



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

COMMERCIAL SUIT NO. 7 OF 2019

BETWEEN

STEPHEN KARIUKI PAUL.....PLAINTIFF

VERSUS

1. CO-OPERATIVE BANK OF KENYA.....1ST DEFENDANT

2. MELLECH ENGINEERING & CONSTRUCTION CO. LTD.....2ND DEFENDANT

RULING

1. STEPHEN KARIUKI PAUL (Kariuki) filed this case on 7th November, 2017 before the Environment and Land Court (ELC) at Thika, before being transferred to this court because it is a commercial matter. Before that court, Kariuki filed an interlocutory application by way of Notice of Motion dated 3rd November, 2017. By that application, Kariuki sought injunction to restrain Co-operative Bank of Kenya Limited the 1st defendant hereinafter the Bank, from realising its security.

2. The background of this case is that Kariuki is the registered owner of property L.R. No. SIGONA/195 (hereinafter the property). The Bank granted a loan facility to Mellech Engineering and Construction Co. Ltd, the 2nd defendant. Kariuki amongst other persons guaranteed that loan and also as security for the loan charged their properties to the Bank. The loan was for Kshs.105 million. Kariuki who charged the property as security for that facility filed this case based on his allegation that the Bank offered further loan facility to the 2nd defendant without his knowledge. Kariuki by his pleading stated that the bank and the 2nd defendant acted illegally in disbursement of the further loan to the 2nd defendant without his knowledge. By his plaint, Kariuki prays for orders for injunction to restrain the Bank from realising its security by auctioning the property, for an order for reconciled account to be provided, for a declaration that the loan given to the 2nd defendant by the Bank was illegal, for documents relating to loan facility to be provided, and for 2nd defendant to be compelled to pay the Bank the loan.

3. The interlocutory application was heard by a judge of the Environment and Land Court (ELC) and the learned Judge of that Court, *Justice L. Gacheru*, delivered a ruling on 24th May, 2019. By that ruling the learned Judge dismissed Kariuki's application for interlocutory orders. After delivery of that ruling the learned Judge transferred this matter to this Court, Kiambu High Court. The learned Judge in transferring the matter to this Court noted that the matter involved realisation of "Security which is a preserve of the High Court."

4. Kariuki has now filed before this Court a Notice of Motion application dated 5th August, 2019 seeking the following orders:-

a. THAT this honourable Court be pleased to review and/or set aside the Ruling delivered on the 24th May, 2019.

b. THAT this honourable court, upon review, do issue an order for an injunction against the First defendant stopping the said defendant from selling, offering for sale, transferring or in any other way interfering with L.R. No. SIGONA 195 pending the hearing and determination of this suit.

5. Kariuki's prayers are based on the grounds that the ELC lacked jurisdiction to entertain this matter and that there is an error on face of the record because the learned judge failed to take into account that the Bank and the 2nd defendant altered their relationship without involving him.

6. It is clear from the above grounds that the application is premised on the ground that ELC lacked jurisdiction when it delivered its ruling and in delivering that ruling failed to take into account Kariuki's allegation that the Bank and 2nd defendant had altered their contract.

7. The issues that need determination are:-

- (i) Can this Court review a decision of co-ordinate court; and
- (ii) Is there merit in the application?

8. The Constitution under **Article 165(1)** establishes the High Court and under sub Article (3) set out the jurisdiction of the High Court. Under sub-Article (5), the Constitution provides that the High Court shall not have jurisdiction in respect to matters reserved for exclusive jurisdiction of the Supreme Court and the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court.

9. As stated before, Kariuki first filed this case before ELC. The Court of Appeal pronounced itself in the case **CO-OPERATIVE BANK LIMITED VS. PATRICK KANGETHE NJUGUNA & 5 OTHERS (2017) eKLR** on the matter of which court has jurisdiction to hear disputes relating to mortgages and accounting. The court held that the jurisdiction on such disputes lies before the High Court. This is what the Court of Appeal held:-

“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court...

the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia, that:-

‘1. subject to clause (5), the High Court shall have -

a. unlimited original jurisdiction in criminal and civil matters...’ (Emphasis mine)

10. The learned Judge of ELC transferred this case to this Court in view of the above holding of the case of **CO-OPERATIVE BANK VS. KANGETHE** (supra). The High Court and ELC are courts of equal status. See **Article 162(1)**. It follows that the power to review decree or order under **Section 80** of Civil Procedure Act Cap 21 and under **Order 45** of the **Civil Procedure Rules** (hereinafter the Rules) can enable the High Court to review an order or decree of a court of equal status, such as ELC, so long as the application is properly brought within the ambits of section 80 Cap 21 and Order 45 of the Rules and so long as the High Court has jurisdiction over the matter, the subject of the review. Having made that determination, the issue to determine is whether Kariuki’s application for review and for injunctive orders is merited.

11. Section 80 of Cap. 21 provides:-

“Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. Kariuki is, as can be seen from his application, aggrieved by the Ruling of the ELC. He however will need to satisfy the provisions of Order 45 of the Rules which is in the following terms:-

“Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”
(Emphasis mine)

13. What is the basis of Kariuki seeking review? Kariuki seeks review on the grounds that ELC had no jurisdiction to entertain the interlocutory application for injunction and that ELC court failed to consider his contention that the bank and the 2nd defendant altered their

relationship in according the 2nd defendant further loan.

14. By his affidavit in support of the application, Kariuki deponed that ELC erred to have heard and determined his application when it had no jurisdiction.

15. My consideration of the application and deposition of Kariuki reveals that Kariuki seeks review because ELC Court made an error in law. That in my view is a ground to file an appeal against the decision of ELC as provided under **Section 16** of the Environment and Land Court Act. That Section provides thus:-

“Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

16. The Court of Appeal was of similar sentiments in the holding in the case of NAKURU INDUSTRIES LIMITED VS. SIRBROOK (K) LIMITED (2017) eKLR thus:-

“A litigant who has a right of appeal but has not appealed or who has no right of appeal but who desires to seek review of the order or decree with which he is aggrieved must bring himself within the parameters of rule 1(1) of Order 45. In the instant case, the matters stated by the appellant as the basis of the review sought before the learned Judge fell outside the ambit of rule1(1) (supra). They also could not constitute “any other sufficient reason” as they were clearly grievances appertaining to alleged errors by the learned Judge in his decision. That is the stuff expected in an appeal and not in a review. It would be awkward for a judicial officer to be required to sit and listen to submissions and arguments as to why his decision is wrong or erroneous. That would be tantamount to asking the court to sit on appeal on its own decision.” (Emphasis mine)

17. The Supreme Court also made a similar determination in the case REPUBLIC VS. KARISA CHENGO & 2 OTHERS (2017) eKLR as follows:-

“[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:-

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.” (Emphasis mine)

18. It is clear that Kariuki failed to bring his application within the provisions of Order 45 of the Rules in that he failed to show discovery of new and important matter or mistake or error apparent on the face of the record. Kariuki erred to say that this Court can review the ruling of ELC because the court did not consider the altered contract relationship between the Bank and 2nd defendant. I have noted that Kariuki placed before ELC Court, as one of the grounds in support of his application, precisely that issue of altered relationship. Kariuki is not correct in that contention that ELC by its Ruling failed consider that issue. ELC did determine that issue. If however Kariuki is aggrieved by the ELC’s determination of that issue, the only option available to Kariuki as provided under Section 16 ELC Act is to appeal to the Court of Appeal. This Court is not competent to entertain an appeal from ELC.

19. On the whole, because Kariuki failed to meet the provisions of **Order 45** of the Rules and because his grievance should be entertained by the Court of Appeal, the Notice of Motion dated 5th August, 2019 is without merit and is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF OCTOBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant : Nancy

For the Plaintiff: Mr. Makori

For the 1st Defendant : N/A

For the 2nd Defendant: Mr. Ongengu

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE