



**Otim v Tirgra Holdings Limited & 4 others (Environment & Land
Case 55 of 2022) [2024] KEELC 5716 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5716 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 55 OF 2022**

EK MAKORI, J

JULY 23, 2024

BETWEEN

DR. BENNY BEN OTIM PLAINTIFF

AND

TIRGRA HOLDINGS LIMITED 1ST DEFENDANT

IVOR ENGEL 2ND DEFENDANT

JEAN HUISH 3RD DEFENDANT

ROBERT MONTICELLI 4TH DEFENDANT

JOEL CHINN 5TH DEFENDANT

RULING

1. The Notice of Motion application dated 5th April 2023 seeks to have the present suit struck out with costs. The application is supported by the Affidavit of Joel Chinn, sworn on 10th April 2023. In a rejoinder, the plaintiff-respondent filed a replying affidavit deposed on 22nd January 2024.
2. I frame the issues for this Court's determination as whether, based on the materials presented, the current suit should be struck out with costs.
3. The parties were directed to file written submissions. They complied.
4. The applicant states that the facts on which the application is premised are as set out in the Supporting Affidavit of Joel Chinn sworn on the 10th of April 2023 and which can be summarized as follows: The suit does not disclose a cause of action against the defendants herein given that the sums claimed are forfeited in terms of clause 5.2.2 of the sale Agreement, which expressly provided that the plaintiff would have no claim whatsoever against the 1st defendant/applicant regarding the sale of the property. The suit is a commercial dispute for a refund of a deposit paid in a conveyancing transaction. It offends



- Articles 162 (2) and 165 (5) of the [Constitution of Kenya 2010](#). The suit against the 2nd, 3rd, 4th, and 5th defendants, known agents of the 1st defendant, cannot be sued on their individual capacities; this offends the principle of law that an agent shall not be sued where a principal is known. The suit against the 2nd, 3rd, 4th, and 5th defendants offends the principle of law set out in [Salmond v Salmond & Co. Ltd](#) [1897] AC on how to sue Directors of an incorporated entity. The 3rd defendant is deceased, and the suit against her is untenable.
5. The applicant contends that the ELC was established pursuant to Article 162 (2)(b) of the [Constitution](#) to handle matters relating to the environment and the use and occupation of, and title to, land. Section 13 (2) of the [ELC Act](#) sets out the extent of that jurisdiction. The jurisdiction aforesaid has been stated not to include commercial transactions as held in [Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others](#) [2017] eKLR that determined that the ELC had jurisdiction to deal with disputes connected to the ‘use’ of land but did not include mortgages, charges, collection of dues, and rents within the civil jurisdiction of the High Court. The Court of Appeal further held that the exclusive jurisdiction of the ELC is limited to Articles 162 (2) (b) of the [Constitution](#) and Section 13 of the [ELC Act](#), which are not concerned with accounting questions. In contrast, the jurisdiction of the High Court in accounting matters is evidenced by Article 165(3) of the [Constitution](#). This was further fortified by the holding in [Martin Luther Mc Were v James Mabango Ambundo](#) [2022] eKLR, with the Court restating that where the dominant issue is Commercial, the recovery of monies and the taking of accounts, that issue falls within the jurisdiction of the High Court and not the ELC.
 6. The applicant avers that from the plaint as couched, the same seeks the recovery of the sum of Kshs. 4,500,000 paid to the 1st defendant as a deposit of the purchase price of a property pursuant to a sale agreement dated 4th August 2021 with the 1st defendant and Kshs 525,000/- itemized as Special Damages with cost and interest. The suit does not involve title, use, and occupation of land or the environment. Therefore, the Court should down tools - see [Cyrus Wanyeri Kanyi & 101 others v Kenya Commercial Bank & another](#) [2020] eKLR.
 7. The applicant submits that the suit against 3rd defendant cannot be sustained. It has been deposed on oath, which fact has been admitted by the plaintiff in paragraph 5 of the replying affidavit of Benny Ben Otim sworn on the 22nd January 2024, that the 3rd defendant died on 17th August 2022. There is also evidence of the death of the 3rd defendant as shown by exhibit marked RM 2 on the supporting affidavit of Joel Chinn sworn on the 10th of April 2023. It is also evident that the plaintiff filed this case on the 12th of September 2022 against the 3rd defendant, who was dead by then. It is the defendants’ submission that as the suit herein was commenced against a dead 3rd defendant, this Court ought to down its tools by striking it.
 8. The applicant states further that this suit, as it is brought against agents with known principals, stands untenable and that the defendants are sued in individual capacities and not as Directors, offending the [Salmond v Salmond Rule](#) on suing incorporated entities. In that regard, the applicant has cited the decisions in [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR, [Victor Mabachi & another v Nurtun Bates Limited](#) [2013] eKLR and [Fursys \(K\) Ltd v The De Gama Rose Group of Companies & another](#), HCCC No. 2005 of 2001 (at Milimani Commercial Courts).
 9. The applicant believes firmly that this Court has the power to strike out a suit that discloses no reasonable cause of action. The present suit is patently a waste of judicial time, hopeless, and only fit for dismissal with costs. The Court of Appeal decision in [Crescent Construction Limited v Kenya Commercial Bank Limited](#) [2019] eKLR is quoted in that regard.



