



REPUBLIC OF KENYA



Gatura & another v Mungania & another (Environment & Land Case E006 of 2024) [2024] KEELC 6311 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E006 OF 2024
TW MURIGI, J
SEPTEMBER 25, 2024**

BETWEEN

JOSEPH GORDON GATURA 1ST PLAINTIFF

MAKINDU MEDICAL CENTRE 2ND PLAINTIFF

AND

PURITY NTINYARI MUNGANIA 1ST DEFENDANT

FESTUS MULINGE MULI 2ND DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 4th April 2024 raised by the 1st Defendant on the following grounds:-
 - a. The instant suit is sub judice Makueni High Court HCCC E003/2024 Purity Mungania & Makindu Medical Centre vs Joseph Gordon Gatura, Festus Muli Mulinge, Micheal Karanja & Registrar of Companies.
 - b. The subject matter of this suit is beyond the jurisdiction conferred upon this Honourable court by Article 162)(2)(b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act* No. 19 of 2011.
 - c. The 1st Plaintiff has not sought and obtained leave from the Honourable Court as required under Section 29 of the *Companies Act* 2015 to institute proceedings in respect of a cause of action vested in a company.
2. The parties were directed to canvass the preliminary objection by way of written submissions.



The 1st Defendant's Submissions

3. The 1st Defendant filed her submissions dated 1st May 2024.
4. On her behalf Counsel identified the following issues for the court's determination:-
 - a. Whether the instant suit is sub judice Makueni High Court HCCC/E003/2024 Purity Mungania & Makindu Medical Centre vs Joseph Gordon Gatura, Festus Muli Mulinge, Michael Karanja & Registrar of Companies?
 - b. Whether the subject matter of this suit is beyond the jurisdiction conferred upon this Honourable court by Article 162(2)(b) of *the Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act*, No. 19 of 2011.
 - c. Whether the 1st Plaintiff requires leave from the Honourable Court to institute proceedings in respect of a cause of action vested in a company.
5. On the first issue, Counsel submitted that the instant suit is sub judice Makueni HCCC E003 of 2024 as the parties and the subject matter in the two suits are the same.
6. Counsel further submitted that in Makueni HCCC No. E003 of 2024 the cause of action is fraud, breach of fiduciary and breach of trust occasioned by the acts and omissions of Gordon Gatura and Festus Muli Mulinge in their capacity as directors against the company the 1st Plaintiff herein, while in the present suit, the cause of action is breach of contract, statutory and professional allegedly perpetrated by Purity Mungania and Festus Mulinge in their capacity as directors against the company, the 2nd Plaintiff herein.
7. Counsel contended that the dispute in the two suits involves the rights, duties and liabilities of the directors and shareholders of Makindu Medical Centre which should be heard and determined by the High Court.
8. With regards to the second issue, Counsel submitted that the instant suit is founded on a dispute between the directors and shareholders of the 2nd Plaintiff which falls within the jurisdiction of the High Court.
9. On the last issue, Counsel submitted that the 1st Plaintiff ought to have sought leave of this court to commence proceedings in respect of a cause of action vested in a company. The basis of this argument is that the 1st Plaintiff is a director and shareholder of the 2nd Plaintiff while his claims are against his co shareholders and directors for the alleged breach of statutory, legal and professional duties against the company. Counsel urged the court to uphold the objection and strike out the suit with costs. None of the authorities cited by Counsel were availed for the court's perusal.

The Plaintiffs' Submissions

10. The Plaintiffs filed their submissions dated 22nd April 2024.
11. On their behalf, Counsel outlined the following issues for the court's determination:-
 - a. Whether the Defendants objection herein meets the requisite threshold qualifies in law as preliminary objection.
 - b. Whether the Honourable court has jurisdiction to entertain the cause of action herein.
 - c. Whether the suit herein is sub judice.



- d. Whether the Plaintiff was required to seek leave to originate the cause of action herein.
12. As regards the first issue, Counsel submitted that the preliminary objection has not met the threshold set out in the case of *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd (1969) E.A 696* as it is based on disputed facts.
 13. Counsel argued that the court will have to ascertain facts and probe evidence in order to determine whether the present suit is sub judice Makueni HCCC No. E003 of 2024.
 14. With regards to the second issue, Counsel submitted that the jurisdiction of this court is derived from Article 162(2) (b) of *the Constitution*, Section 13(2) of the *Environment and Land Court Act*, Section 150 of the *Land Act* and Section 101 of the *Land Registration Act*. Counsel further submitted that this court has jurisdiction to hear and determine this suit based on the pleadings and the reliefs sought by the Plaintiff. In addition, Counsel contended that ownership of land, buildings and the movable assets belonging to the 2nd Plaintiff was at the heart of the dispute in the suit herein.
 15. Counsel further contended that the Plaintiff's cause is anchored on his investment, land and stakes in movable and immovable properties of the 2nd Plaintiff which falls within the jurisdiction of this court.
 16. Counsel argued that the court may apply the predominance test in determining the issue of jurisdiction.
 17. On the third issue, Counsel submitted that the 1st Defendant has not satisfied the conditions set out in Section 6 of the *Civil Procedure Act* nor submitted pleadings to show that the instant suit is sub judice Makueni HCCC E003 of 2024.
 18. Counsel submitted that the parties and the cause of action in the present suit are not the same as those in Makueni HCCC No. E003 of 2024. Counsel argued that the pleadings in the two suits are distinct of each other. It was further submitted that the present suit is founded on ownership of the suit property while the High Court suit is based on fraudulent transfer of shares. According to Counsel, the issues of ownership of the suit property, buildings constructions, as well as other movable assets of the 2nd Plaintiff, entry or exit from the same falls within the jurisdiction of this court.
 19. On the fourth issue, Counsel submitted that the 1st Plaintiff is the sole registered owner of the 2nd Plaintiff in terms of the Medical Practitioners and Dentist Act and holds a current certificate of registration. Counsel argued that the Plaintiff does not require leave to commence the proceedings herein as he bears personal liability to sue and to be sued.
 20. Counsel further submitted that Section 3 of the High court (Companies) practice rules imports the application of the *Civil Procedure Act* and Rules in proceedings relating to companies which expands the definition of a person to include a natural corporate or a juristic person.
 21. Counsel further submitted that the instant application is based on Articles 11, 25, 33, 36, 40, 41, 43 and 232 of *the Constitution* without necessarily importing the application of Article 22 as read with Section 3 of the High Court Protection of Fundamental Rights and Freedoms Practice Directions which grants the right to institute proceedings related to violation or threatened violation of fundamental rights or freedoms either in his capacity or on behalf of an interested group or a class of persons. On the basis of the foregoing, Counsel submitted that the Plaintiff does not require leave to commence the proceedings herein because the instant suit is not a derivative action. Counsel submitted that the Plaintiff will be prejudiced in the event that the preliminary objection is upheld as he will lose his right to canvass his cause of action since the issues raised in the Plaintiff have not been pleaded in the defence.
 22. Counsel further submitted that the preliminary objection is defective for lack of a supporting affidavit.



23. On costs Counsel submitted that the preliminary objection is devoid of merit and ought to be dismissed with costs. None of the authorities cited by Counsel were availed for the court's perusal.

Analysis and Determination

24. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696*, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

25. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

26. In *Oraro Vs Mbaja 2005 eKLR Ojwang J* (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

27. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

28. The 1st Defendants' preliminary objection is based on the grounds that the Court lacks jurisdiction to hear and determine this suit as the dispute falls within the jurisdiction of the High Court. The 1st Defendant further contended that the present suit is sub judice HCCCE003 of 2023.

29. Having considered the preliminary objection and the rival submissions, the following issues fall for determination:-

- i. Whether this suit is sub judice Makuani HCCC E003 of 2023?
- ii. Whether this court has jurisdiction to hear and determine this suit?
- iii. Whether the Plaintiff's claim is a derivative suit?



30. Before considering the issues identified for determination, this court is called upon to determine whether it has jurisdiction to hear and determine this suit. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case.
31. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the Defendant's Preliminary Objection is based on a pure point of law.
32. The locus classicus on jurisdiction is the celebrated case of Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (Kenya) Limited (1989) eKLR where the Court held as follows:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

33. Similarly, the Supreme Court in the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR pronounced itself thus;

“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. 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....”

