Japata Agricultural Development Corporation v Mungusho & 2 others (Environment and Land Appeal E003 of 2024) [2024] KEELC 5775 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5775 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E003 OF 2024

FO NYAGAKA, J

JULY 19, 2024

BETWEEN

JAPATA AGRICULTURAL DEVELOPMENT CORPORATION ..... APPELLANT

AND

FREDRICK MAKOKHA MUNGUSHO .... 1ST RESPONDENT

DANIEL SIMIYU KHAEMBA .... 2ND RESPONDENT

MARGARET NASAMBU CHAKALI .... 3RD RESPONDENT

RULING

(On a Preliminary Objection dated 12/04/2024)

1. The Appellant filed the instant appeal dated 09/02/2024 on 12/02/2024. It was against the Orders of the Honourable M. M. Nafula, Principal Magistrate, which were made on 12/01/2024 in Kitale CMCC No. 6 of 2024. The orders were granted when an Application dated 11/01/2024 filed under Certificate of Urgency was considered at the ex parte stage on the material date.
2. Soon after filing of the appeal the Appellant filed a Record of Appeal dated 07/03/2024. Upon service of the appeal, the Respondents filed a Notice of Preliminary Objection dated 06/05/2024. The Preliminary Objection was to the effect that the entire appeal be determined in limine since the Honorable Court lacks jurisdiction to sit as an Appellate Court on a (decision made by the) lower court in Civil Suit No. E006 of 2024.
3. The Preliminary Objection was disposed of by way of written submissions. But the Respondents opted not to file any submissions. On its part the Appellant filed its submissions dated 28/05/2024. Before filing the submissions, the Appellant filed a Replying Affidavit. The Affidavit titled "Replying Affidavit in Response to the Respondents' Preliminary Objection dated the 06/05/2024" was sworn

on 17/05/2024 by one Edward Ojode of Trans Nzoia who deponed that he was the Regional Manager in charge of the Kitale Region of the Appellant.

Issue, Analysis And Determination

4. Before the Court proceeds to determine the objection, it is important to underscore the meaning of a Preliminary Objection. This would inform the reason why the Court shall disregard the entire Replying Affidavit when it analyzes the Preliminary Objection hereinafter. A Preliminary Objection was defined by the seminal case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, wherein Sir Charles Newbold defined it 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."

5. 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."

6. 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."

7. It is clear from the definitions given in the authorities above that a Preliminary Objection arises on a point of law only. To make it plain, a finding in terms of a Preliminary Objection must flow directly from the parties' pleadings which are then compared with the law. Anything short of reliance on pleadings only is evidentiary and that would involve an inquiry into facts and the merits of an issue.

8. In the instant appeal, the Respondents raised the point that this Court lacks jurisdiction to entertain the appeal for reason that it arises from a determination by a subordinate court over a civil claim, which means or implies, and not a land claim hence the Court is precluded by law to look at such a decision. This is a pure point of law which can only be discerned from the issues that were pleaded in the matter when it was before the subordinate Court. It goes without saying then that it requires no explanation by way of affidavit as the Appellant has done through the Replying Affidavit sworn by Edward Ojode

in answer to the Preliminary Objection. Thus, this Court must steer clear from analyzing facts as it determines the Preliminary Objection herein.

9. This turns me to the Preliminary Objection raised herein. The Respondents contended by a straightforward point that this Court lacks jurisdiction. If I understand the Respondents correctly, their point is that the matter appealed from was a civil suit rather than a land and environment one. The subject matter was of a civil nature. It simply means that the subject matter was not a land and/ or environment one.

10. When the Preliminary Objection was about to be heard, the Respondents raised an interesting point to the effect that the appeal may not be necessary after all. They gave the reason that the lower court matter/suit had been withdrawn by the Plaintiffs by their act of filing a Notice of Withdrawal of Suit.

11. On their part the Appellants answered that it would not have been true that suit was withdrawn because it had been fixed severally before the lower court but the trial magistrate who issued the orders had recused herself in the course of time and the matter had been placed before other magistrates who too were not willing to proceed with it given the nature of the orders issued which were the subject of the appeal herein. Further, it argued that even if the suit would have been withdrawn, there was a counterclaim it filed in the matter and was pending hence it could not be wished away.

12. This prompted this Court to peruse the lower court file which as at the time of hearing this Objection had been placed by the lower court before this Court for directions for reason that it touched on another matter, being Kitale ELC No. 40 of 2019 between the Appellant and, among many other parties, the Defendants over the same subject matter, and in which ELC matter this Court has issued orders of injunction against the Respondents earlier on.

