REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO 6 OF 2018

ASIS HOTEL LTD...PLAINTIFF

VERSUS

I & M BANK LIMITED...DEFENDANT

RULING

1. By a notice of preliminary objection dated 9.04.2018, the defendant argues that this court lacks the requisite jurisdiction to hear and determine this suit which offends **Section 7** of the **Civil Procedure Act**.

It is contended that the suit breaches the rule on res judicata and is an abuse of court process designed by the plaintiff to circumvent express legal provisions in a bid to forum-shop for a favourable court.

The suit is also described as defective for non-joinder of a necessary party i.e the firm of auctioneer.

2. The preliminary objection was canvassed through written submissions wherein the defendants counsel pointed out that the plaintiff filed a suit challenging the sale of property known as **ASIS HOTEL** situated on parcel No. **ELDORET MUNICIPALITY/BLOCK 6/180,** which was scheduled for sale by public auction on 12th April 2018. Plaintiff sought an order that the said sale which was conducted either by auction or private treaty be declared null and void, and the defendant be restrained from taking possession or any other steps in the running of the suit property.

In alternative prayers urges the court to order an independent and reputable valuer to furnish the court with a current valuation report of the suit property.

3. It is submitted that the plaintiff's cause of action does not arise from the charge instrument but from the sale transaction – meaning the plaintiff has no issue with the terms of the charge instrument, but only the value of the property. Further that the plaintiff has an issue with the possession and use of the property by the defendant in operating the hotel business. Counsel argues that taking into consideration the nature of the dispute demonstrated by the pleadings and the reliefs sought, then this court is divested of such jurisdiction to entertain the matter.

4. The basis for this objection is that the dispute herein falls within the category of matters reserved for hearing and determination by the Environment and Land Court. It is submitted that the jurisdiction of this court is limited by **Art 162** of the Constitution of Kenya with respect to land disputes. Further that **Section 162** provides for the establishment of specialized courts to hear and determine matters on:

> **(a) employment and labour relations.**
>
> **(b) The environment and the use and occupation of, and title to, land.**

That this is fortified by **Section 4** of the Environment and Land Court Act which establishes the Environment and Land Court and **Section 13(2)** which gives the Environment and Land Court power to hear disputes involving inter-alia relating to public, private and community land and contracts, choses in action, or other instruments granting any enforceable interests in land.

5. Counsel contends that since the dominant issue in the plaintiff's case is valuation of the land which fall squarely under **Section 13 (2)** of the Environment and Land Court Act.

It is also pointed out that the plaintiff is also challenging the sale of the subject property which is an overriding interest in the land as envisaged by Section (d) of the Act. Counsel argues that a sale transaction conveys title over the property and is actually a process geared towards transfer of ownership of land – so that what the appellant is challenging is the dispute of ownership or title to the suit property. It is on account of this that the defendant maintains that a dispute over title to land is outside the preview of this court's jurisdiction as the running

of the hotel is an aspect of land use.

6. In opposing the preliminary Mr Omboto on behalf of the plaintiffs submits that the jurisdiction of the Environment and Land Court is limited under **Art 162,** of the Constitution, **Section 13** of the Environment and Land Court Act and **Section 150** of the Land Act, none of which concern the determination of accounting issues. This he insists takes this matter away from the jurisdiction of the Environment and Land Court, and places it under the High Court. He points out that the dominant issue in this case is the settling of accounts owing from the respondent by dent of a charge on account of contractual relationship of a banker and lender which is only the preserve of the High Court.

7. He draws this court's attention to the provisions of **Section 2** of the Land Act which defines a charged to mean:

> ***"an interest in land securing the payment of money or money's worth or the fulfilment of any condition. The right is only limited to the realization of the suit security so advanced."***

8. It is contended that the charge is simply limited to ensuring that the chargee is assured of repayment of the money he has advanced to the charger. Counsel urged this court to be guided by the court of Appeal's decision in ***Msa CA No 83 of 2016 Co-op Bank of Kenya Ltd V Patrick Kangethe & others*** where the court stated that **Section 2** of the Environment and Land Court Act is only;

> **"…recognized a charge as a disposition in land. A disposition is distinguishable from land "use: where the former creates the relationship, the latter is the utilization of the natural resources found on … saying that creation of an interest or disposition amount to use of land, is akin to saying that writing a will bequeath land or the act of signing a tenancy agreement constitutes land use… the mere acquisition or conferment of an interest in land does not amount to use of that land."**

It is on the strength of this that the defendants counsel urges this court to find that this matter cannot fall within the jurisdiction of the Environment and Land Court, clarifying that the dispute is strictly premised on the charge created in favour of the defendant, and not on the land use.

He concedes that there is a case before Eldoret Environment and Land ***Court being ELD ELC No. 43 OF 2017*** but this case was withdrawn on 20th March 2018 vide a notice of withdrawal dated on 10th April 2018 (a copy is annexed). Counsel points out that the ELC matter never took off for hearing and determination on merit and on account of jurisdiction, the matter was transformed into the current suit, so res judicata does not apply.

That in any case the matter which was before the ELC had sought an injunction to restrain the defendant from exercising its purported statutory power of sale in respect of the suit property for non compliance with Section 96 (2) of the Land Act where the defendant's agents had not prepared a valuation report while the present case seeks revocation of sale conducted on 12.04.2018 without adhering to the required procedure and the plaintiff's claim is that in exercise of the statutory power of sale, the defendant greatly undervalued the suit property – so the sale ought to be declared null and void.

9. As per the non-joinder of parties, this court is urged to pay heed to Art 159 (2) (d) of the Constitution of Kenya as read with Order 1 Rule 9 of the Civil Procedure Rules which dictate that a suit shall not be defeated by reason of mis-joinder or non-joinder of parties. Also that Section 1B (d) of the Civil Procedure Act which requires court uphold the over-riding objectives by refusing to be unduly hampered by procedural technicalities, and allow a matter to be determined on merit – taking a cue from ***Eldoret HCC No.342 of 2014 SKAIR ASSOCIATES ARCHITECTS VS EVANGELICAL LUTHERAN CHURCH OF KENYA & 4 OTHERS (2015) eKLR.***

10. Certainly the Constitution has spoken that justice shall not be hampered by undue (emphasis mere) procedural technicalities. The question is whether the issue of court's jurisdiction is an undue procedural technicality? The very constitution which frowns at procedural technicalities is the same one which under **Art 162** and **165** created the special courts and High Courts and prescribed their intent of their involvement in different kinds of dispute, Indeed the classical statement by ***Nyarangi (J) in the M.V Lillian's V Caltex oil (Kenya) Ltd [1989] KLR 1*** that:

> **"…Jurisdiction is everything. Without it the court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tool in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

Does the situation prevailing here fall within the above context of the M V Lillian S Scenario. I will not pretend to re-invent the wheel – the dispute here does not relate to use of the land per see, it is with regard to the charge and the valuation of the property sold thereof. It fits in exactly with what the court of Appeal addressed in the **Co-op Bank Ltd,** and attempts to split hairs on what is in issue here, is simply breathing hot air. I have no doubt in my mind that the dominant issue is the settling of accounts. The question regarding restraining orders is a collateral one – that pending the taking of accounts there should be restraining orders. I hold that the matter is properly before this court.

As to whether the matter is res judicata on the basis that it was initially filed before the Environment and Land Court at Eldoret.

> (1) The matter was withdrawn before being heard. **Section 7** of the Civil Procedure Act is very clear – the term refers to a matter which has been heard and determined – which is not the case here.

11. As for non-joinder and mis-joinder that is really upto the plaintiff, if it decides to proceed without forming the necessary party, then certainly it must know where the hammer will fall – it would not be a reason to strike out a suit as there are other avenues of remedying the situation.

12. The upshot is that the preliminary objection lacks merit and is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY 2019

H. A. OMONDI

JUDGE