Gatatha Farmers Company Limited v Chemtingei & 3 others; Kaitet Tea Estates (1977) Limited & another (Interested Parties) (Environment & Land Case 9 of 2023) [2024] KEELC 3467 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3467 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 9 OF 2023

FO NYAGAKA, J

APRIL 29, 2024

BETWEEN

GATATHA FARMERS COMPANY LIMITED ..... PLAINTIFF

AND

SIMATWA CHEMTINGEI ..... 1ST DEFENDANT

ODUORI CHONGORE ..... 2ND DEFENDANT

THE ESTATE OF OKIRO OKOYO ..... 3RD DEFENDANT

OTIENO OKIRO ..... 4TH DEFENDANT

AND

KAITET TEA ESTATES (1977) LIMITED ..... INTERESTED PARTY

ENDEBESS ESTATE PRIMARY SCHOOL ..... INTERESTED PARTY

RULING

1. The instant suit or Application was instituted on 16/08/2023 under certificate of urgency. It was dated 15/08/2023 and filed by one Mr. Otieno Okiro, the fourth Respondent. It is worth of note that it was not filed in any prior filed suit or matter: it was the document that originated the proceedings herein. It sought a number of prayers which were:-

    1. ...spent.

    2. ...spent.

    3. An order of Certiorari do issue to remove into Court for the purpose of issuing a preservation order barring the 1st Interested Party hereinafter Kaitet Tea Estates (1977) Limited from

evicting or interfering with the four (4) families of Simatwa Chamtingei, Oduori Chongore, The Estate of Okiro Okoyo, Otieno Okiro and Endebess Estate Primary School being bona fide beneficiaries of gift inter vivos of land gifted in contemplation of death by the original white settler proprietor of Endebess Coffee Estates hereinafter called Guy Edmund Dolier to his trusted farm workers in 1957 DO ISSUE for the purpose of prohibiting and/or restraining the subsequent proprietor company hereinafter Kaitet Tea Estate (1977) Limited whether by itself, its agents, servants, assigns, associates, employees, family members and/or other persons claiming through its name from trespassing into, alienating, wasting, wrongfully selling, removing or disposing or dealing in any manner or any way whatsoever with the property in dispute by ploughing, cultivating, planting, harvesting, constructing, demolishing, fencing, or carrying out any agricultural activities in the disputed land parcel Nos. 5710/2 and 6137 respectively comprised in Endebess Coffee Estates in the specific area held, occupied and used by the families of Simatwa Cheemtingen in LR. 6137 measuring approximately 300 acres, Oduori Chongore measuring approximately 38 acres, The Estate of Okiro Okoyo measuring approximately 36 acres and Endebess Estate Primary School measuring approximately 17 acres until further orders

4. An order of Certiorari do issue to remove into court for the purpose of issuing a compelling order allowing for a grant by the Commissioner of Lands specifically excluding area (sic) held, occupied and used by the families of Simatwa Cheemtingen in LR. 6137 measuring approximately 300 acres, Oduori Chongore measuring approximately 38 acres, The Estate of Okiro Okoyo measuring approximately 36 acres and Endebess Estate Primary School measuring approximately 17 acres excluded from the lease acquired by gift inter vivos in contemplation of death from a white settler donor Edmund William Dolier to the donees for the purpose of registration of freehold titles by the conversion of the leasehold land comprised in Endebess Coffee Estates from leasehold tenureship (sic) to freehold tenureship (sic) by charging and discharging the disputed area of land after a process of surveying, subdividing and transfer on order of the commissioner of land concerned as the ox-officio land registrar on behalf of the Chief Land Registrar.

5. An Order of certiorari do issue to remove into Court for purposes of issuing an Order of nullification nullifying (sic) all new and subsequent suits, applications, appeals, judgments, decrees, and or orders fraudulently obtained by parties in this matter which are not of appellate nature, namely, Kitale High Court Civil Case No. 57 of 2011, Kitale ELC Case No. 36 of 2013, Eldoret Appeal No. 27 of 2021, Eldoret Appeal Application No. 91 of 2022 and Eldoret Appeal Application No. 92 of 2018 and not originating from this suit herein after known as res judicata estoppels filed subsequently after the dismissal order of Hon. Justice Mukite Judge in this matter which suits are stayed, res judicata or barred by rules and are therefore null and void ab initio.

6. The costs if this Application be provided for.

7. The Court be pleased to grant any other relieve (sic) deemed fit, just and expedient to grant demanded by the ends of justice.