13. A perusal of the subordinate court file revealed that there was no Notice of Withdrawal of Suit filed in it. And, even if there could have been one, it had not been either noted in the file as such nor argued before the trial Court. Moreover, an interesting order of representation of the parties obtained in the said file. First, the Plaintiffs filed the suit in person. On 12/01/2024 they were granted ex parte the orders appealed from while they acted in person. Before the application could be heard inter partes on 24/01/2024, they instructed the firm of Oringe Waswa & Company Advocates to act for them. The said firm filed a Notice of Appointment of Advocates dated 23/01/2024 on the same date. It would appear that they quickly changed their mind and instructed the firm of M/S K. W. Nakitare & Company Advocates to take over the matter. The said law firm filed a Notice of Appointment of Advocates on 24/01/2024 at 8:54 AM. Was there a Notice of Change of Advocates filed and served on all parties before the said firm would take further steps in the matter on behalf of the Plaintiffs, now Respondents? No. Definitely this was an irregular way of the latter law firm coming on record since in terms of Order 9 Rules 5 and 6 of the Civil Procedure Rules because when a party has previously appointed an advocate and the matter has not been concluded by way of delivery of judgment, the one subsequently instructed ought to file a Notice of Change of Advocates and serve all the parties and other advocates previously on the record before he can be deemed to have duly taken over the matter. This is demonstrated from the court record when learned counsel for the now Respondent attended court, indicated that the law firm of K. W. Nakitare & Co. Advocates was coming on record for the Plaintiffs. But the record is that in regard to the lower court, the said law firm never completed the process of coming on the record. Thus, the firm of k. W. Nakitare should have filed a Notice of Change of Advocates and not the Appointment since the Plaintiffs were no longer acting in person.

14. Be that as it may, this Court finds that the matter having not been withdrawn it still subsists in the lower Court. Additionally, even if the Plaintiffs would have filed a Notice of Withdrawal of Suit, it could not take effect until it was determined by the Court IN THE PRESENCE OF ALL parties in

the suit that the matter could be withdrawn because the input of the parties who have been "brought to court" through the institution of the suit is important.

15. A party cannot decide on his own to unilaterally withdraw a suit to the exclusion of the input of the other parties even though the matter has not been listed for hearing because once the other parties have been served and they have filed pleadings the issue of who bears the costs of appearing in or defending the matter automatically kicks in. Although the award of costs is at the discretion of the judge or magistrate as provided for under Section 27 of the *Civil Procedure Act*, when the matter is being withdrawn the interests of justice and the rules of natural justice demand that the other parties be given a hearing on how the costs incurred are to be considered by the Court.

16. By the reasoning and view that the input of the other party(ies) is necessary when a matter is being withdrawn this Court does not imply that a party who wishes to withdraw their suit or matter have to be compelled to proceed with it if they so wish. A party has all the liberty to do so. But the natural consequences of involvement of other parties in the suit must as of necessity be borne by someone, at the discretion of the Court and if not, then in terms of Section 27 of the *Civil Procedure Act*, the judge or magistrate should record the reasons for the costs not following the event.

17. For a long time, the provision regarding the procedure on withdrawal of suits by Plaintiffs has been misunderstood: it is time the record must be made straight. In regard to the steps to be taken when a party wants to withdraw a suit, the law, just as is required of interpretation of all statutes, ought to be interpreted in a manner that brings the harmony, intent and progressive development of the legislation: the mischief sought to be addressed by the law should be borne in mind. Thus, the necessity of the involvement of the other parties is borne from the purposive interpretation and the living spirit of Order 24 Rule 1 of the Civil Procedure Rules which relates to where a suit has not been set down for hearing. Even if that be case, all the parties have to be notified of the intent to withdraw the suit. What the Plaintiff does is to issue a Notice of Discontinuance or Withdrawal (of the suit). The import of and the step to be taken following the issuance of the Notice becomes clear when the obligation laid on the Plaintiff by the provision is understood.

18. The provision stipulates as follows:

> " At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action" [Emphasis by way of underline].

19. The Plaintiff must serve the Notice on all parties. Why? Because they ought to know that the suit is due for withdrawal. At that point they will be given an opportunity to pray to the Court anything they may wish to. It is until the sentiments of the parties affected by the withdrawal are noted that the withdrawal is given effect. In the instant case (of the lower court matter) none of the above was ever done.

20. Having found that the lower court suit is still alive, this Court proceeds now to determine the Preliminary Objection. As stated above the Respondents contend that this Court is sitting on appeal over a civil matter. It should be borne in mind that the jurisdiction of a Court is neither conferred by parties nor by the court. It is simply a creature of statute: it is given only by the law.

21. Since jurisdiction is everything, this Court needs not reinvent the wisdom enunciated in the Court of Appeal decision of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR that without jurisdiction, I must and will down my tools.

22. Furthermore, In the Matter of Advisory Opinions of the Court under Article 163 of *the Constitution* (Constitutional Application No. 2 of 2011 at para. 30), the Court stated:

> " …a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity."

