



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 91 OF 2016

CONIER LIMITED PLAINTIFF

VERSUS

CATHOLIC DIOCESE OF HOMABAY REGISTERED TRUSTEES.....DEFENDANT

RULING

1. The plaintiff by a plaint dated 6th April, 2016 claims from the defendant a sum of Kshs. 22,283,914/70 on account of works done pursuant to a construction contract entered into with the defendant. The plaintiff further prays for an order of injunction restraining the defendant from proceeding with the construction of Centenary Hostels on **Plot No. South Kamagambo/ Kanyajuok/71** which the plaintiff was to construct under the said contract until payment of the debt in full to the plaintiff. The plaintiff further prays for general damages for damaged reputation.

2. Simultaneously with the plaint the plaintiff filed a Notice of Motion application expressed to be made under Order 40 Rules 1 & 4 and Order 51 of the Civil Procedure Rules and Sections 3, 3A and 63 of the Civil Procedure Act. By the application the plaintiff seeks the following substantive orders:-

1. That a temporary injunction do issue restraining the defendant by itself, its agents, assigns, successors, employees, servants, personal representatives and or any others acting on its behalf from commencing and/or proceeding with construction of centenary Hostels on Plot No. South Kamagambo/Kanyajuok/71 pending hearing and final determination of this suit.

2. That this honourable court be pleased to order cancellation any or suspension any contract entered between the defendant and any third party for the continued construction of the said hostels pending hearing and final determination of this suit.

3. The plaintiff's application is supported on the grounds set out on the face of the application and on the supporting affidavit sworn by Michael Kibaki Kinyua Managing Director of the plaintiff's company on 6th April 2016. The plaintiff avers that the defendant is the legal proprietor of land parcel **South Kamagambo/Kanyajuok/71** situate in Migori County. The plaintiff further states that on or about 14th May 2014 it entered into a construction contract with the defendant whereby the plaintiff was to construct Centenary Hostels on the said property for a sum of kshs. 25,521/57/50. The plaintiff states the defendant was to pay the plaintiff within 14 days of being presented with the certificate of payment and that any due account was to accrue interest at 3% over and above the commercial lending rates. The plaintiff was further entitled to suspend and/or terminate the construction contract in the event any amounts remained unpaid for a period of 30 days after presentation of the certificate of payment.

4. The plaintiff avers that it commenced construction of the Centenary Hostels and was sourcing

construction materials on credit and was paying the same after the defendant paid up. The plaintiff avers that the defendant throughout the construction period repeatedly defaulted in paying the plaintiff within the agreed time period after the presentation of the certificates of payment. The plaintiff on or about 30th April 2015 issued the defendant with notice of suspension of construction works and on 1st August 2015 the plaintiff terminated the contract on the basis of nonpayment by the defendant for work done. The plaintiff further avers that it with the agreement of the defendant obtained the services of a Quantity Surveyor (QS) who assessed and valued the work already completed by the plaintiff and not paid for at kshs. 22,283,914.70 as at 8th February 2016. The plaintiff states that the defendant has nevertheless failed, neglected and/or refused to pay the said sum and as a consequence the plaintiff has been unable to meet its obligations to pay suppliers, its workers and its office rent. The plaintiff states that the defendant intends to contract out the outstanding works relating to the construction of the hostels to other parties without first settling the outstanding account to the plaintiff and prays that the defendant be restrained from doing so unless they first settle the plaintiff's outstanding account.

5. The defendant/respondent filed a Notice of Preliminary Objection dated 29th April 2016 and a replying affidavit sworn on 3rd May 2016 in opposition to the plaintiff's application dated 6th April 2016. The defendant by the Notice of Preliminary Objection sets out the following grounds:-

1. The plaintiff's cause of action as set out in the body of the plaint relates to a claim on breach of contract for construction of hostel of the defendant on the parcel of land known as South Kamagambo/ Kanyajuok/71 which contract was rescinded by the plaintiff.

2. The nature of the dispute does not fall within the meaning of the disputes set out at article 162 (1) (2) (b) and 3 of the Constitution of Kenya, 2010 as read with the express and mandatory provisions of Articles 160 (1), 159 (1) (e), 1 (1) and (3), 2 (1), (3) and (4) and 3 thereof, on one hand, and the express and mandatory provisions of section 13 (1), (2) (d), and 30 (1) and (2) of the Environment and Land Court Act, 2011 as read with the preamble of the said statute.

3. The contract the subject matter of this dispute provides that in case of any dispute then the same should be dealt with through arbitration and the plaintiff has already preferred this matter to arbitration.

4. This honourable court sitting as special court which ought to deal with the use occupation and title to land, is divested of jurisdiction to hear and determine such a suit, and the same ought to be struck out and all interim orders issued thereon, if any, be discharged

6. Under paragraph 18 of the statement of defence filed by the defendant, the defendant states thus:- **"Jurisdiction of this honourable court is denied."** This court in the premises and in the face of the preliminary objection taken touching on its jurisdiction to hear and determine the matter is obligated to consider and deal with the question whether or not it has jurisdiction as a preliminary issue as it may otherwise engage on a useless mission if it eventually is determined it lacked jurisdiction. Anything that a court does without jurisdiction is null and void and of no effect. The words of Lord Denning in the case of **Macfoy –vs- United Africa Co. Ltd [1961] PC 1169** best illustrates this when he stated:-

"...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The defendant by the replying affidavit denies owing the plaintiff any monies on the construction contract save for monies owed to suppliers whom the defendant had agreed to pay directly.