2. The Application was based on a number of grounds which were that this suit (sic) was dismissed for want of prosecution on 19/01/2002 and there is no suit pending in court by which the Interested Party, M/S Kaitet Tea Estate to obtain eviction orders since the dismissal orders were not set aside or appeal hence res judicata. That Eldoret Civil Suit No. 131 of 1987 was, on 20/12/2011, handled by Hon. Lady Justice Muketi wherein it was unclear whether the suit was dismissed or withdrawn. A Court should not proceed with a matter directly or substantially in issue in a previous suit or proceedings between

the same parties or parties under whom they or any of them claim litigating under the same title where the matter is pending setting aside, review or appeal on the same court or other. Also, the court should not try a matter under the same parameters as stated immediately above if the same has been heard and finally decided. The phrase "former suit" means a suit decided before. That for purposes of res judicata estoppels (sic) where the matter is filed after the dismissal of this suit the competence of this Court shall be determined in relation to the order of Hon. Justice Mukite on 16/01/2002.

3. A further ground was that the suit filed by Gathatha Farmers Company Limited and Kaitet Tea Estates (1977) Limited as denied by Simatwa Chemtingen, Oduori Chongore, The Estate Okiro Okoyo and Otieno Okiro. The issue which might have been made a ground of attack in the subsequent suits, applications, or appeals would be directly substantially in issue in the former suits herein. The reliefs of res judicata in Kitale High Court Civil Case No. 57 of 2011, Kitale ELC Case No. 36 of 2013, Eldoret Appeal No. 27 of 2021, Eldoret Appeal Application No. 91 of 2022 and Eldoret Appeal Application No. 92 of 2018 which were not expressly granted by this Court in the dismissal ruling by Hon. Muketi J. shall for purposes of this application be deemed to have been refused.

4. Further, he reproduced part of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Again, that where the Plaintiff was precluded by rules from instituting a further suit on respect of the cause of action he shall not be entitled to institute a suit in respect of that cause of action as he is prohibited by the bar (sic) to further suits which shall estopped (sic) by rules. The Applicant stands to suffer irreparable harm and damage not compensable (sic) if the Interested Party is not compelled by this Court from using res judicata estoppel orders to evict the applicants from Endebess Coffee Estates. It is prudent that the application be granted. The Applicant has a prima facie case with high chances of success.

5. The Application was supported by the affidavit of Otieno Okiro, sworn on 15/08/2023. In it he reiterated the contents of the grounds word for word save that it was in disposition form. Therefore, this Court need not repeat the same except that it will take it as the factual depositions of the applicant. To the affidavit he annexed and marked as OO-1 a copy of the proceedings dated 16/01/2002. However, since the annexture was not commissioned before the Commissioner for Oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules as made pursuant to Section 6 of the *Oaths and Statutory Declarations Act*, they are neither here nor there hence the Court shall not consider them as evidence.

Preliminary Objections

6. On 06/09/2023, the Interested Party filed a Preliminary Objection dated the same date. It raised three grounds which were that:

    1. The Application (sic) was fatally and incurably defective as it was instituted by a Notice of Motion which was not a legally recognized means of institution suits.

    2. The suit was incompetent as it sought judicial Review Orders of certiorari to quash decisions of courts of concurrent jurisdiction.

    3. The Application was incompetent, a non-starter, bad in law and inept as it sought order for Judicial Review without a proper application as required by law.

7. On their part the Plaintiff filed a preliminary objection dated 25/08/2023. It a nutshell the Objection was that:-

    1. The suit was fraudulently filed in the name of the against whom orders were being sought and it would be prejudicial to it.

2. That the interests of the parties in the suit properties were determined with finality by the Court's judgment delivered on 30/05/2018 and confirmed vide a Court of Appeal judgment delivered on 27/05/2022 in Kisumu Civil Appeal No. 92 of 2018.

3. The Orders sought cannot be granted in so far as they sought to quash orders regularly and properly granted in Kitale ELC No. 57 of 2011 and Kisumu Court of Appeal Civil Appeal No. 92 of 2018.

4. The application and suit herein was fraudulent and should be struck out with a notice to the registry that Mr. Otieno Okiro should not file any other matter touching the subject matter, without leave of the Court.

8. The Plaintiff submitted in support of the Preliminary Objection that the suit was fraudulently instituted in the name of the Plaintiff yet the Plaintiff had never filed it. Learned counsel argued that the email used was not of the Plaintiff. The sole purpose of that was that the suit proceeds ex parte to the alleged Plaintiff's exclusion. He termed the issue as not one of misjoinder but fraud.

9. He submitted that the interests of the parties were determined by the Court in Kitale ELC No. 57 of 2011 in the judgment delivered on 30/05/2018 which was upheld by the Court of Appeal on 27/05/2022 in Kisumu Civil Appeal Np. 92 of 2018. Then he submitted that the issues in the instant application were determined by Hon. S. Muketi on 20/12/2011. He urged the Court to strike out the matters.

