REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 321 OF 2012

DANIEL KYALO LUA

WAMBUA LUA - *(Suing as Administrators to the*

Estate of the late **JAMES LUA MAIA)............................PLAINTIFFS**

VERSUS

RICHARD MUINDI ....DEFENDANT

RULING

1. What is before me is the Application by the Defendant dated 14th February, 2017 seeking for the following orders:

> ***a. That the court be pleased to stay the hearing and determination of the Notice of Motion filed in court and dated the 14th April, 2014 pending the hearing of this Application.***
>
> ***b. That the court does declare that the entire proceedings in this suit are a nullity ab initio for want of jurisdiction as well as having been conducted by a court not having the jurisdiction to try it.***
>
> ***c. That the costs of this Application be provided for.***

2. The Application is based on the grounds that the suit was filed in a court without jurisdiction to try it; that the suit ought to have been transferred to the Environment and Land Court but not tried in the High Court and that the trial Judge conducted the proceedings that fell squarely under Section 13 of the Environment and Land Court Act.

3. The Plaintiffs deponed that the High Court ceased to have any power to try any matter related to land by virtue of the Environment and Land Court Act and thus the entire proceedings were a nullity *ab initio.*

4. The Defendant's advocate submitted that pursuant to the provisions of Articles 162(2) and 165(5) (2) of the Constitution, the High Court did not have jurisdiction to determine this matter; that the suit should not have been filed in the High court and that the matter and the decision that arose therefrom is a nullity *ab initio*. The Defendant's counsel relied on the case of

5. The Plaintiffs' advocate submitted that this case is not about ownership of land or title to land; that the Plaintiffs' claim is for the Defendant's eviction from the Plaintiffs' land and that their claim is not covered by Section 13 of the Environment and Land Court Act.

6. The Plaintiffs' counsel submitted that Section 13 of the Environment and Land Court Act does not take away the jurisdiction of the High Court to hear an determine any matter; that the Section only limits the jurisdiction of the Environment and Land Court but does not restrict the jurisdiction of the High Court and that the High Court Judge considered all the issues before he delivered his Judgment.

7. In the Plaint dated 3rd August, 2012, the Plaintiffs averred that land Parcel No. 12, Kilome adjudication section was registered in the name of the deceased and that the Defendant trespassed on the said land. In the said Plaint, the Plaintiffs sought for a permanent injunction restraining the Defendant from occupying the said land and for a declaration that the deceased was the owner of the land. The Plaintiffs also prayed for an order of eviction.

8. The Plaint was filed on 24th August, 2012, in the High Court. By that time, the Judges to the Environment and Land Court had not been appointed.

9. The matter was eventually heard and determined by Kariuki J., who is a High Court Judge. Indeed, other than this matter, Kariuki J., who had been designated by the Chief Justice to handle land disputes in Machakos, heard and determined other matters.

10. Indeed, the Plaintiffs' claim is in respect to ownership and title to land. I say so because the Plaintiffs averred that the land belonged to their father and that the court should make a declaration that they are the ones entitled to the land, and not the Defendant.

11. Consequently, and pursuant to the provisions of Article 162(2) (b) and 165(5) of the Constitution, as read together with Section 13 of the Environment and Land Court Act, it is only the Environment and Land Court that had jurisdiction to deal with the matter.

12. It is however in the public domain that before the Court of Appeal made its decision in the case of ***Karisa Chengo & others vs. R, Malindi Criminal Appeal No. 44 of 2014*** a few judges of the High Court had been designated by the Chief Justice to hear disputes relating to Environment and Land. The Court of Appeal's decision was upheld by the Supreme Court in Petition No. 5 of 2015. In the said decision, the Supreme Court held as follows:

> ***"(79) It follows from the above analysis that, although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the Judges appointed to those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes... [80]. In this case, it therefore also follows that Angote J., appointed as a Judge of the Environment and Land Court, and not of the High Court, had no jurisdiction to determine Criminal Appeals. Consequently, we concur with the Court of Appeal that Gazette Notice No. 13601 of 4th October, 2013, by which the former Chief Justice empanelled him to sit and determine the Criminal Appeals in question, was unlawful and unconstitutional."***

13. As I have stated above, this suit was filed in the High Court because the Environment and Land Court had not been operationalized then. Indeed, it was not until in October, 2012 that the first group of Judges were appointed to serve in the court. This file was however moved to the Environment and Land Court, Machakos, which was by then handled by Kariuki J., who heard and determined the matter on 13th March, 2015.

14. By the time Kariuki J. delivered the Judgment, neither the Court of Appeal nor the Supreme Court had declared that a Judge appointed to serve in the High Court, like Kariuki J., could not handle matters relating to ownership and title to land.

15. That being the case, the decision of the Court of Appeal and the Supreme Court which held that High Court Judges cannot handle matters reserved for the Environment and Land Court and vice-versa, cannot

be used retrospectively to annul the decisions that had been made.

16. The non-application of decisions of the courts retrospectively was considered by the Supreme Court in the ***Chengo case*** *(supra)* where the court held as follows:

> ***"104. Disruption in the application of criminal justice, finality in criminal proceedings, certainty of the law and public policy in respect of rights that have vested and have been acted upon have been given as the reasons for prospective rather than retrospective application of judicial pronouncements. In the United states case of Johnson vs. New Jersey 384 U.S 719 (1966), the Supreme Court was called upon to determine whether two earlier decisions ... should be applied retrospectively, as to do otherwise was likely to occasion severe disruption in the administration of criminal law in particular as it would require the re-trial or release of many prisoners already found guilty, on the basis of evidence adduced in accordance with earlier-recognized constitutional standards."***

17. In the case of ***Chicot County Drainage District vs. Bexter State Bank, 308 U.S 371 (1970)*** which was quoted by our Supreme Court in the ***Chengo case***, the court held as follows:

> ***"The past cannot always be erased by a new judicial declaration... It is manifest from numerous decisions that an-all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."***

18. The Supreme Court of Kenya in the ***Chengo case*** was of the view that it behoves of Judges, by dint of their professional training and work experience, to determine, on a case-by-case basis, the propriety of a prospective or retrospective application of a constitutional principle or edict.

19. However, while declining to apply their decision prospectively, the Supreme Court in the ***Chengo case***, stated that jurisdiction goes to the root of any litigation, and held that the decision of Meoli and Angote JJ. was a nullity *ab initio*, for want of prosecution. In the penultimate paragraph the court held as follows:

> ***"[113] It therefore follows that, in the light of the terms of Article 2(4) of the Constitution, despite the drawback our decision will have on the backlog of cases in our courts, we have no choice but to accede to the Respondent's plea that their appeals at the High Court level be re-heard. Our decision must of necessity have a similar effect on all the appeals that were determined by similarly empanelled High Court Benches."***

20. The above decision of the Supreme Court is binding on this court. From the said decision, any decision that was delivered by a High Court Judge in respect of matters falling within the jurisdiction of the Environment and Land Court is a nullity *ab initio*. However, the circumstances surrounding each case has to be dealt with on a case by case basis.

21. The record shows that this matter proceeded for hearing before Kariuki J. on 11th November, 2014 and the Judgment was delivered by the court on 13th March, 2015.

22. The Plaintiffs have annexed on their Affidavit Gazette Notice Number 4377 dated 27th June, 2014 showing that Kariuki J. was appointed a Judge of the High Court on 27th June, 2014. However, until the Court of Appeal pronounced itself on the jurisdiction of the High Court Judges hearing and determining Environment and Land matters, there was consensus that the High Court Judges could hear and determine those matters. I therefore decline to apply the decision of the Court of Appeal and Supreme Court retrospectively.

23. For those reasons, I dismiss with no order as to costs the Application dated 14th February, 2017.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF MARCH, 2018.

O.A. ANGOTE

JUDGE