7. The parties argued the preliminary objection and the plaintiff's application by way of written

submissions. The defendant in support of its preliminary objection argued that the contract entered into between the plaintiff and the defendant did not relate to a dispute relating to the use, occupation and title to land or a dealing in land as envisaged by article 162 of the Constitution and by the provisions of Section 13 and 30 of the Environment and Land Court Act, 2011.

Article 162 of the Constitution provides:-

1. The Supreme Courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

a. Employment and labour relations; and

b. The environment and the use and occupation of, and title to, land

3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

8. Parliament in fulfillment of its mandate under Article 162 (2) of the Constitution enacted the Environment and Land Court Act, 2011 which established the Environment and Land Court (ELC). While Article 162 2(b) provided that the Environment and Land court would hear and determine disputes relating to ...**“the environment and the use and occupation of, and title to land”** the Act establishing the Environment and Land Court under Section 13 elaborated and set out the jurisdiction of the court. Section 13 of the Environment and Land Court provides:-

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.

Jurisdiction of the court as is clear is conferred by the constitution and the statute. The jurisdiction cannot be inferred and/or implied and neither can the same be presumed. The court's jurisdiction is as expressly given by the statute and the court cannot give itself any jurisdiction that is not conferred on it.

9. In the instant case and having regard to the pleadings, it is clear that the plaintiff's case is founded on a construction contract that it entered into with the defendant to construct hostels for the defendant, in the defendant's land **parcel South Kamagambo/Kanyajuok/71**. It is that contract that the plaintiff alleges the defendant has breached by failing to honour the terms of payment for work done as provided under the contract. The claim is indeed for payment of monies due to the plaintiff by the defendant for

construction works done by the plaintiff pursuant to the construction contract. There is no dispute between the plaintiff and the defendant touching on the use and occupation of and/or title to land that is acknowledged to be owned by the defendant. The plaintiff is not claiming any interest in the land. The plaintiff is clear that the plaintiff is claiming the sum of KShs. 22,283,914/70 being the value of work done and completed by the plaintiff but which is unpaid. A claim for payment of money for services rendered pursuant to a contract is all that the plaintiff is making and in my view that falls outside the matters that this court has jurisdiction to handle.

10. Where a court finds that it lacks jurisdiction, the court has no further business dealing with the matter. Nyarangi J. A (as he then was) succinctly summed the position in the case of the **Owners of Motor Vessel "LillianS" –vs- Caltex Oil Kenya Limited [1989] KLR 1** when he observed thus:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.”

11. I have upon review of the pleadings and material placed before me come to the conclusion that the dispute lodged before this court does not relate to any of the matters this court has jurisdiction to deal with under the auspices of article 162 (2) (b) and Section 13 of the Environment and Land Court Act. The dispute purely relates to a civil contract for provision of services pursuant to a contract for construction and does not relate to any interest in land and consequently falls outside the jurisdiction of this court as per statute.

12. The plaintiff in responding to the jurisdiction issue in its submissions stated that the Homa Bay Court, rejected the matter to be filed there as a civil matter as the Resident Judge directed the matter touched on the use of land and was therefore within the jurisdiction of the Environment and Land Court and ought to be filed before that court. It is not clear how the judge gave any such directions since the matter had not been filed and placed before the judge so that he could give directions. Be it as it may be, I have come to the determination that the dispute does not relate to the use of land but rather a civil contract to which the plaintiff and the defendant were parties and the issue was whether there was any breach of the same and whether the plaintiff had performed work pursuant to the contract in regard to which payment was not effected by the defendant. There was never any dispute respecting the use, the land was being put into involving the parties. The plaintiff is not making any claim that touches on any interest in the land and its claim is clearly a claim for money for work done.

13. Having held that this court lacks the jurisdiction to deal with this matter the other issue to determine is whether I should strike out the suit as I am urged by the defendant to do. I have considered that the plaintiff may genuinely have been misadvised not to file the matter at the Homa Bay High Court as clearly appears to have been the intention. A perusal of the initial pleadings as drawn shows that the intention was to file the suit as a Civil Case at Homa Bay High Court. This is borne out by the fact that **“Homa Bay”** is cancelled out and **“Kisii”** inserted in the plaint, the application and the other supporting documents. It would be an affront to the principles of access to justice and fair hearing which are provided for under Articles 48 and 50 of the Constitution if I were to resort to the draconian action of striking out the suit on the ground that this court lacks jurisdiction. Parties have a right to access justice under Article 48 and to a fair hearing of any dispute under the provisions of Article 50 of the Constitution. The tenets respecting the right to access justice and fair hearing anchored in the constitution militate against the exercise by the court of the power to strike out the suit.

14. In the premises I will therefore decline the invitation to strike out the suit and I will instead order and direct that the file herein be transferred to Homa Bay High Court for the hearing and determination of the plaintiff’s application for injunction and the suit. The defendant’s preliminary objection that this court lacks jurisdiction to deal with this matter is sustained. The cost of the preliminary objection will be in the cause.

Ruling dated, signed and delivered at Kisii this 4th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyawencha for Mrs. Becco for the plaintiff

Mr. Nyawencha for Ragot for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE