



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO.E037 OF 2021

ELIAS MUTURI NJIRU.....APPLICANT/APPELLANT

VEERSUS

NAWIRI SACCO SOCIETY.....1ST RESPONDENT

GIANT AUCTIONEERS2ND RESPONDENT

RULING

1. By an notice of motion dated 12.10.2021, the applicant/ appellant herein moved this court under certificate of urgency and wherein he sought for orders that:

i. Spent

ii. The Honourable court be pleased to issue injunction orders to restrain the respondents from exercising their statutory power of sale in respect of charged property known as Land Parcel No. Ngandori/Kirigi/T143 pending the hearing and determination of this application interparties.

iii. The Honourable court be pleased to issue injunction orders to restrain the respondents from exercising their statutory power of sale in respect of charged property known as Land Parcel No. Ngandori/Kirigi/T143 pending the hearing and determination of the lodged appeal.

iv. Costs of the application be in the cause

2. The application is premised on the grounds on its face and it's supported by the affidavit sworn by the applicant.

3. The applicant/appellant moved the court under certificate of urgency and the court upon considering the application in the first instance, granted interim orders to last until the 1/11/2021 when the application came up for inter partes hearing. On the said date, the respondents did not attend court and the interim orders were confirmed to last until the appeal is heard and determined.

4. It is the above notice of motion and the orders therein that caused the filing of the preliminary objection dated 28.10.2021 wherein the respondents in support of the preliminary objection proffered the following grounds that:

i. The notice of motion was filed by an advocate who is not properly on record for the applicant/appellant.

ii. The court lacks jurisdiction to hear and determine both the application and the appeal herein in view of Article 162(2) (b) of the constitution of Kenya.

iii. The notice of motion dated 12.10.2021 is therefore incompetent and should be struck out together with the appeal with costs.

5. The applicant/appellant swore a replying affidavit where he deposed that the application dated 12.10.2021 was filed by the current counsel on record and that prior to the filing, the counsel herein had not acted for the appellant before the tribunal court; further that, the High Court has jurisdiction to hear and determine the appeal and that, the issue of jurisdiction cannot be raised now since, the court has already pronounced itself via orders dated 01.11.2021.

6. The respondents submitted that the appeal to this court was as a result a ruling and orders delivered by Hon. B. Kimemia and Hon. Mwatsama dated and delivered on 02.09.2021 wherein the appellant herein was represented by Winnie Ngigi & Associates Advocates and in this particular regard, no notice of appointment has been filed by the current firm of advocates acting for the appellant; that this is in breach

of the requirement under Order 9 Rule 7 of the Civil Procedure Rules. That the appellant had filed the appeal herein in person and there was no notice of appointment filed by the firm of Wandia Murimi Advocates and as such, the notice of motion dated 12.10.2021 was filed by an advocate who is not on record.

7. They submitted that the notice of motion in question thus is incompetent and as such, should be struck out. It is also their case that this court lacks jurisdiction to hear and determine both the notice of motion dated 12.10.2021 and the entire appeal in that, the dispute herein relates to environment, use, occupation and title to land and can only be determined by the Environment and Land Court and as such, this court lacks jurisdiction since the only prayer sought by the applicant is one for permanent injunction restraining the respondents from attaching, advertising for sale, selling, alienating and disposing off or in any way dealing with the claimant's property Land Parcel No. Ngandori/Kirigi/T143. Reliance was made on the case of **Nancy Wambui Ndung'u v Joseph Kahukia & Another (2020) eKLR** wherein they urged this court to down its tools and take no further step or action other than striking out both the notice of motion dated 12.10.2021 and the appeal in its entirety and award costs to the respondents.

8. The applicant/appellant submitted that there is no law that compels the advocate to file an appeal through the firm of the advocates that represented the litigant in the subordinate court. That the notice of motion and the appeal as filed were fresh and in reference to Order 9 Rule 1 of the Civil Procedure Rules; he submitted further that, it is not a requirement that a party must file a formal notice of appointment of an advocate when a matter is fresh and in any case, the counsel for the respondents received the pleadings without protest. Reliance was made on the case **Iway Africa Ltd v Infonet Africa & Standard Chartered Bank of Kenya Limited [2017] eKLR**. In the same breadth, he urged this court to invoke Article 159 of the Constitution and further Section 1A of the Civil Procedure Act which furthers a just, expeditious, proportionate and affordable resolution of civil disputes.