23. With the above in mind, it must be clear that the Court is a creature of the law. It should and must live and thrive in, clothe and cover itself and others by, move and fly using, spread its wings and glide through, and give its fragrance of meting justice by nothing but the law. For these reasons, a court cannot arrogate itself jurisdiction. Similarly, no party or other thing, except the law can confer it with jurisdiction. The Court must be wary of and shun the subtle devices and wiles of the (crooked) human nature of crafting pleadings to mislead to the belief of existence of jurisdiction when there is none.

24. About jurisdiction of courts generally, it can be limited in three ways, namely, in terms of the nature of the subject matter; the situation or territorial location or place of the subject matter or where the cause of action relational to that matter arose; or the pecuniary value of the subject matter. Thus, Section 4 of the *Civil Procedure Act* addresses the pecuniary jurisdiction of courts by providing that,

> " Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction."

25. Then, Section 11 of the Act provides for the territorial jurisdiction of courts by stipulating that suits should be instituted in the courts of the lowest competent to try it, except where there is coordinate territorial situation, that is to say, where the subject matter lies between two courts of competent jurisdiction, in which case it can be filed in either of them.

26. Section 5 provides for the limitation of jurisdiction in terms of the subject matter.

> " Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred."

27. Regarding this Court, therefore, following the promulgation of the 2010 Constitution, Article 162 (2) (b) established this Court. Consequently, the legislature *Environment and Land Court Act* which statute was "to give effect to Article 162(2)(b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers".

28. The Act provides for the jurisdiction of this court in Section 13. Some of the matters, relevant to the subject of the objection raised herein, over which the Act confers this Court with jurisdiction, are ownership and use of land. With that in mind, this Court must go beyond the craft of the heading of the pleadings of the parties in the lower court wherein they slyly titled the Plaint as "In the Chief Magistrate's Court at Kitale, Civil Suit No. 6 of 2024" and ask, what was the subject of the matter before the trial court? This is because the parties could be mistaken as to the court in which they file the matter or by design, including forum shopping, file a matter in a specific court. By so doing they would be 'conferring' the court with jurisdiction, which is illegal.

    In the instant Appeal, a look at the Plaint in the Chief Magistrates Court at Kitale, Civil Suit No. 6 of 2024 reveals the following.

29. The Plaintiffs (now Respondents) who claimed be registered owners of parcel No. L.R. 6106/4, sued the Defendant (now Appellant) over allegations that the Defendant was "keen to prevent or stop" them from burying one Amos Barasa Masika (deceased) on the land. They claimed further that they had no other home anywhere else where they could bury the deceased. They prayed for a permanent injunction against the Defendant or anyone claiming through it preventing them from or stopping the burial the said Amos Barasa Masika on the parcel of land No. L.R. 6106/4. Further, they prayed that the Officer Commanding Station Chepchiona Police Station be ordered to ensure that the burial of the said deceased person was conducted by the deceased's family without any interference from any quarters (sic).

30. From the pleadings (Plaint) the subject matter or dispute between the parties was "where" to bury the deceased Amos Barasa Masika. It means the place or territory on which to bury the deceased. It was NOT regarding "who" to bury the deceased person. Attendant to answering the "where" question, the other one was "who owns the "where" or territory"? In the circumstances and pleadings of the Plaintiffs the "where" to bury the deceased was land parcel number L.R. No. 6106/4 which they claimed to own. Then the attendant issue was "who" between the parties owned the parcel of land, and from there the one who did not own the land be restrained by way of injunction from stopping the burial on the land. It was not even a question of the predominant issue to be determined in order to decide whether the court had jurisdiction or not. It was a pure question of who owns the land on which the deceased was to be buried. Thus, the court made a decision on which related to land, specifically, ownership and use of the land (to bury the deceased). The decision was not made in a civil suit but in a "land" and "environment" jurisdictional subject. That can only be determined by a Court established under Article 162(2)(b) of *the Constitution* and any court subordinate to it exercising the jurisdiction as contemplated under Section 13 of the Environment and *Land Act*. An appeal from a decision by such a court can only lie to this Court and not the High Court, as urged in the Preliminary Objection.

31. Thus, simply put, when the lower court sat to determine that issue, it did so as a court subordinate to this one. Any decision it made which aggrieved the parties could only be appealable to this Court and subsequently to the Court of Appeal if the law permits it. For that reason, this Court has and is properly seized with the jurisdiction to hear and determine this Appeal.

32. The upshot is that the Preliminary Objection is baseless, unmerited and is hereby dismissed with costs to the Appellant.

33. Having so determined, the hearing of this appeal remains to be on the 22/07/2024.

34. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM THIS 19TH DAY OF JULY, 2024.

HON. DR. *IUR* F. NYAGAKA

JUDGE, ELC KITALE