



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

JUDICIAL REVIEW NO 13 OF 2019

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 2, 53(1), 68 OF THE PROCEEDS OF CRIMES

AND ANTIMONEY LAUNDERING ACT NO 9 OF 2009 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 76 OF THE LAND REGISTRATION ACT CAP 300 OF LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 23 AND 47(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULE, 2010

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

AND

**IN THE MATTER OF REMOVAL OF AN ILLEGAL RESTRICTION PLACED
BY ASSETS RECOVERY AGENCY ON LR NO MITUBIRI/WEMPA BLOCK 1/6824**

FAMILY BANK LTD.....APPLICANT

AND

ASSETS RECOVERY AGENCY.....1ST RESPONDENT

LAND REGISTRAR, THIKA LAND REGISTRY.....2ND RESPONDENT

ATTORNEY GENERAL.....RD RESPONDENT

CHOSEN BUILDERS INVESTMENT LTD.....INTERESTED PARTY

JUDGMENT

1. **Attorney General**, the 3rd Respondent (hereinafter A. G), filed Notice of Preliminary objection, in this matter, dated 2nd March 2020. In that objection, A.G. contends that this court lacks jurisdiction to hear and determine this action because it is a dispute relating to environment and use and occupation of, and title to land, whose jurisdiction falls on the Environment and Land Court.

2. **Family Bank Limited**, the ex parte Applicant (hereinafter the Bank) seeks this court's leave to institute judicial review proceedings for an order of certiorari, to remove to this court and quash the decision of the **Assets Recovery Agency**, the 1st respondent (hereinafter the Agency) and the decision of the **Thika Land Registrar**, the 2nd Respondent, (hereinafter the Respondent) in respect to the registration by the Agency of a restriction over property LR No. Mitubiri/Wempa Block 1/6824 (hereinafter the property). The Bank also seeks leave to institute judicial review proceedings for an order of mandamus directed to the Registrar to remove the said restriction. The Bank also seeks to institute judicial review proceedings for an order of prohibition directed to the Agency from interfering with the property.

3. **Alex Mwangi Muriithi**, the Bank's relationship manager deponed, by the affidavit dated 14th August 2019, that Chosen Builders Investments Limited, the interested party, obtained a loan from the Bank, which loan was secured by the charge of the property which charge was in favour of the Bank. The deponent therefore stated that the Bank acquired an interest and obtained proprietary rights in the property by way of the charge registered on 30th April 2015. That on the interested party defaulting in the repayment of that loan advanced, the bank commenced process of realizing its security and it is then, the Bank conducted an official search on the property and found that there was a restriction placed against the property by the Agency which restriction was preventing any dealing over the property pending conclusion of investigation.

4. **Fredrick Muriuki**, the police officer attached to the Agency by his replying affidavit, dated 10th February 2020 stated that he was tasked to investigate fraud and theft of KShs.1,052,746,094 from **Ekeza Sacco**. In that regard he was required to trace, identify, preserve and forfeiture of proceeds of crime as provided under **Proceeds of Crime and Anti-Money laundering Act**. It is that investigation that led to the Agency, on confirming there were no encumbrances against the property, placed a restriction on property.

ANALYSIS AND DETERMINATION

5. A.G. has raised the objection to this court entertaining this matter. Judge John M. Mativo in the Case **Republic -v- Chief land Registrar and Another (2019) e KLR** in discussing jurisdiction referred to the John Becroft's Treatise "Words and phrases Legally Defined" Volume 3: 1 N, thus:

6. *"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"*

7. Under Article 156 (5) of the Constitution the jurisdiction of the courts that are contemplated under Article 162 (2) is excluded. It is under Article 162 that the Constitution established two other courts of equal status to the High Court, that is **Employment and Labour Relations Court** and **Environment and Land Court**.

8. Our focus for the matter before me is the Environment and Land Court. Section 13 of the Environment and Land Court Act No. 19 of 2011, on the jurisdiction of that court provides:

(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, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and

70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs

9. The Bank argued that the issue of land, in this case, is peripheral to this matter and that since the issue of legality of the restriction is the substratum of the dispute that this court should determine, this court has jurisdiction to entertain this matter. The Bank relied on the case **Republic -v- Chief Land Registrar & 3 Others (2018) eKLR** where the court held that it is not the mere mention of the word “Land” which connotes jurisdiction. The Bank further relied on the case **Land Commission and Another; Kimasas Farmers Co-operative Society and Another; Eastern Produce Kenya Limited (Ex parte)** where the court held that where a matter is hybrid, where both the High Court and Environment and Land Court have concurrent jurisdiction, that is where the issues cut across, either court can hear the matter.

10. In this case I beg to differ with the Bank’s Submissions. The issue for determination is whether the Agencies’ restriction over the land is lawful that is whether there was an encumbrances when the Agency placed the restriction. It is an issue relating to the title to the land. In my view the issues raised herein falls squarely within the provisions of Section 13 of Environment and Land Act. The court is called upon to consider whether there was encumbrance when the agency applied for restriction on the property. The issue is not contractual, that is the issue is not about the loan contract. If it were then the matter would fall to be determined by this court. It is because of that finding that I find and hold that the objection raised by A.G. is merited.

11. The fact the objection succeeds it does not follow that this suit should be struck out. This court has inherent power to transfer this matter to the court that should entertain it.

12. It follows that in respect to the Notice of Preliminary objection dated 2nd March 2020 I make the following orders:

a) The Preliminary Objection dated 2nd March 2020 succeeds

with costs thereof being awarded to the 3rd Respondent.

b) This case is hereby transferred to the Thika Environment and Land Court for hearing and determination.

c) At the reading of this Ruling a mention date will be fixed before that Court.

SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

Applicant –

For the Applicant – Mr. Abdulahi

For the Respondent – Ms Nyakora

COURT

Judgment virtually delivered in their presence.

MARY KASANGO

JUDGE