



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 83 OF 2017

BETWEEN

JOEL KENDUIYWO..... APPELLANT

AND

DISTRICT CRIMINAL INVESTIGATION OFFICER NANDI.....1<sup>ST</sup> RESPONDENT

ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

FRANCIS SIRATE MISSOS.....3<sup>RD</sup> RESPONDENT

ANDREA RUTO.....4<sup>TH</sup> RESPONDENT

PAULINE CHEPKEMOI .....5<sup>TH</sup> RESPONDENT

*(An appeal from the Ruling of the Environment & Land Court at Eldoret*

*(M. Odeny, J.) dated 1<sup>st</sup> March, 2017*

in

**ELC PETITION NO. 11 OF 2015)**

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JUDGMENT OF COURT

The Environment and Land Court, **(M. Odeny, J.)** on 1<sup>st</sup> March, 2017 struck out the appellant’s petition for being an abuse of the court process. The appellant was aggrieved with the said decision and lodged the present appeal.

The appellant, by way of background, filed a petition dated 23<sup>rd</sup> June, 2015 seeking orders against the respondents jointly and severally for *mesne* profits, compensation for character assassination, loss of income, pain and physical torture, restitution of property **Nandi/Kamobo/914** hereinafter, “*the suit property*” and costs of the petition. He claimed that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents colluded to fabricate charges against him which led to his arrest and incarceration. He was thereafter arraigned in court vide **Kapsabet PM’s Criminal Case No. 2523 of 2014**. While he was so incarcerated and being prosecuted, the 3<sup>rd</sup> respondent trespassed into his suit property and developed it.

The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents subsequently entered appearance and filed replying affidavit to the petition. They denied the claims and the particulars thereof averred in the petition. They maintained that the suit property belonged to the 5<sup>th</sup> respondent and was the subject of the proceedings in **Eldoret HC E & L Case Number 231 of 2012** which was yet to be concluded. That the petitioner was a vexatious litigant who had filed several suits over the suit property. That in any event the appellant’s petition was incomplete and untenable in law for want of form as it did not disclose the Articles of the Constitution that had been violated. Based on the foregoing, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents contemporaneously with the filing of the replying affidavits also filed notice of preliminary objection seeking the dismissal of the petition on grounds that; it was odious, premature, bad in law, incompetent, unmerited, an afterthought, misadvised, baseless, frivolous, scandalous,

vexatious and an outright abuse of the due process of the court; the petition was incompetent and untenable in law for want of form as it did not disclose the articles of the Constitution upon which the appellant's fundamental rights had been violated; the petition offended the provisions of Section 2 of Vexatious Proceedings Act and urged the court to declare the appellant a vexatious litigant since he had filed numerous suits over the suit property against the respondent being Eldoret ELC No. 231 of 2012, HCC Misc. Application No. 181 of 1996, CMCC No. 963 of 1997, HCC Misc. Application No. 205 of 1997 and HCC Misc. Application No. 48 of 1999; that the petition was sub judice since there existed ELC No. 231 of 2012 between the appellant and the 3<sup>rd</sup> and 5<sup>th</sup> respondents over the suit property and the appellant was determined to take the respondents in circles with the sole intention of frustrating them; the court lacked jurisdiction to entertain the petition; and that the petition was fatally defective for misjoinder of parties.

In response to the preliminary objection, the appellant filed grounds of opposition in which he stated that he was not a party to ELC No. 231 of 2012 although the suit property was the same as the one in contestation.

The learned Judge in her considered ruling held that the filing of the petition in respect of the same parties in which the matter in issue was directly and substantially in issue in ELC No. 231 of 2012 pending before a court of competent jurisdiction was clearly an abuse of the court process. The preliminary objection on want of form was dismissed in view of the provisions of Order 2 Rule 14 of the Civil Procedure Rules. The learned Judge further held that the right procedure for declaring the appellant a vexatious litigant was not followed. With regard to jurisdiction, the learned Judge found that the court lacked jurisdiction under Section 13(2) of the Land and Environment Court Act to entertain the prayers for compensation for character assassination, loss of income, pain and physical torture and consequently struck them off. The learned Judge also held that the prayers for mesne profits and restitution of property could adequately be pursued in ELC No. 231 of 2012. Finally, the learned Judge held that the petition was sub judice as there was a pending suit, ELC No. 231 of 2012 involving the same parties.

Aggrieved by the ruling, the appellant lodged the present appeal and raised five (5) grounds to wit that, the High Court erred and misdirected itself in law and fact; in upholding the preliminary objection on the grounds that ELC No. 231 of 2012 was between the appellant and the 3<sup>rd</sup> and 5<sup>th</sup> respondents, in its interpretation of the principle of sub judice; by not considering the fact the respondents had colluded to maliciously prefer criminal charges against the appellant; not considering the fact that the appellant had suffered both economically and psychologically and was entitled to damages, mesne profits and restitution of the suit property; and in striking out the petition without perusing the documents and the appellant's grounds of opposition.

During the hearing of the appeal, the appellant appeared in person; **Mr. Lung'u**, learned counsel appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents; while **Ms. Kandie**, learned counsel appeared for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. Following the directions given by the court earlier, parties filed and exchanged written submissions which they briefly highlighted.

