Keter v Ecobank Kenya Limited (Civil Case 16 of 2018) [2023] KEHC 2544 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 16 OF 2018

RN NYAKUNDI, J

MARCH 28, 2023

BETWEEN

DAPHINE BELINDA KETER ..... PLAINTIFF

AND

ECOBANK KENYA LIMITED ..... DEFENDANT

RULING

1. The applicant approached this court vide an application dated 21st October 2022 seeking the following orders

    1. Spent

    2. That the honourable court be pleased to issue directions, ruling, determination and or further orders as regards the jurisdiction of the court to handle the suit pursuant to the orders of Hon. Justice E.K Ogola delivered on 28th September,2022.

    3. That costs of this application be in the cause.

2. The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn by Stephen Kipkorir Bundotich.

Applicant's Case

3. The applicant's contention is that the defendant had filed an application dated 5th May 2021 seeking review of the ruling and orders of the court made in 20th April 2021. The court delivered a ruling on 28th September 2022 where it declined to make orders on the said application dated 5th May 2021 and instead ruled that the issue of whether the environment and land court had jurisdiction to transfer the suit to the high court should be determined before hearing the application. He urged that the court of

appeal had struck out the notice of appeal by the appellant and therefore there is no pending appeal but they have been unable to exercise their statutory power of sale.

4. In its submissions, the applicant stated that the jurisdiction of the environment and land court as set out in section 13 of the Environment and Land Act as read together with article 162(2)(b) of the *Constitution of Kenya* does not confer jurisdiction to the Environment and Land Court to deal with matters relating to legal charges.

Respondent's Case

5. There are no submissions or pleadings on record for the applicant with regard to this application.

Analysis & Determination

Whether this court has jurisdiction to handle the suit

6. The locus classicus in this subject, this court is to be found in *owners of the Motor Vessels Lillian S" v Caltex Oil (Kenya) Ltd* (1989) in which the court pronounce itself 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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given." These words were also echoed by the court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words: " In numerous decided cases, courts, including this court have held that it would be illegal for the High Court in exercise of its power under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be a muddle up the waters and allow confusion to reign, it is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exist. It is fundamental that where it lacks parties cannot even seek refuge under the 02 principles or the overriding objective under the Civil Procedure Act, The Appellant jurisdiction Act or even Article 159 of *the Constitution* to remedy the same. In the same way a court of law should not through what can be termed as judicial craftsmanship sanctity an otherwise incompetent suit through transfer"

7. I have perused the ruling by Hon. Justice Ogola that was delivered on 28th September 2022. I have also considered the ruling delivered by Hon. Kibunja on 9th December 2020 transferring the suit to the High Court as the dispute was commercial in nature. In order to determine whether the court has jurisdiction it must interrogate the sub stratum of the suit. A reading in of the decision by Hon Justice E. K Ogola reveals that the position is that the high court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of statutory power of sale by charge.

8. While some courts may have exclusive jurisdiction in respect of some subject matter in civil cases and actions, they share or have concurrent jurisdictions with other courts of the same ranking in other subject matters. Jurisdiction is a fundamental pre-requisite in all cases presided over by session Judges or Magistrates. It is a condition precedence that cannot be waived by the court or parties to the litigation. I am persuaded by this proposition by the nature of the principles in the case of *Zakari v Ngerian Army* (2015) 17 NWLR (Pt 1487)p 77 at 88 in which the Supreme Court held: " that jurisdiction is the blood that gives life to the survival of an action in a court of law without which the action being

like an animal drained of its blood. Ceases to be alive. Berefit of any blood in it and indeed without life any effort at resuscitating it remains a futile exercise. Jurisdiction being a forerunner of judicial process cannot by acquiescence, collusion compromise or waiver be conferred on a court that lacks it. Parties do not have legal right to donate jurisdiction on a court that lacks it. Non-compliance with the rules which affect the very foundation or props of the case cannot be treated by the court as an irregularity but as mollifying the entire proceedings. Once the non-compliance affects the substance of the matter to the extent that the merits of the case are ruined, then it is impossible to salvage the proceedings in favour of the party in blunder, no amount of waiver by the party can be of assistance to the adverse party"

9. I am further guided by the decision in the Court of Appeal case of *Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 Others* [2017] eKLR, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to 'use' of land and do not include mortgages, charges, collection of dues and rents are within the civil jurisdiction of the High Court. The Court further held that 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 whereas the jurisdiction of the High Court in accounting matters is evidenced by Article 165(3) of *the Constitution*. Article 162(2)(b) of *the Constitution* states that the Environment and Land Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land.

10. The case before the court was initiated vide a plaint dated 29th day of December 2011 and subsequently amended on the 4th of July 2012 seeking the following orders: That a declaration for the intended sale of land References No. 9399/32, 9399/34, and 9399/36 is illegal null and void ab initio. That an injunction to prevent the defendant, its Agents and all servants from illegally disposing the aforementioned land references do issue plus the cost of the suit. The declarations sought by the plaintiff arise of the pleadings in paragraph 4, 5 and 6 of the plaint which avers as follows:

    1. That On or about 25th March 2010 Kwalitifoods Africa Limited obtained a loan of Kshs 20,000,000/= from the defendant.

    2. That the plaintiff and one Kenneth K Cherogony guaranteed the repayment of the loan through a personal letter of guarantee.

    3. That the plaintiff has never pledged his land reference number 9399/32,9399/34 and9399/36within Nandi County as security for the loan's repayment. The property is currently valued at more than Kshs 25,000,000

11. This subject matter of the case going by the decision of the Court of Appeal in Cooperative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 Others supra is within the court's jurisdiction and there is no feature in the pleadings which prevents the court from exercising its jurisdiction. No matter in what manner the pleadings are fashioned the dispute arising between the plaintiff and the defendant boils down to a mortgagor and mortgagee contractual obligation. There is nothing about land use as contemplated in Section 13 of the ELC Act. Having considered the issue it is very disturbing that both parties for a long time have been held hostage and fail to free themselves from the chain as to which forum has the power donated by *the constitution* or statute law to exercise jurisdiction over the cause of action. The Plaintiff initiated this commercial claim by filing a plaint served upon the defendant laying down the background pursuant to the law in commencing a civil action against the defendant. There are no relaxed rules administratively to host the jurisdiction of the court to warrant the avalanche of litigations. Therefore, in attempting to render the statutory provisions under the *Land Act* of 2012 in significant the parties were grossly excessive in pursuit of their rights and in the process violated the due process clause on a right of fair hearing under Article 50 of *the Constitution*. The constitution dictate that the determination of all suits be either criminal or civil be heard and adjudicated within

a reasonable time. Specifically, I am amazed that notwithstanding the decision by my brother Justice Ogola J. on this same subject matter the parties had the luxury to make lengthy submissions as a second bite of the Cherry on the same issue. The parties were never restrained even at the fact the principle of res judicata is well established in our law. That one statement made by the court in Page 9 par 17 of the ruling dated 28th September, 2022 answered the parties contestation in totality. That the dominant issue. In so far as the pleadings are concerned in HCC No. 16 of 2018 or other secondary issues are collateral to the primary justiciable issue. Subject matter jurisdiction is recognisable from the averments in the Plaint and subsequent defence filed by the parties to the suit.

12. It is beyond peradventure that the nature of the dispute in this matter is commercial and no judicial energy and resources should be overspent to rule on whether the statutory power of sale arising from a charge instrument is to be adjudicated by ELC or the High Court. It is now trite that all commercial disputes are domiciled in the High Court of Kenya. Therefore, the application dated 21st October 2021 succeeds to the extent;

    1. That this court has jurisdiction to hear and determine this suit.
    2. That pursuant to Section 1(A) and (B) of the *Civil Procedure Act* the plaintiff and the defendant are directed to purpose to

       fast- track the pre-trial Conference to have the matter listed for hearing and determination on the interlocking issues.
    3. That the costs of this application to abide the outcome of the suit.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 28TH DAY OF MARCH 2023

R.NYAKUNDI

JUDGE

Coram: Before Hon. Justice R. Nyakundi

M/s Oburu & Co. Advocates

Kale Maia & Bundotich Advocates

Miyenda & Company Advocates