10. He prayed that in order for the innocent parties not to be vexed with other filings, this Court does issue an order barring the applicant from filing any other matter without leave of the Court since the applicant was keen to engage other parties in an exercise of defending matters already finalized.

11. Learned counsel for the Interested Party supported his Preliminary Objection dated 06/09/2023 by arguing that the suit was fatally defective, in absence of a substantive suit filed by the applicant: it did not have a Plaint at all. Further, the instant application could not be said to arise from Kitale High Court Civil Case No. 57 of 2011 since these were two separate suits.

12. He argued that the prayers in the instant matter were in the nature of judicial review. That being so, the application was improperly before the Court for two reasons. One was that leave of the Court was not sought and granted to bring the substantive application. He referred to Section 19 of the *Civil Procedure Act* which prescribes how suits should be instituted. Further, that the provision when read with Order 3 Rule 1 and 2 of the Civil Procedure Rules it means that s suit can only be instituted through a Plaint, Petition, Claim or by way of an Originating Summons.

13. He submitted lastly that the orders of Certiorari as sought against the suits referred to could not issue since this Court cannot issue such orders against decisions made by courts of concurrent jurisdiction or those of the Court of Appeal.

14. The Applicant filed written submissions on 01/11/2023. He basically summed the history of the various suits over the suit land. Then he submitted that all the cases raised (sic) after 16/01/2002 without applying for leave of Court or review or appeal were res judicata as provided for by Section 7 of the Civil Procedure Rules. Then he went on to argue that the 1st employer of Endebess Estates Limited employed Mr. Okiro and gave him land through a credible letter dated 29/03/1937 and the on 03/11/2015 the Area Chief supported the same. Further, that the current Chief also did the same through letters dated 21/09/2022 and 11/08/2021.

15. He submitted that the objections by both the Plaintiff and Interested Party through their learned counsel were irrelevant to the Eldoret case the applicant filed, being Eldoret No. 113 of 1987. Further, that the preliminary objections were an abuse of the law and an insult. He referred the parties to the Ruling of Hon. Muketi on 20/12/2021 (sic). Lastly, that he has made a report to the police about insults and provocation by one Mr. Wilfred Ogutu vide OB. No. 36/27/10/2023.

Issue, Analysis And Determination

16. I have carefully considered the two Preliminary Objections to the Application. I will combine both in this determination. I am of the view that the following issues commend themselves for determination. One, whether a suit can be instituted by way of an application of the instant nature. Two, whether a party can file an application on behalf of another party, that is to say, in which he/she is a Respondent. Three, whether orders of certiorari can issue against orders of a Court of concurrent or higher jurisdiction. Four, whether the instant application having been instituted without leave of Court is incompetent. Five, who to bear the costs of the application.

17. The beginning point is the definition of what a preliminary objection is. In In the case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, Sir Charles Newbold defined a Preliminary objection as follows:

> " 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion."

18. In Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, the same Court held that:

> " We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush."

19. Also, in SUSAN WAIRIMU NDIANGUI V PAULINE W. THUO & ANOTHER [2005] eKLR, Musinga J as he then was held as follows:-

> " a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect."

20. It is clear from the above decisions that a preliminary objection arises as a necessity on a point of law only. It does not require evidence being adduced.

Whether a suit can be instituted by way of an application as the instant one

21. Thus, the first issue is whether a suit can be instituted by way of an application as the instant one. The instant matter is titled, as seen above, as ELC Suit No. 9 of 2023 ("Formerly Eldoret High Court Civil Suit No. 113 of 1987 brought to Kitale High Court Registry by Order of Hon. Justice S. M. Muketi Judge in Kitale High Court Civil Case No. 57 of 2011..."). Three problems stem from this heading. One is that is indeed this suit was the one formerly known as Kitale High Court Civil Case No. 57 of 2011 the instant application is totally incompetent as it is not filed in the said suit. It ought to have been filed in the suit. Again, if the instant application is in relation to the previous suit which is already concluded, and they are in sought in a suit, then the orders sought cannot be granted this is not a suit or claim properly so called and they ought to have been in the parent previous suit. Second, if the instant application was supposed to be a suit, then it offends Section 19 of the Act which provides that suits be instituted in the manner prescribed by the Rules since it is not based on a Plaint, Claim or Petition. Third, if the reliefs sought relate to a suit then they cannot be sought in the manner they have been and basing them on the provisions of law cited. In short this Interested Party's first ground would succeed. In short, the heading and the prayers of the instant matter do not rhyme at all. But since Article 159(2)(d) of *the Constitution* of Kenya 2010 obligates this Court to look at substantive justice rather than technicalities, it will not dismiss the matter on that ground.

