



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL SUIT NO. 5 OF 2020

PASAKA VENTURES LIMITED.....PLAINTIFF

VERSUS

KAUSHIK PANCHMATIA.....DEFENDANT

RULING

The application before me is dated 10th February 2021.

1. The Defendant sought an order to arrest the Ruling which the Court was scheduled to deliver on 12th April 2021.
2. The Defendant asked the Court to strike out the suit, for want of jurisdiction.
3. It is common ground that the Plaintiff, **PASAKA VENTURES LIMITED** participated at a Public Auction on 17th July 2020, where it was declared the highest bidder in respect of the “*Suit Property*”, **L.R. NO. KISUMU/MUNICIPALITY BLOCK 12/310**.
4. The said suit property had been put on auction by **PRIME BANK LIMITED**, in the exercise of the said bank’s statutory powers of sale.
5. After the public auction the Plaintiff was registered as the owner of the suit property on 3rd August 2020.
6. The Plaintiff instituted these proceedings for the purposes of obtaining orders to compel the Defendant, **KAUSHIK PANCHMATIA**, to vacate the suit property.
7. In a nutshell, the Defendant’s current application asks me to find that the High Court lacks jurisdiction to hear and determine the case.
8. The Defendant’s position was that the orders sought in the suit could only be granted by the **Environment and Land Court**.
9. The Defendant submitted that pursuant to the provisions of **Article 162 (2)** of the **Constitution**, as well as **Section 13** of the **Environment and Land Court Act**, cases in which the predominant issue is either the occupation of or the title to land, may only be handled by the **Environment and Land Court**.
10. Consequently, the Defendant contends that the suit herein was a nullity *ab initio*. Based upon that contention, the Defendant told the Court that it was incapable of giving a ruling on the Plaintiff’s application.
11. In answer to the application the Plaintiff submitted that the matter in dispute herein was of a commercial nature.
12. According to the Plaintiff, the issues which the Court will be called upon to take into consideration when making a determination of the suit, were essentially concerning commercial processes.
13. In the case of **CO-OPERATIVE BANK OF KENYA LIMITED Vs PATRICK KANGETHE NJUGUNA & 5 OTHERS, CIVIL APPEAL NO. 83 OF 2016** the Court of Appeal held as follows;

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it, according to the purpose for which that land is adapted. Neither the *cujus*

doctrine nor Article 260, whether expressly or by implication recognizes charging land as connoting land use.”

14. In the case before me the Plaintiff did not even have the relationship of chargor/chargee as between it and the Defendant.
15. The suit property had been offered as security, by way of a charge, which was registered in favour of Prime Bank Limited.
16. It is noteworthy that even where there was a legal charge, the Court of Appeal held as follows, in the case of **CO-OPERATIVE BANK OF KENYA LIMITED Vs PATRICK KANGETHE NJUGUNA & 5 OTHERS** (above-cited);

“Further, Section 2 of the Land Act recognizes a charge as a disposition in land. A disposition is distinguishable from land use. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be “using” his land simply by virtue of having a floating charge/disposition over the property.”

17. The Court of Appeal made it plain that the jurisdiction of the **Environment and Land Court** to deal with disputes relating to contracts under **Section 13** of the **ELC Act** should be understood within the context of that court’s jurisdiction to handle disputes connected to “the use” of land.
18. Accordingly, the Court held that such contracts do not include mortgages, charges, or collection of dues and rents.
19. The Court of Appeal held that contracts of mortgages, charges, collection of dues and rents fall within the jurisdiction of the High Court.
20. I am aware that L. Gacheru J. arrived at a different conclusion in **PETER KIAMA MAINA Vs INDUSTRIAL COMMERCIAL DEVELOPMENT CORPORATION & ANOTHER, ELC CASE NO. 11 OF 2020.**
21. In that case the 1st Defendant had asserted that the **ELC Court** lacked jurisdiction as the dispute in issue had arisen from a commercial lending transaction.
22. The learned Judge expressed herself thus;

“The Land Act and Land Registration Act also provide for the jurisdiction of the Environment & Land Court, as the two Acts address the land transactions and dispositions of land. The process through which a chargee can exercise its statutory power of sale is found in the said Acts, and therefore the jurisdiction of the Environment and Land Court (ELC) in dealing with the same is justified.”

23. Meanwhile S. Munyao J. held as follows in **LYDIA MBUGUA Vs DIAMOND TRUST BANK KENYA LIMITED & ANOTHER, ELC NO. 296 OF 2013;**

“It will thus be seen from the above that it is the ELC and the empowered subordinate courts which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions.

Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and empowered subordinate courts which have jurisdiction.”

24. I must admit that the reasoning advanced by the learned Judges of the **Environment and Land Court** sounds very convincing.
25. Nonetheless, the decision of the Court of Appeal remains binding upon the High Court, and I am thus constrained to be guided accordingly.
26. In effect, I find that the High Court has jurisdiction to hear and determine the case herein.
27. The application dated 10th February 2021 is dismissed, with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2021

FRED A. OCHIENG

JUDGE