



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
ENVIRONMENT AND LAND COURT

ELC NO 764 OF 2013

SYLVESTER MUNYALO MAKUNDI.....PLAINTIFF

VS

GEORGE MUTEMI MAKUNDI.....1ST DEFENDANT

MALOMBE MUTEMI MAKUNDI.....2ND DEFENDANT

JAMES MASILA MAKUNDI.....3RD DEFENDANT

RULING:

The suit herein was filed by the Plaintiff on 28th June 2013. The 1st and 2nd Defendants filed their Defence on 18th October 2013, and averred in their paragraph 11 of the Defence that the Court is divested of the requisite *territorial jurisdiction* to entertain the Plaintiff's suit. The 1st & 2nd Defendants intimated that they would raise a preliminary objection that this suit should be struck out in **limine**.

Indeed when the matter came up for hearing, on 4th March 2015, **Mr Ngolya**, Counsel for the **1st & 2nd** Defendants submitted that this Court is divested of territorial jurisdiction to handle the Plaintiff's claim. Further that the suit is filed in violation of the provisions of Sections **11,12 & 13** of the **Civil Procedure Act**. It was submitted that the Defendants reside in Kitui and the subject parcels of land are also in Kitui County. Therefore the suit ought to have been filed at either *Kitui Law Courts* or *Machakos High Court* which has jurisdiction to handle matter of this nature. Counsel therefore urged the Court to dismiss the suit with costs to the 1st and 2nd Defendants.

Mr Kamwendwa, Counsel for the Plaintiff opposed the preliminary objection and submitted that the preliminary objection is very frivolous since under the Constitution of Kenya, the High Court has unlimited original and territorial jurisdiction. Further that by the time of filing this suit, there was no **Environment & Land** Court in **Kitui**. The nearest Environment and Land Court was the one in Nairobi and that was the reason for filing this case in Milimani Environment & Land Court. It was his submissions that Sections 12 and 13 of the Civil Procedure Act are subordinate to the Constitution and therefore the preliminary objection was only meant to delay the suit. He urged the Court to dismiss the instant preliminary objection and allow the suit to proceed for hearing.

The Preliminary Objection as raised by the Defence counsel touches on jurisdiction. Jurisdiction is everything and goes to root of the matter. If the Court has no jurisdiction over a matter, then it is supposed to down its pen and bring the matter to halt. The issue herein as raised touches on a point of law

and therefore qualifies to be a preliminary objection.

The 1st & 2nd Defendants argued that the Court has no territorial jurisdiction over the subject matter as the said matter is situated in Kitui County which falls within Machakos High Court. **Article 165(3) (a)** creates the High Court with unlimited original jurisdiction in criminal and civil matter.

Further **Article 165(5)** provides, that the High Court shall not have Jurisdiction in respect of matters falling within the jurisdiction of the Court contemplated in **Article 162(2)**. Again **Article 162(2)b** provides that, Parliament shall establish Courts with **status quo** of the High Court to hear and determine disputes relating to the Environment and the use and occupation of , and title to land.

The Environment & Land Court was established in the year 2011 to give effect to **Article 162(2)** of the Constitution and Section 13(1) of the said Act gives the jurisdiction of the Court.

“ The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) of the Constitution ...relating to environment and land”.

The Constitution having removed the jurisdiction of the High Court to determine matter related to Land and Environment and vested it in Environment & Land Court meant that any dispute related to land was to be filed in an Environment & Land Court. The suit herein was filed in the year 2013. There was no Environment & Land Court in Machakos High Court then. The nearest Environment & Land Court was in Milimani High Court. The Plaintiff therefore did not violate the provisions of **Sections 12** and **13** of the Civil Procedure Act as he filed his suit in the nearest Environment & Land Court.

The Environment & Land Court has the same status as the High Court and thus has unlimited original jurisdiction over matters related to land and Environment. I find and hold that this Court has territorial jurisdiction to hear and determine this matter, given that it was filed in the year 2013 before an Environment & Land Court had been set up in Machakos High Court.

The Preliminary Objection raised by the 1st and 2nd Defendants is not merited. The same is dismissed with costs to the Plaintiff who was ready to proceed with the matter on 4th March 2015. Matter to proceed for hearing and be determined on merit.

It is so ordered.

Dated, Signed and delivered this **25th of March 2015**

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of

None attendance for the Plaintiff

Mr Nthiwa holding brief for Mr Ngolya for 1st and 2nd for the Defendant

Hilda : Court Clerk

L. GACHERU

JUDGE

19/3/2015

Mr Nthiwa : I seek for a copy of the Ruling for purpose of Appeal.

L. GACHERU

JUDGE

19/5/2015

Court:

Certified copy of the Ruling to be provided upon payment of requisite fees.

L. GACHERU

JUDGE

19/3/2015