cause in the Chief Magistrates Court ostensibly because the value of the deceased’s properties was not more than Kshs. 20 Million as provided for in the Magistrate’s Court Act, 2015**;

c. the Plaintiff has attached a copy of an approval allegedly granted by the District Health Officer, Meru, on 9th **December, 1988**, for a proposed business premises on the suit property for the deceased; **this then begs the question, why was the approval not sought from the Meru County Council which was the relevant organ to approve buildings/ construction plans at the time; the Applicants submit that, on the face of it, this was an illegal approval made by an illegal body**;

d. as can be seen from the photographs attached to his bundle of pleadings, neither the deceased nor the Plaintiff built a hospital/ clinic on the suit property if the approval given by District Health Officer, Meru, on 9th **December, 1988**, is valid;

e. according to a Valuation Report contained in the Plaintiff’s bundle, which has been prepared by Ms. Tuliflocks Ltd, the valuation of the suit property confirms that it is worth **Kshs. 15, 437, 000/-**; **page 6** of that Report reads as follows:-

VALUATION

Having regard to the foregoing particulars and the prevailing economic circumstances, we are of the considered opinion that the value of the unencumbered freehold interests I Magumoni/ Thuita/ 779 as at date of inspection is as follows:-

OUR OPINION ON THE CURRENT MARKET VALUE

Kshs. 15, 437, 000/-

READ:- FIFTEEN MILLION, FOUR HUNDRED AND THIRTY SEVEN ONLY.

f. he filed this suit on 27th February, 2019.

Part 3 – The Law

The Preliminary Objection

8. The Applicants submit that that the leading authority on the nature of a preliminary objection is found in **Mukisa Biscuits –v- West End [1969] EA 696**. In that case, the East African Court of Appeal held that a preliminary objection raises a pure question of law. Law JA stated the law as follows:-

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, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.

Hon Justice Newbold stated as follows,

A preliminary objection is in the nature of what used to be a demurr. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

Please see authority number 9 contained in the Applicants' list of authorities dated 25th March, 2019, at pages 55 to 63 of that bundle.

9. In **John Mundia Njoroge and 9 Others –v- Cecilia Muthoni Njoroge and Another [2016] eKLR**, this Honorable Court outlined the grounds which could form the basis of a preliminary objection,

In my view, a preliminary objection can be raised on any of the following grounds:-

- a. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;***
- b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;***
- c. Insufficient specificity in a pleading;***
- d. Legal insufficiency of a pleading (demurrer);***
- e. Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and***
- f. Pendency of a prior action or agreement for alternative dispute resolution.***

A copy of that authority is attached to these submissions.

10. The Respondents further submit that in **Omondi–v- National Bank of Kenya Ltd and Others [2001] 1 EA 177**, the High Court held as follows,

Bearing that definition in mind, I agree with counsels for the Defendants that both the objection as to the legal competence of the Plaintiffs to sue and pleas of *res judicata* are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. ... And I hasten to add that in determining both points, the court is perfectly at liberty to look at the pleadings and other relevant matter in its records. It is not necessary to file affidavit evidence in those matters as contended by counsel for the Plaintiff.

Please see authority number 10 contained in the Applicants' list of authorities dated 25th March, 2019.

11. The Applicants submit that litigants, like the Plaintiff herein, who approach this Honorable Court must be clear which jurisdiction, he/she intends to invoke as the court will down its tools as soon as it discovers that it lacks jurisdiction to hear the dispute before it. Please see

Owners of the Motor Vessel Lillian S v Caltex Kenya [1989] KLR 1. In that case, Hon. Justice Nyarangi said this of jurisdiction and the consequence of a court holding that it lacks 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 pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

Please see authority number 7 in the same bundle of authorities dated 25th March, 2019.

12. In the case before the court, the Applicants submit that as they shall demonstrate below, this Honorable Court lacks jurisdiction to hear the suit herein.

The Jurisdiction of the Magistrate's Court

13. Section 7 of the Magistrates Court Act, 2015, provides as follows:-

7. (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

- (a) twenty million shillings, where the court is presided over by a chief magistrate;**
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;**
- (c) ten million shillings, where the court is presided over by a principal magistrate;**
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or**
- (e) five million shillings, where the court is presided over by a resident magistrate.**

(2) The Chief Justice may from time to time, by notice in the Gazette, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.

(3) A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law —

- (a) land held under customary tenure;**
- (b) marriage, divorce, maintenance or dowry;**
- (c) seduction or pregnancy of an unmarried woman or girl;**
- (d) enticement of, or adultery with a married person;**
- (e) matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and**
- (f) intestate succession and administration of intestate estates, so far as they are not governed by any written law.**

The Applicants submit that as the valuation report filed by the Plaintiff shows, the value of the suit property is **Kshs. 15, 437, 000/-**. This suit, as is demonstrated from the above quoted section, should have been filed before the Chief Magistrate's Court at Chuka which has jurisdiction to hear and determine suits of a civil nature which does not exceed **Kshs. 20 Million**. We urge this Honorable Court to allow the objection and strike out both the application and suit with costs to the Applicants.

14. Section 9 of the same Act reads as follows:-

9. A magistrate's court shall —

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- (ii) compulsory acquisition of land;**

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations.

It is thus clear that the Chief Magistrates Court, Chuka, has the jurisdiction to determine the claim before this court. However, the Plaintiff chose to file his claim before this Honorable Court which, as stated above, lacks jurisdiction to entertain it. The Applicants, therefore urge this Honorable Court to strike out the suit with costs.

15. In Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR, the law was stated as follows as regards the jurisdiction of the Magistrates Court at paragraphs 65 and 71:-

65. In our view, conferring jurisdiction on magistrates courts to hear and determine does not diminish the specialization of the specialized courts considering that appeals from the magistrates' courts over those matters lie with the specialized courts. As urged by Mr. Kanjama, under the doctrine of judicial precedent, the decisions of the specialized courts would bind the magistrates' courts and the specialized courts would therefore undoubtedly imprint the "specialized jurisprudence" on the magistrate's courts.

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71. By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases.

Please see authority number 6 in the Applicants' list of authorities dated 25th March, 2019.

16. In Amos Tirop Matui & another -v- Festus K. Kiprono & 2 others [2018] eKLR, this Honorable Court held as follows on the jurisdiction of the Magistrates Court over land and environment matters:-

I have considered the submissions of counsels and do find that the value of the suit property is approximately 6.5 Million Shillings and therefore, the Magistrate's Court has pecuniary jurisdiction to entertain the dispute herein under section 7 of the Magistrates' Court Act no 26 of 2015. However, the issue is whether the Magistrate's Court have the jurisdiction to cancel a title or to order for the rectification of the register. Article 162(2)(b) of the Constitution provides that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

"(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 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."

The Environment and Land Court Act grants jurisdiction to the Environment and Land Court under section 13 (7) to do the following, thus: -

“...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.”*

Section 26 of the Environment and Land Court Act provides for the Sitting of the Court thus: -

- (1) The Court shall ensure reasonable and equitable access to its services in all Counties.
 - (2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.
 - (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
 - (4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
 - (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
- (4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.”

Section 9 of the Magistrates' court Act deals with claims in employment, labor relations claims; land and environment cases and provides that a magistrate's court shall in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to; environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (ii) compulsory acquisition of land;(iii) land administration and management; (iv)public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (v) environment and land generally.

Section 80 of the Land Registration Act Cap 12A of the Laws of Kenya provides for rectification of the register by order of Court. The section provides that Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake and that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

Section 2 of the Act defines court to mean the Environment and Land Court established by the Environment and Land Court Act, 2011 and other courts having jurisdiction on matters relating to land and therefore the argument by counsel that the law is silent on the powers of the magistrate's court in rectification of the register are without basis as the law is very clear in sections 2 and 80 of the Land Registration Act Cap 12A laws of Kenya that the courts referred to include the other courts with jurisdiction to hear environment and land matters which are the magistrates courts.

In conclusion, I do find that the powers of the magistrate's court in respect of disputes relating to title to land are very wide and extensive. The Magistrates court have jurisdiction to cancel title and rectify a register in compliance with section 80 of the Land Registration Act so long as the value of the subject matter falls within the pecuniary

jurisdiction of the court. Ultimately, this matter is transferred to the Chief Magistrates Court Eldoret for hearing and determination.

Please see authority number 13 in the Applicants' list of authorities dated 25th March, 2019.

The Applicants, therefore, urge this Honorable Court to strike out the suit with costs.

PART B – RESPONSE TO THE PLAINTIFF'S SUBMISSIONS

17. In reply to the Plaintiff's submissions, the Applicants reiterate paragraphs 1 to 16 above.

18. It is not in dispute that the suit property is valued at **Kshs. 15, 437, 000/-** as can be seen from the Plaintiff's own pleadings. The Plaintiff submits that due to the fact that he has sought for general damages and other constitutional declarations as per paragraph 12 of the Plaintiff, then he was entitled to file his claim before this court. This notion is wrong because of **two** reasons. The **first** reason is that parties are bound by their pleadings. Once he avers that the value is **Kshs. 15, 437, 000/-**, he cannot go back on that averment unless through an amendment of his pleadings. He has not done so. **Secondly**, courts do **not** allow parties to speculate on what it will decide because to do so will impede on the course of justice. The Plaintiff has already held that the Applicants have no known defence in law, he has proved his case on a balance of probabilities, judgment has been delivered in his favor and damages have been awarded. We urge this Honorable Court to dismiss this claim and uphold the said preliminary objection raised.

19. In the alternative, Section 8 (1) of the Magistrate's Court Act, 2015, provides as follows:-

8. (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

We submit that under that Section, the Chief Magistrates Court has power to determine the claim raised by the Plaintiff.

20. Paragraphs 2 and 3 of the Plaintiff's reply to the preliminary objection deals with the merits of his case which we respectfully submit can only be determined after the hearing of the case on merit i.e. *issues of the requisite approvals obtained, a prima facie case with high chances of success, the merits of his case* etc.

21. We submit that the authority cited by the Plaintiff is not relevant to the objection before this Honorable Court as the same related to barring an advocate from appearing in a matter for a party. In the Applicants' objection, the issue of the jurisdiction of this Honorable Court has been raised. We submit that since the Plaintiff has not responded to the objection raised, he has conceded that this Honorable Court has **no** jurisdiction to hear and determine the matter.

Part 4 – Conclusion

22. For the foregoing reasons, the Applicants urge this Honorable Court to uphold the Notice of Preliminary Objection and dismiss the suit and the application herein as prayed with costs.

DATED at NAIROBI this5th ...day ofApril,..... 2019

KAMAU KURIA & COMPANY

ADVOCATES FOR THE 1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS

8. The Applicant/Plaintiff filed written submissions which state as follows:

Applicant's/Plaintiff's written submissions:

APPLICANT'S/PLAINTIFF'S WRITTEN SUBMISSIONS TO REPLY AND/OR OPPOSE THE 1ST, 2ND, 4TH, 5TH AND 6TH RESPONDENTS'/DEFENDANTS' NOTICE OF PRELIMINARY OBJECTION AND GROUNDS OF OPPOSITION FILED ON 25TH MARCH 2019.

May it please your Lordship, these are the humble Submissions for the Applicant/Plaintiff **to reply and/or oppose** to the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Notice of Preliminary Objection and grounds of opposition filed on 25th March 2019.

PLEADINGS.

Your Lordship, the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants filed a Notice of Preliminary Objection and grounds of opposition to the Applicant's/Plaintiff's Suit filed on 27th February 2019 **on the main ground that this Honourable Court has no Jurisdiction to hear and**

determine the Applicant's/Plaintiff's Suit, and consequence thereof, the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants pray for striking out and/or dismissal of the Plaintiff's Suit for want of Jurisdiction.

The applicant/Plaintiff through his advocate on record **has vehemently opposed** the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Notice of Preliminary Objection and grounds of opposition filed on 25th March 2019, by filing the replies dated 28th March 2019 and which were duly served upon the Advocates for the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants on 2nd April 2019 and an affidavit of service filed on 3rd April 2019.

FACTS AND EVIDENCE.

Your Lordship, when this matter came up for your directions on 8th April 2019, you directed that the Preliminary Objections and replies thereto, be disposed by way of written Submissions.

The 1st, 2nd, 4th, 5th and 6th Respondents/Defendants have filed their Submissions. Your Lordship with your kind permission, may you please allow the Applicant/Plaintiff **briefly poke holes** on the said Submissions, as hereunder:-

i. That the Applicant's/Plaintiff's claim **in this Suit** is well documented on the Plaintiff's Plaint filed on 27th February 2019 and we humbly submit that the anticipated award to be awarded in the Instant Suit **would be in excess of Kshs. 20 Million** and therefore, we submit that this is the proper court to hear and determine the Applicant's/Plaintiff's Claim.

ii. Your Lordship, the issues of whether the Suit property had the requisite approvals from the relevant bodies cannot be canvassed at the interlocutory stage and we submit that the issues can only be canvassed during the main hearing of the Suit and the 1st, 2nd, 4th, 5th and 6th Respondents/Defendants **should not be allowed to use short cuts**, in administration of Justice. As a consequence, by raising a question of fact whereas it's well established that Preliminary Objections **are matters purely hinged on questions of Law** then it goes without saying that this Preliminary Objection must fall on its own sword.

For this, we rely on the case of MUKISA BISCUITS CO. LTD versus WEST END DISTRIBUTORS LTD (1969) EA, and pray that the Preliminary Objection be dismissed with costs against Respondents/Defendants.

THE LAW

Your Lordship, the Jurisdiction of this Honourable Court to hear and determine the Applicant's/Plaintiff's Suit is well founded *under Section 4 of the Environment and Land Court Act as read with Section 13 of the said Act and Article 162 (2) (b) of the Constitution of Kenya, 2010.*

The 1st, 2nd, 4th, 5th and 6th Respondents/Defendants **have rightly** admitted the Jurisdiction of this Court in their Submissions on paragraph 9 of their Submissions and which in Principal they have submitted that this Honourable Court has original and Appellate Jurisdiction *under Article 162 (2) (b) of Constitution of Kenya, 2010.*

Your Lordship, we Submit that the Court having original Jurisdiction implies that any party can institute a suit in that Court of any claim and in the event, the Court establishes that the claim is below its Jurisdiction can transfer it to appropriate Court, *under Provisions of Section 18 (1) of the Civil Procedure Act and cannot Order* the Suit to be struck out and/or dismissed, for doing the same would be tantamount to offending the express Provisions of *Article 159 2 (a), (b), (d) and (e) of the Kenya Constitution 2010*, and which expressly bars administration of Justice on **technicalities**.

Your Lordship, we shall rely on the authorities cited in our reply filed on 1st April 2019 to oppose the 1st, 2nd, 4th, 5th and 6th Respondents'/Defendants' Preliminary Objections and grounds of opposition filed on 25th March 2019, together with the *Provisions of Section 4 and 13 of the Environment Land Act, Section 18 (1) of the Civil Procedure Act and Article 159 2 (a), (b), (d) and (e) of the Constitution Kenya 2010.*

CONCLUSION.

Your Lordship, we rest our Submissions by submitting further that the Preliminary Objection and grounds of opposition filed on 25th March 2019, do not deserve to see the light of the day, and consequence thereof, is for their dismissal for being a gross abuse of the court process. They are tantamount to inviting this Honourable Court to bar parties from accessing substantive Justice by condemning them unheard.

DATED at CHUKA this15th day ofApril,..... 2019

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M/S WAKLAW ADVOCATES,

ADVOCATES FOR THE APPLICANT/PLAINTIFF

9. The 3rd defendant filed written submissions in the following manner:-

3RD DEFENDANT'S SUBMISSIONS ON PRELIMINARY OBJECTION

Introduction

Your Lordship, on behalf of the 3rd defendant we wish to address you on two distinct issues as directed by the Honourable Court.

1. Firstly, we shall endeavour to address you on the preliminary objection raised on the 25th March, 2019 which objects to the jurisdiction of this court to hear and determine the plaint as filed.
2. Secondly, it was a direction of this court that we also address you on the issue as whether the 3rd Defendant, the member of the County Assembly for Magumoni Ward is properly suited.
3. We shall proceed to address you chronologically on the two issues in the succeeding paragraphs.

Preliminary Objection

4. **Your Lordship**, we wish to associate ourselves with the submissions of counsel for the 1st, 2nd, 4th, 5th and 6th defendant/defendant to the extent that they submit jurisdiction is everything and a court cannot hear a matter if no constitution or statute has donated jurisdiction to it.
5. Litigants challenge a court's jurisdiction by filing applications in the nature of preliminary objections. Our jurisprudence is replete with case law relating to this issue and we shall base our reliance on the Courts decision in **Oraro v mbaja (2005) eKLR** where Justice Ojwang J.B (as he then was) cited the Court of Appeal decision in **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd . [1969] E.A. 696**. Of preliminary objections, **Law, JA** in that case said (p.700):

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a ‘preliminary objection’ which it was not. 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 .”

And to the same effect Newbold, P stated (p.701):

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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.

6. It is our submissions that no facts are in dispute in this present case as relates to the raised objection. The matter is therefore, properly filed as a Notice of Preliminary Objection.
7. It is beyond argument that based solely on the pecuniary jurisdiction of Magistrate's Courts as captured in the Magistrate's Court's Act this present matter ought to have and should have been filed in the subordinate Courts. However, there are other limiting concerns.
8. For instance, while the Magistrate's Act donates jurisdiction to the Magistrate's Court to hear and determine matters founded on breach, violation, infringement or threatened breach, violation, infringement of rights and freedoms in the bill of rights and freedoms that jurisdiction under section 8 of the mentioned statute is limited to the hearing and determination of claims originated from article 25 (a) and (b) of the Constitution.
9. The plant is demonstrably founded on alleged violations of article 40, 64 and 199 (10) of the constitution. The plaint which is curiously supported by an amended supplementary verifying affidavit is not a matter that could have been competently filed and entertained by the Magistrate's Courts. As such, it cannot also be transferred into the said subordinate courts.
10. It is our submission that not all matters that raise constitutional issues need to be filed as constitutional petitions. Litigants can file plaints to challenge actions of state officers and state organs that in their estimation and understanding are unlawful and illegal. However, in characterization, what is before you is a constitutional petition clothed as an ordinary civil claim.
11. The upshot, this court has the requisite jurisdiction to hear and determine the suit before it. No man should suffer a wrong without a remedy. *Ubi Jus Ibi Remedium*.

Whether the 3rd defendant is properly sued?

12. **Your Lordship**, I shall proceed and address you on the propriety of suing the 3rd defendant as a person and in his capacity as a member of the County Assembly for Magumoni Ward.

13. No specific allegations have been leveled against the 3rd defendant in the plaint where he is sued in his capacity as the MCA Magumoni Ward. Or why else does his description include his titles? It is pleaded that he took instructions from the Governor and the County Government to violate the plaintiff's rights. He is not alone as a subject of the accusations. The others are officers of the County Government Tharaka Nithi.

14. Further, no particulars of such instructions as insinuated are particularized. It is a hollow comment with no factual basis; it reeks of malice and can only be best categorized as a product of the plaintiff's not so fertile imagination.

15. Paragraph 11 of the plaint in no uncertain terms brings out the question of need for compensation in cases of compulsory acquisition of land by a County Government. In our understanding, compensation and the issue of reclaiming public land improperly used by private citizens forms the substratum issues of the claim.

16. Paragraph 12 of the plaint claims that there were violations of specific constitutional provisions namely article 40, 64 and 199(1). While the first two relate to property and vested rights, article 199 (1) relations to publication of County legislation in the Kenya Gazette, a totally misplaced issue.

17. Be that as it may, it is the state that owes its citizens a duty to promote and preserve human rights and freedoms. Any claims for violation of this constitutional duty or responsibility can only be brought against the state or its organs. The orders that a court faced with such a claim will grant are captured under article 23 of the constitution. It is important to note that the 3rd defendant did not owe the plaintiff any constitutional duty as regards the preservation with his property rights.