10. The plaintiff-respondent argues that this Court has jurisdiction to handle the matter as provided in Article 162(2)(b) of the Constitution and Section 13 of the ELC Act – to hear the issues relating to land and environment.
11. The plaintiff submits that the substratum or the crux of this case is the sale agreement entered into between the plaintiff and 1st defendant; the plaintiff agreed to buy, and the defendant agreed to sell all that piece or parcel of land situated in Watamu within Kilifi county known as land Reference No. 8610/5, being a plot and a house - as set out in the plaint dated 31st august, 2022 - read with the replying affidavit of the plaintiff sworn on 22nd January,2024. As disclosed from the plaint, this Court has jurisdiction to hear and determine this matter.
12. The applicant states that Section 13(1) of the Environment and Land Court Act provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to the environment and land; such disputes include disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, mineral, and other natural resources. The Court is urged to find that it has jurisdiction to hear and determine the suit. As such, the judicial authorities the defendants rely on are meant to mislead the Court into wrongly believing that the ELC Court could delve into dereliction of responsibility and fail in its duty to hear and determine this case.
13. The plaintiff submits that the fact that the 3rd defendant (Jean Huish) is dead cannot be sufficient to strike out the suit. It would be unjust and indeed a miscarriage of justice to deny him a chance to be heard and the opportunity to prosecute his case because of the death of the 3rd defendant (Jean Huish).
14. The plaintiff contends that this suit does not fall within what can be struck out the way the defendants have reasoned. Plain and obvious cases are distinguished from the current case; the circumstances are different. The jurisdiction to strike out a suit or pleading was well spelled out in the case of D.T Dobie & Co. Ltd v Muchina [1982] 1 KLR, where the Court held that the power to strike out should be exercised sparingly and that it is a draconian measure to take since parties have not had their day in Court.
15. In the plaint filed by the plaintiff herein, the following substantive orders are sought:
 - a. Refund of the sum of Kshs. 4,500,000.
 - b. Special damages Kshs. 525,000
 - c. Costs of the suit
16. The prayers accrue from a sale of a land transaction described in paragraph 7 of the plaint as follows:

“The plaintiff avers that at all material times relevant to this case, by a written undated sale agreement entered between the plaintiff and the 1st defendant, the plaintiff agreed to sell all that piece of land situated in Watamu within Kilifi County known as Land Reference No. 8610/5 being a plot and a house. However, the defendants duped the plaintiff by making false representations intentionally and knowingly to sell the land to the plaintiff for a total consideration in the sum of Kshs. 50,000,000/- when the motive was actually not to sell but to obtain the money from the plaintiff by false pretense.”



17. Paragraph 19 of the plaint proceeds to state:

“The plaintiff’s claim against the defendants either singly or jointly is for a refund of Kshs 4,500,000/- being deposit paid as part payment of the purchase price.”

18. How the plaint is couched and the prayers sought provoked the current application. The first front is that this is a sale of land transaction, which mutated into a recovery of monies on a failed land sale. The plaintiff is only keen to get his refund from the defendants as opposed to the recovery of the land. Therefore, this Court has no jurisdiction to proceed further but down tools.

19. Whenever a Court is notified that it has no jurisdiction, it must probe that issue immediately before proceeding further. See *Cyrus Wanyeri Kanyi & 101 others v Kenya Commercial Bank & another* [2020] eKLR where it was held that:

“In my considered view, where jurisdiction does not lie, a Court has no power to take one more step. It must down its tools once it is of the opinion it does not have jurisdiction. Other than the issues before me being classic examples of res judicata, I find and hold that in view of the determination by the Supreme Court, this Court does not possess any jurisdiction, and even if the matter is crafted as the Petition herein where it is asserted that the 70th to 102nd Petitioners were not party to the previous suit that is now stated to be pending before the Court of Appeal, this Court lacks jurisdiction and in that regard must down its tools. The Petition is struck out, and each party is to bear their own costs.”

20. The jurisdiction of the ELC is as provided under Article 162 (2) of the *Constitution of Kenya 2010* and Section 13 of the *Environment and Land Court Act* as follows:

Article 162 (2) of the *Constitution*:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

- a) ...
- b) The environment and the use and occupation of, and title to, land.”

Section 13 (2) *ELC Act*:

(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.”



21. Various judicial decisions have clarified the jurisdiction of the ELC; for example, in *Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, the Court of Appeal had this to say relevant to the issue at hand in this application:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the *ELC Act* ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues, and rents which fall within the civil jurisdiction of the High Court. In *Paramount Bank Limited v. Vaqui Syed Qamara & another* [2017] eKLR, this Court, while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution, expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the *Constitution*, Section 13 of the *ELC Act* and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the *Constitution* provides *inter alia*, that;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed.”

22. Further, in *Martin Luther Mc Were v James Mabango Ambundo* [2022] eKLR, the Court held as follows:

“From a careful examination of the pleadings herein, the suit relates to monies due and owing to the plaintiff in respect to the management and or acquisition of two properties namely house B2 in Kileleshwa situated on No. Nrb/Block 209/2973 and house No. 8 situated in Lavington on LR No. 3734/929. Towards this end, the specific prayers sought by the Plaintiff also relate to an order requiring the defendant to account for all the money received



during the exercise of the power of attorney that was issued to him by the plaintiff. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to recover the monies due to the plaintiff and not ownership of the two properties as partly submitted by the plaintiff. Clearly this is a dispute or declaration that can only be resolved by the High Court. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).”

23. The plaintiff in this suit predominantly prays for the recovery of the sum of Kshs. 4,500,000 paid to the 1st defendant as a deposit of the purchase price of a property pursuant to a sale agreement dated 4th August 2021 with the 1st defendant. The suit does not in any way involve title, use, or occupation of land or the environment. The plaintiff clearly asserts in paragraph 7 of the plaint (reproduced above) that:

“However, the defendants duped the plaintiff by making false representations intentionally and knowingly to sell to the plaintiff the land for a total consideration in the sum of Kshs. 50,000,000/- when the motive was actually not to sell but to obtain the money from the plaintiff by false pretense.” (the underlined being the cause of action)

24. The plaintiff does not claim land recovery or specific performance of the agreement. In any event, the deal never materialized, as evidenced by the pleading and the affidavits deposited by the parties. This is a claim that falls within the purview of either the High Court under Article 165(3) of the Constitution or, better still, under the Magistrates Court Act Section 7, for recovery of monies on a sale of a land transaction gone wry, as the claim does not exceed 20,000,000/-.

25. I reckon that striking out pleadings as held in D.T Dobie & Co. Ltd v Muchina [1982] 1 KLR that:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way.”

26. And that as held in Sunday Principal Newspaper Limited [1961] 2 All ER 758:

“It is well established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case.”

27. I agree with the preceding postulation, but then again, I must down tools, having found that I have no jurisdiction to handle this matter. I need not consider the other fronts proposed by the applicant on the striking out of the suit as they go to the suit’s core, which can be interrogated in the appropriate forum. The Notice of Motion application dated 5th April 2023 is hereby allowed. The entire plaint is hereby struck out with costs. The plaintiff is at liberty to file another matter in the appropriate forum.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 23RD DAY OF JULY 2024.

E. K. MAKORI

JUDGE



In the presence of:-

Mr. Jaoko, for Plaintiff

Mr. Wafula, for Defendants

Happy: Court Assistant