34. A court derives its jurisdiction from *the Constitution* or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. Article 162(2) (b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

35. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (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, chose in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

36. The Plaintiffs instituted this suit against the Defendants vide the plaint dated 16th March 2024 seeking the following orders:-

- i. An order directing full audit to determine all monies and commissions illegally drawn or paid to the Defendants herein from the 2nd Plaintiff.
- ii. Upon such audit, an order directing the Defendants to restate in full, all the illegal payments and commissions.
- iii. An order directing full audit to determine the professional and financial contribution and stake of each of the parties herein in the equity and ownership of the 2nd Plaintiff herein;
- iv. A declaration that by virtue of his financial and professional investment, the 1st Plaintiff is the bona fide owner of all that business entity known as Makindu Medical Centre, as well as all that property known as LR No. 254 Makindu together with buildings, structures, medical equipment therein infrastructures and all movable and immovable, tangible and intangible assets thereof.
- v. A declaration that, by a virtue of their contributions and conduct, the 1st and 2nd Defendants herein only qualify as employees and have been engaged as such, or otherwise engaged as commission agents of the 2nd Plaintiff herein;
- vi. A declaration that, the 1st and 2nd Defendants are in breach and/or violation of their legal, statutory and professional duty to the 2nd Plaintiff herein.
- vii. A declaration that, owing to violations and/or breach of legal and statutory duties aforesaid, the 1st and 2nd Defendants have lost moral professional and/or ethical standing to participate in running and management of the affairs of the 2nd Plaintiff herein.
- viii. Orders for determination of the extent of equity and/or entitlement of the Defendants in the 2nd Plaintiff deriving from their nominal/start up capital and further orders and direction for restitution of the same to the Defendants.
- ix. Upon such restitution, orders permanently prohibiting the Defendants from entering into, remaining thereon, interfering with assets, using the name, company stamp or seal, issuing payments, collecting funds, signing cheques, dealing with clients handling staff, or in any other way involving themselves in the interests, operations or management of the 2nd Plaintiff herein.
- x. Orders directing the relevant professional bodies to investigate the Defendants for professional for breaches professional codes of conduct enumerated herein, and to take such action as may be necessary towards safeguarding the Plaintiff and members of public at large from such violations and/or misconduct.
- xi. Costs and interest of this suit as against the Defendants.
- xii. Any other remedy or relief as may be necessary and expedient given the circumstances of this case.



37. At paragraph 9 of the Plaint, the Plaintiffs pleaded that there was no formal agreement, Memorandum of Association, Articles of Association defining the terms of engagement, scope of duties or the extent of liability among the original founders/contributors of the 2nd Plaintiff.
38. At paragraph 10, it was averred that four of the founding members of the 2nd Plaintiff negotiated for refunds of their equity in the 2nd Plaintiff and parted ways thereafter. However, the 2 Defendants remained in service with the 2nd Plaintiff.
39. At paragraph 57 of the Plaint, the 1st Plaintiff pleaded that the Defendants are in blatant breach of their legal, fiduciary and professional duties and crave reprieve from this Honourable court by way of damages. The Plaintiffs set out the particulars of breach of contract, statutory and professional duty by the Defendants herein. The main contention by the 1st Plaintiff is that the Defendants are in breach of contract by virtue of their professional acts and or omissions in the running of the 2nd Plaintiff.
40. From the pleadings it appears that there was a fallout between the parties which resulted to shareholder wrangling. That is why in the ensuing prayers, the Plaintiffs want orders to be issued for a full audit, restitution of monies and commissions.
41. The Plaintiffs have also sought for declaratory orders against the Defendants for their capacities in the operations of the 2nd Plaintiff to be determined by the court.
42. In prayer No (iv) of the plaint, the Plaintiffs sought for a declaration that by virtue of his financial and professional investment the 1st Plaintiff is the bona fide owner of all that business entity known as Makindu Medical Centre as well as all that property known as L.R No 254 Makindu together with the buildings, structures, medical equipment therein infrastructures and all movable and immovable tangible and intangible assets thereof.
43. Even though prayer No. (iv) of the Plaint touches on land Parcel No. L.R 254 Makindu, in the preceding paragraphs specifically paragraphs 15-17 the 1st Plaintiffs pleaded that several legal charges are in existence which are being serviced.
44. The said contracts with the banks are not within the purview of Section 13 of the *Environment and Land Court Act*. Even though prayer No. (iv) which appears to refer to the use, occupation and title to land the dispute cannot be resolved without first determining the dispute that led to the use or occupation or title of the suit property.
45. Looking at the substratum of the suit and the reliefs sought in the plaint it is apparent that they relate to the manner in which the affairs of the company were conducted
46. As rightly submitted by Counsel for the 1st Defendant the Plaintiffs claim falls within the jurisdiction of the High Court. This court has no jurisdiction to hear and determine this suit and must down its tools.
47. Having downed its tools, this court will not delve into the other issues framed for determination.
48. In the end I find that the preliminary objection is merited and I uphold the same. This suit is hereby struck out with costs to the 1st Defendant.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2024.



IN THE PRESENCE OF:

Ghichuhi for the Plaintiff

Kirimi for the 1st Defendant

Court Assistant Steve.