The appellant in his submissions stated that pursuant to the impugned ruling, he filed an application to be enjoined as a party in ELC No. 231 of 2012 which application was disallowed thus necessitating the present appeal. He contended that he was not a party in ELC No. 231 of 2012 and that the subject matter in the said suit did not relate to the suit property.

Mr. Lung'u associated himself with the submissions of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in opposition to the appeal.

Ms. Kandie while opposing the appeal submitted that the petition was not based on any constitutional provisions and was therefore in violation of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, otherwise known as "Mutunga Rules", and as was stated earlier in the case of **Anarita Karimi Njeru v Republic (1976-1980) KLR 1272**. That all suits relating to the suit property were stayed by consent to await the outcome in ELC No. 231 of 2012. The appellant was aware of this position when he filed the petition which was subsequently heard by a court of concurrent jurisdiction as the court in ELC No. 231 of 2012 and therefore the trial court was justified when it made a finding that the petition was sub judice. Relying on the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) E.A.**, counsel submitted that the issue of sub judice was a point of law. Counsel further submitted that the fact that the appellant was charged with obtaining land registration by false pretences and the charge was later withdrawn had no bearing on the petition or this appeal. Counsel argued that the jurisdiction of the trial court was limited under Section 13(2) of the Environment and Land Court Act and the prayers sought by the appellant were not in the purview of the said court. Finally, counsel pointed out that by making submissions on the finding of the court in ELC No. 231 of 2012 instead of appealing against the said orders, the appellant's actions were lacking in utmost good faith.

We have anxiously considered the record, submissions by counsel and the law. The pertinent issues that stand out for determination are whether the trial court had jurisdiction to hear and determine the petition; whether the petition was sub judice; and whether this appeal has merit.

The appeal herein arises from the ruling of the trial court in exercise of its discretion to strike out the appellant's petition. It is trite that an appellate court will only interfere with the exercise of such discretion by the trial court, in the words of Sir Charles Newbold P in **Mbogo v. Shah (1968) EA 93**:

*"...unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice."*

Jurisdiction is everything. A court of law cannot confer jurisdiction upon itself where that jurisdiction has been ousted by the Constitution or by statute. In **The Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (1989) KLR 1** this Court stated that:

*"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is*

*conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”*

Similarly, in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR** the Supreme Court stated thus:

*“A court’s jurisdiction flows from either the Constitution or statute or both. Thus, a court of law can only exercise jurisdiction conferred by the Constitution or any other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law.”*

*In the instant appeal, the jurisdiction of the trial court stems from the provisions of Section 13(2) of the Environment and Land Court Act in line with Article 162(2) (b) of the Constitution. We reiterate that where the law expressly provides for the jurisdiction of the court, that court should not exercise its jurisdiction in excess of what it has been granted. The trial court held, and rightly so in our view, that it did not have jurisdiction to entertain compensation for character assassination, loss of income, pain and psychological torture as the same did not fall within its purview. Further, the petition as filed did not meet the threshold set out in the Mutunga rules as well as the case of **Anarita Karimi Njeru v Republic [1976 – 1980] KLR 1272**. It is a requirement that a constitutional petition be pleaded with reasonable precision setting out the provisions of the Constitution that are alleged to have been contravened, and the manner in which they were contravened. This was not done in the circumstances of this case. Nor did the appellant cite any law or statute upon which the petition was anchored. As a consequence the petition was dead on arrival and could not be revived by the application of Article 159(2) (d) of the Constitution. The trial court was thus right in striking out the petition on that ground as well.*

It is common ground that at the time of filing the petition, ELC No. 231 of 2012 was pending determination before another court of concurrent and competent jurisdiction. It is also not in dispute that the appellant was aware of the consent in ELC No. 231 of 2012 that stayed all other proceedings relating to the suit property including the suits filed by the appellant to await the outcome of that suit. **Section 6** of the Civil Procedure Act provides as follows:

*“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

It is common ground that the appellant filed the petition that is the subject of this appeal in total disregard of the consent order staying all subsequent cases involving the suit property. The petition was in those circumstances rendered sub judice.

The appellant contended that he was not a party to ELC No. 231 of 2012 hence the doctrine of sub judice did not apply. The learned Judge found as fact that the suit was sub judice on account of pending suit and the consent order that had been made staying any suit touching on the suit property. The appellant was aware of the order and indeed had been a party to the same and yet proceeded to file the petition that touched on the suit property. The appellant cannot with a hard eye in our view claim that he was not a party to or aware of the suit as well as the consent order. We note that the appellant despite having knowledge of the consent order was not candid enough to disclose such facts to the trial court. The appellant did not therefore act in good faith. This fact alone was sufficient to deny him the court’s exercise of discretion in his favour.

Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action. The filing of the petition before the trial court in the face of the consent order in ELC No. 231 of 2012 was clearly an abuse of court process and sub judice. The trial court cannot therefore be blamed for so holding.

The upshot then is that the appeal is devoid of merit and is accordingly dismissed with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of November, 2019.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR.**