18. Ultimately, the orders sought are of a compensatory nature. They are orders for damages and compensation for breach of some human rights. There is also an order for restoration being sought. With all fairness to the plaintiff, these orders cannot vest upon the 3rd defendant either as an individual or as a member of the County Assembly.

19. **Your Lordship**, a court of record cannot issue orders in vain. You should decline such an invitation. A trial where orders cannot be granted against a party is one that offends the non-derogable right to fair hearing for an accused person and the overriding objectives of the Civil Procedure Code that include, expeditious and cost effective determination of suits.

20. This honourable Court should endeavour to mark in bold the line of separation of powers. The executive arm of the County Government does not by any stretch of interpretation include the 3rd defendant either in person or in his capacity as a member of the legislative organ of government. Any attempts to do so would be unlawful.

21. We will urge the Court to expunge from the pleadings and record the name of the 3rd Defendant. We shall also seek costs for the inconvenience caused.

22. That is our humble submissions.

DATED at **NAIROBI** this.....15thday of April,.....2019

YUNIS OSMAN & MWITI ADVOCATES

FOR THE 3rd DEFENDANT

10. I have considered the pleadings and the submissions proffered by the parties in their diametrically divergent assertions.

11. I have also considered the legal authorities proffered by the parties in support of their assertions. I do not need to regurgitate the principles enunciated by those authorities in view of the fact that they have been elaborated upon in their written submissions which have been reproduced in full in the earlier part of this ruling. All these authorities are good precedents in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

12. I agree with the principle, which principle has been strongly proslutated by the 1st, 2nd, 4th, 5th and 6th defendants, contained in the classic case of Owners of the Motor Vessel Lilian S [1989] KLR 1 where Hon. Justice Nyarangi, JA, opined as follows:

“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.”

Should this court find that it lacks requisite jurisdiction to hear and determine this suit, it will down its tools immediately without further prompting.

13. I now turn to the grounds contained in the Notice of Preliminary Objection.

14. Ground 1 is to the effect that this court has no jurisdiction to entertain this suit as its value is Kshs.15,437,000/= by virtue of section 7 of the Magistrate's Courts Act. Section 7 of the said Act confers jurisdiction to the various cadres of the magistracy as follows: Chief Magistrate – Kshs. Twenty Million, Senior Principal Magistrate – Kshs. Fifteen Million, Principal Magistrate – Kshs. Ten Million, Senior Resident Magistrate – Kshs. Seven Million **AND** Resident Magistrate – Kshs. Five Million. Nowhere does the said section oust the jurisdiction of the ELC from hearing land cases which can be heard by magistrates seized with the apposite pecuniary jurisdiction.

15. Article 165(3) a of the Constitution reads as follows:

“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.”

Article 162 of the Constitution grants the ELC equality of status with the High Court. By dint of this equality of status, the ELC Court has unlimited original jurisdiction in Civil disputes germane to land and the environment.

16. Section 13(1) of the Environment and Land Court Act reads as follows

“(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”

17. Beyond peradventure, I find that this court has jurisdiction to hear and determine this suit. Where necessary, the ELC Court can transfer a suit to a subordinate court or withdraw a suit from a subordinate court and hear and determine it as allowed by section 18 of the Civil Procedure Act.

18. For the aforesaid reasons, Ground 1 in the Preliminary Objection is hereby dismissed. For the same reason, Ground 2 is similarly dismissed.

19. Grounds 3, 4 and 5 are argumentative and do not constitute pure points of law. Accordingly, they are hereby dismissed.

20. Ground 6 is nebulous in that the affidavit in question raises issues which need canvassing in the main suit.

21. In the circumstances, this Notice of Preliminary Objection is hereby dismissed.

22. Costs concerning this Preliminary Objection are awarded to the plaintiff.

Delivered in open Court at Chuka this **13th day of November, 2019** in the presence of:

CA: Ndegwa

Kirimi Muturi for the Plaintiff

Munyori for 1st, 2nd, 4th, 5th and 6th defendants

P.M. NJOROGE

JUDGE