9. It is his case that the dispute between the parties herein is based on a commercial lending transaction where there was a purported breach of terms of the facilities that led to an attempted sale of the charged property. That the substantive dispute before the Tribunal was whether there was a breach of contract and if so, whether the respondents followed the prescribed law in exercising their purported power of sale of the charged property. The appellant argued that this matter does not relate to matters listed in article 162 of the constitution since it only dwells on issues of accounting mishaps, alleged breach of a commercial contract leading to an attempted illegal exercise of power of sale over a charged property by the 1st respondent. He proceeded to state that the jurisdiction of the High Court as set out by Article 165 of the constitution provides that the court has appellate jurisdiction and without doubt competent to hear and determine the appeal herein. Reliance was made on the case of **Thomas Mutuku Kasue v Housing Finance Company Ltd & Legacy Auctioneers (2020) eKLR**. It was his prayer thus that this court invokes its jurisdiction to hear and determine the appeal herein.

10. The parties took directions that the preliminary objection be canvassed by way of written submissions and wherein all the parties complied.

11. It is clear that the respondents have opposed the notice of motion dated 12.10.2021 for the reason that no notice of appointment has been filed by the current firm of advocates acting for the appellant and as such, the said firm of advocates is not properly before the court; in that regard, the main issues that I have to determine are:

i. *Jurisdiction.*

ii. *Whether the notice of motion was filed by an advocate who is not properly on record.*

12. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** where it was held;

“So far as I am aware, 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 objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. On jurisdiction, it was submitted that this court lacks the jurisdiction to determine the matter herein. It is trite that the jurisdiction of a Court can neither be implied nor conferred by agreement of parties, by judicial craft or legal sophistry, it must be expressly provided for in the Constitution or in the statute. This was the holding of Supreme Court in the case of, **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where it held, that:

“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 counsel 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.”

14. The jurisdictional limit of the High Court is anchored in ***Article 165(3) of the Constitution*** which states:-

“Subject to clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters;

b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened:

c) *Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

d) *Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-*

i) *The question whether any law is inconsistent with or in contravention of this Constitution;*

ii) *The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.*

iii) *Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*

iv) *A question relating to conflict of laws under Article 191; and*

e) *Any other jurisdiction, original or appellate, conferred on it by legislation.*

15. Section 74 of the Co-operative Societies Act states that: -

“(1) Any person aggrieved by an order of the Commissioner under section 73(1) may, within thirty days, appeal to the Tribunal.

(2) A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.”

16. The matter whose decision has been appealed against originated from the co-operative tribunal wherein the appellant was dissatisfied with the ruling. As already pleaded, the substantive dispute before the Tribunal was whether there was a breach of contract between the parties herein. The applicant/appellant had sought for stay orders pending sale by public auction of the charged property Land Parcel No. Ngandori/Kirigi/T.143 after the 1st respondent had sought to exercise its statutory power of sale. The applicant had contended that it did not receive the requisite statutory notices; it was submitted that, the substratum of the suit relates to the legal charges and subsequent statutory power of sale thus this matter is purely a commercial dispute within the jurisdiction of the High Court and is in fact, the dominant dispute for determination under the predominant purpose test. The appellant contended that the respondents’ claim that the matter herein falls under the Environment and Land Court is unfounded and relied on the decision in the case of *Kisimani Holdings Limited & Another v Fidelity Bank Limited [2013] eKLR*, where it was held that in matters involving a charged property, the proper forum for filing the suit is the High Court. In my view, the jurisdictional dichotomy of which court should hear disputes where charged properties are concerned was laid to rest by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR*. I find that this court has jurisdiction to hear the matter herein.

17. The second limb is whether the advocate for the applicant/ appellant is properly on record before the court.

18. **The applicant/appellant has urged this court to invoke article 159 of the Constitution and further Section 1A of the Civil Procedure Act which furthers a just, expeditious, proportionate and affordable resolution of civil disputes. In the case of *Abdirahman Abdi also known as Abdirmahman Mohamed Abdi v Safi Petroleum Product Ltd & 6 others (2011) eKLR* the Court of Appeal stated:-**

"The enactment of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159(2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

19. With regard to the 2nd issue, the court notes that the appellant filed the memorandum of appeal in person. The firm of Wandia Murimi Advocates filed the notice of motion dated the 12th day of October, 2021 but did not file a notice of appointment of advocates as required under Order 9 Rule 7 of the Civil Procedure Rules. It therefore follows that the notice of motion and the record of appeal are incomplete.

20. In the foregoing, the notice of motion dated 12/10/2021 and the record of appeal filed on the 10/10/2021 are hereby struck out with costs to the respondent.

21. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....**FOR THE APPLICANT/APPELLANT**

.....**FOR THE 1ST RESPONDENT**

.....**FOR THE 2ND RESPONDENT**