Whether a party can file an application on behalf of another party

22. The 4th Applicant filed this suit as an application for and on behalf of the Gatatha Farmers Company Limited. He named that said Plaintiff as the Applicant. To put it in clear perspective, the entire suit or Application herein was filed by the 4th Defendant who named himself as the 4th Respondent. He described the other defendants as they appear and then enjoined the two entities named as Interested Parties as such. The Pleadings that formed the basis of the entire claim was signed by the 4th Defendant as a person or individual. In essence the 4th Defendant sued himself through the company he named as the Plaintiff and sought the orders herein as against him and the other parties.

    The Court finds that this was an absurdity of the highest order. It is contrary to both reason and all law besides human comprehension that a party can do such a thing. The *Civil Procedure Act* and Rules are clear on how suits may be instituted and by who that is possible. It is nothing but an intent to obtain orders by fraud and through an abuse of the process of the Court. Each party should always urge their case and not of another's party unless they have pleaded that they indeed urge the same cause.

Whether orders of certiorari can issue against orders of a Court of concurrent or higher jurisdiction

23. I will explain, when deciding the next issue, against which bodies orders of certiorari, among others, do issue. But before then I will straightaway state that a court of concurrent jurisdiction is never permitted to issue an order of such nature against orders made by a sister one. In the case of Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - H. Ong'udi, J) Lady Justice Hedwig Ong'udi in her dissenting opinion at paragraph *16* held as follows:

> "Manifestly, the contents of the two decisions arise from courts of concurrent jurisdiction which legally, do not bind this court as we are of equal status. This was underscored by the Court of Appeal in the case of Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR (Civil Appeal No 239 of 2017) where it held as follows:"

> I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in article 165(6) of *the Constitution* in these terms;
>
> "The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

24. I am further guided by the holding in the case of Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR, where the Court of Appeal stated:

> " Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the Court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. *The Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of *the Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing".

25. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong; without jurisdiction it would be embarking on a hopeless adventure to nowhere.

26. It is my humble opinion that this court is not bound by decisions of the courts of concurrent jurisdictions neither can it issue certiorari against the superior courts.

Whether the instant application having been instituted without leave of Court is incompetent

27. The starting point is the understanding of the import and meaning of the substantive prayers sought in the instant application. They are judicial review orders.

28. Judicial review is the jurisdiction of the Courts to examine, review and determine whether the actions of the legislative, executive, and various administrative arms of the government are in line with both *the Constitution* and law. It does not extend to the review of the decision of another Court, be it of the same status or lower. Even when that power extends to the judgments of the subordinate courts, it has nothing to do with their decision-making but is only limited to the procedural step the such Courts take to immortalize by way of adoption as judgments of the court the decisions of the administrative arms of government that by law follow that path.

29. Under the 2010 Constitutional dispensation, Article 47 (1) laid the basis for entrenching such a process. It led to the enactment of the *Fair Administrative Action Act*, 2015. Lest there be a mistake belief that whenever courts of this level entertain applications of judicial review which touch on judgments of subordinate courts that it gives this Court or its sister ones the judicial authority to micromanage the independence of decision-making of the subordinate Court, it should be clear that each Court is clothed with the constitutional authority to adjudicate any issue that is brought before it. That is what is known as judicial authority, and it is not subject to judicial review. Decisions of such bodies can only be challenged and set aside by applications made to the same courts to that effect or by way of review (totally different from judicial review), or by orders issued by an appellate court in that respect.

30. Thus, in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR the Supreme Court held as follows:

> " [40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner."

31. Similarly, in Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), the Supreme Court once more stated as follows:-

> "With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under *the Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal."

32. This Court agrees with the Lordships in the two decisions above. It should be beyond peradventure that when a court embarks on judicial review of a decision, even when the merits of the decision may be before it, the underlying point is that the body whose decision is impugned was acting in its administrative capacity.

33. Having said that the question that this Court poses is, were the orders sought capable of being granted? It is clear that they are aimed at decisions made by bodies which, in the instant case were a court of concurrent jurisdiction and the Court of Appeal, were not in any way acting in administrative capacity. Therefore, they can never be granted.

34. Besides, the instant application was incompetent. It is a very appropriate candidate for dismissal and has successfully passed the examination. This is because, under Order 53 Rule 1 of the Civil Procedure Rules, it is clear that before an application for mandamus, prohibition and certiorari can only be made with leave of the Court. The relevant provisions thereunder state that:-

> " 1.
>
> (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
>
> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."

35. In the instant case, no leave was sought before bringing the Application, dubbed as suit. This is not a mere technicality with Article 159(2)(d) of *the Constitution* can cure.

What orders to issue

36. The entire Application (and what is referred to as suit) fails. Costs follow the event. The event is the failure of the entire suit or application. Thus, the Applicant, specifically, the 4th Defendant, one Mr. Otieno Okiro, is to bear the costs thereof.

37. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 29TH DAY OF APRIL, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE