



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 89 OF 2017

JOEL KIPKOSGEL.....PLAINTIFF

VERSUS

THOMAS KIPROP.....DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Defendant's Preliminary Objection dated 12th February 2018 which is based on the following grounds:

1. That this Honourable Court lacks the geographical jurisdiction to hear and determine this suit in view of the provisions of section 15 of the Civil Procedure Act.
2. The suit herein is time barred by dint of the provisions of section 7 of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

2. The Court directed that the Preliminary Objection be canvassed by way of written submissions but none of the parties filed their submissions.

Issues for determination

3. The main issues for determination are:

- i. Whether the plaintiff's suit is time barred
- ii. Whether this court has the jurisdiction to entertain this suit.

Analysis and Determination

4. With regard to geographical jurisdiction, section 15 of the Civil Procedure Act provides as follows:

“Subject to the limitations aforesaid, every suit shall be instituted within the local limits of whose jurisdiction

a) The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain.”

5. Section 12 of the Civil Procedure Act provides that:

“Subject to the pecuniary or other limitations prescribed by any law, suits

- a. for the recovery of immovable property with or without rent or profits*
- b. For the partition of immovable property*
- c. For the foreclosure, sale or redemption in the case of a mortgage or charge upon immovable property*

d. Or the determination of any other right or interest in immovable property.”

Where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate.

Provided that a suit to obtain relief respecting, or compensation for wrong to immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

6. The suit land herein is situated in Nandi Hills which is under the Eldoret Environment and Land Court. It is therefore my finding that this court has no jurisdiction to entertain the matter.

7. With regard to the second issue, section 7 of the Limitation of Actions Act provides as follows:

‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

8. According to paragraphs 3, 4 and 5 of the Plaintiff, the cause of action arose in 1976 although it is not clear if the other wrongs complained of are still on-going as the pleadings are poorly drafted.

9. However in view on my finding above, I find and hold that this court has no jurisdiction to entertain this suit. In arriving at this decision I am guided by the celebrated case of The Owners of Motor Vessel Lillian “S” V Caltex Oil Kenya Limited 1989 KLR 1653 the Court of Appeal held 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 its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”

10. What then is the fate of a matter that is filed in a court that has no jurisdiction? Can it be transferred to a court that has jurisdiction?

11. In **Kagenyi V Musiramo & Another 1968 EA 43** it was held that whereas section 18 of the Ugandan Civil Procedure Act (which is similar to section 18 of the Kenyan Civil Procedure Act), gives the High Court a general power to transfer all suits at any stage of the proceedings, even *suo moto* by the court, an order for transfer of a suit from one court to another cannot be made unless the suit has in the first instance been brought to a court which has jurisdiction to try it.

12. The holding in the **Kagenyi** case has been followed in many decisions in Kenya including the case of **Rob De Jong & Another V Charles Mureithi Wachira (2012) eKLR** where Ibrahim J (as he then was) held as follows:

“The second issue is whether this court can direct the transfer of the suit before the Magistrate’s court to the Industrial Court. I concur with the position taken by learned counsel for the Appellant that to invoke this power the case should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction, then the suit is a nullity and there is nothing capable of being transferred. This position was also followed by Makau J in Joseph Muiruri V Godfrey Gikundi Anjuri 2012 eKLR”.

13. However, in a departure from this position, Kasango J in **Wycliffe Mwangaza Kihugwa V Grainbulk Handlers Limited (2014) eKLR** held that the High Court can now transfer a suit to another competent court even where the suit had been, in the first instance, brought to a court which had no jurisdiction to try it. Such transfer must however, be in compliance with section 18 of the Civil Procedure Act and the Constitution of Kenya. With respect, I do not agree that jurisdiction is of no consequence.

14. In the recent case of **R V Karisa Chengo and 2 Others (2017) eKLR** the Supreme Court of Kenya revisited the issue of jurisdiction and observed that in almost all legal systems of the world, jurisdiction has emerged as a critical concept in litigation. Citing **John Beecroft Saunders in his treatise Words and Phrases legally defined Vol 3 at P. 113 jurisdiction** is defined as follows:

“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 limited by like means....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decisions amount to nothing”

15. The Supreme Court further cited the **Owners of Motor Vessel Lilian “S”** which held as follows:

“Lack of jurisdiction renders a court’s decision void as opposed to merely voidable. When an act is void, it is a nullity ab initio, it cannot found any legal proceedings”

16. The Supreme Court further cited Lord Denning in Benjamin Leonard in **Macfoy United Africa Company Limited (UK) 1962 AC 152** where he succinctly stated as follows:

“A court has jurisdiction in matters that are voidable, not to proceedings that are a nullity, for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court”

If an act is void then it is in law a nullity, it is not only bad, but it is incurably bad and every proceeding which is founded on it is also bad and incurable bad. You cannot put something on nothing and expect it to stay there, it will collapse”.

17. From the foregoing it is clear that jurisdiction is not just a procedural matter which can be glossed over. Its absence renders the suit void.
21. Consequently, the suit herein cannot be transferred to another court as it is void. The suit is therefore struck out with costs to the defendant.

Dated, signed and delivered at Kericho this 10th day of September, 2018

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J.M ONYANGO

JUDGE

In the presence of

1. Mr. Songok for the Applicant/Defendant
2. N/A for the Plaintiff/Respondent
3. Court assistant – Rotich