



Mokoro v Jedison Company Limited & 3 others (Environment & Land Case E0241 of 2022) [2023] KEELC 910 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E0241 OF 2022
J OMANGE, J
FEBRUARY 16, 2023**

BETWEEN

YUKABETH GESARE MOKORO PLAINTIFF

AND

JEDISON COMPANY LIMITED 1ST DEFENDANT

NAIROBI COUNTY GOVERNMENT 2ND DEFENDANT

NATIONAL ENVIRONMENT AUTHORITY 3RD DEFENDANT

NAIROBI CITY WATER AND SEWARAGE 4TH DEFENDANT

RULING

1. The plaintiff's amended notice of motion seeks for orders for a temporary injunction restraining the 1st defendant, its agents and or servants from constructing on LR/ No/ 209/22440 until after it has repaired, relocated, unblocked both the sewerage and other dirty water drainages which exits through a pipe underneath from the plaintiffs LR/ No 209/14394 of Land Survey Plan Number 236279 which shares the same boundary pending the hearing and determination of the Applicant/ Plaintiffs application.
2. The plaintiff further seeks an order compelling the 1st Defendant to stop construction on LR/ No/ 209/22440 and embark on the reconstruction of the demolished stone wall separating LR/ No 209/14394 and LR/ No/ 209/22440. In the same vein the plaintiff seeks and order compelling the 1st Defendant to replace the two beacons.
3. Lastly the plaintiff prays for a permanent injunction to issue restraining the 1st Defendant from tampering, blocking sewerage pipes and their dirty water draining's which passes underneath LR/ No/ 209/22440 as it was designed by the local municipal authority then being connections from LR/ No 209/14394 via LR/ No/ 209/22440 pending the hearing and determination of the suit.



4. The plaintiff avers that she has been residing on from m1981 without any disturbance or interruptions of any kind. She depones that the 1st Defendant has commenced construction on an adjacent parcel of land that had previously been used as a foot path connecting residents and that was also a pathway to their sewer line. The plaintiff contends that the construction has interfered with her sewerage system and caused blockages which have now resulted in overflow of the sewer line. This is affecting the health of herself and her visitor's.
5. The 1st Defendant raised a Preliminary Objection on the jurisdiction of the court to hear this matter. The objection was premised on the ground that the court does not have jurisdiction to hear this matter as there is a clear procedure for redress set out under Section 18 and 19 of the [Land Registration Act](#), Section 108,109 and 129 of the [Environmental Management and Coordination Act](#) and Section 78 of the [Physical and Land Use Planning Act](#) No. 13 of 2019. It is the first defendant's contention that the where there is a clear procedure for redress of any particular grievance the procedure should be strictly followed.
6. The 2nd Defendant on its part contends that not a single relief has been sought against them hence they should be struck out from the suit. Innocent Muthama an officer from the 4th Defendant avers that the 4th Defendant is willing to address the sewerage issues facing the plaintiff but had advised that the boundary issues be resolved first.
7. The Plaintiff and the Defendant/ Respondents have filed written submissions accompanied by authorities which I have duly considered. The preliminary objection was handled jointly with the application. From the submissions and the pleadings, the following issues emerge for determination by the court; Does the court have jurisdiction to hear this matter? Is the 2nd Defendant wrongly enjoined in the matter? Lastly has the plaintiff established a *prima facie* case warranting the grant of the injunctive orders ought?
8. I will deal with the issue of jurisdiction first. On the question of jurisdiction, it is the case of the 1st Defendant that this is a boundary dispute hence should be referred to the Chief Land Registrar. Section 19 of the [Land Registration Act](#) is clear at sub section 2 that "The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance to this section" A further reading of the section makes it clear that parliament intended that boundary disputes be resolved at first instance by the Land Registrar. Question then is whether the cause of action in this matter is a boundary dispute.
9. The answer is to be found in the plaintiffs pleadings. In the first prayer the plaintiff avers " temporary injunction restraining the 1st defendant, its agents and or servants from constructing on LR/ No/ 209/22440 until after it has repaired, relocated, unblocked both the sewerage and other dirty water drainages which exits through a pipe underneath from the plaintiffs LR/ No 209/14394 of Land Survey Plan Number 236279 which shares the same boundary pending the hearing and determination of the Applicant/ Plaintiffs application" (*emphasis mine*) For the court to make a resolution on this prayer a finding will have to be made on the boundary.
10. The second prayer posits "order compelling the 1st Defendant to stop construction on LR/ No/ 209/22440 and embark on the reconstruction of the demolished stone wall separating LR/ No 209/14394 and LR/ No/ 209/22440.
11. The third prayer seeks replacement of two beacons which is essentially a determination of boundaries while the last prayer on the location of the sewer also calls for a determination of boundaries. Resolution of boundary disputes are the preserve of the Chief Land Registrar as provided in Section 19 of the [Land Registration Act](#).



12. The pleadings raise several concerns on environmental issues caused by the construction and their impact on the health of the plaintiff. The *Environment and Management Coordination Act* at Section 31 provides for the establishment of a Public Complaints Committee which is mandated to investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;
13. Section 129 of the *Environmental Management and Co-ordination Act* provides that:-
- (1) Any person who is aggrieved by—
- a. a refusal to grant a licence or to the transfer of his licence under this Act or its regulations;
 - b. the imposition of any condition, limitation or restriction on his licence under this Act or its regulations;
 - c. the revocation, suspension or variation of his licence under this Act or its regulations made;
 - d. the amount of money which he is required to pay as a fee under this Act or its regulations;
 - e. the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.
14. The National Environmental Tribunal is the body that is clothed with jurisdiction to determine at first instance the any appeals against a grant of a licence. The Act also creates the Public Complaints Committee which has wide powers to receive and investigate any complaints regarding the state of the environment. The jurisdiction of the Environment and Land Court is appellate as provided by Section 130 of the Environmental Management and Coordination Act.
15. Section 77 of the *Physical and Land Use Planning Act* establishes the County Physical and Land use planning Committee. The functions of the committees are defined in section 78 of the Act thus;
- “The functions of the County Physical and Land Use Planning Liaison Committee shall be to—
- (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
 - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
 - (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
 - (d) hear appeals with respect to enforcement notices.”
17. From the foregoing, I find that there are dispute resolution mechanisms to address the concerns the plaintiff had. The plaintiff has made no attempt to explain why this court which has an appellate jurisdiction should hear issues which the law mandates other bodies to determine.



18. The courts have had occasion to make pronouncements on this issue. In the case of *Kibos Distillers Ltd & 4 Others v Benson Ambuti Adega & 3 Others* [2020] eKLR the Court of Appeal observed in part:-

“.....As aptly stated by the Supreme Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others* (*Supra*), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the Constitution or statute.....”.

The court went further to state:

“.....Further, I observe that the jurisdiction of the ELC is appellate under Section 130 EMCA. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”

19. The Supreme Court had the last word on this issue. In the case of *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & others* (2012) eKLR the court stated: -

“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 counsels 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute.”

20. In the case of *Benard Ambuti Andega & 2 Others v Kibos Distillers Ltd and 5 others* (2020) eKLR the Court restated the importance of a court exercising jurisdiction strictly in accordance to the law.....

“This principle has been replicated in a plethora of determinations by this Court, of common cause being that, a Court, even this Court, cannot arrogate itself jurisdiction through crafts of interpretation (see *Interim Independent Electoral Commission Constitutional (Advisory Opinion)* Application No. 2 of 2011) and a Court ought to exercise its powers strictly within the jurisdictional limits (*Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* (*supra*)).”

21. Guided by the numerous judicial pronouncements on this issue, this court has previously held that the court has a duty under Article 159 of the Constitution to promote Alternative Dispute Resolution mechanisms. The only way the court can bring to life this Constitutional imperative is if the courts allow other courts and bodies to exercise the jurisdiction assigned to them. Any errors can then be corrected using the appellate or Judicial Review process.



22. In the end I find that this court has no jurisdiction and guided by the words of Nyarangi J in the famous case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 I find that I have no power to make one more step.
23. Consequently, the court makes the following final orders:-
- a. The Preliminary Objection dated 6th April, 2022 is hereby upheld.
 - b. The Application dated 27th January, 2022 and Plaint dated 27th January, 2022 are hereby struck out.
 - c. Given that the protagonist are neighbours each part to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF FEBRUARY 2023.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Sausi for the Plaintiff

Mr. Karani for the 1st Defendant

Mr. Odoto for the 4th Defendant

Steve - Court Assistant

