



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 462 OF 2019

VERONICA MARY NJERI.....APPLICANT

VERSUS

TRIPPLE EIGHT PROPERTIES LIMITED.....1ST RESPONDENT

JOSEPH MBURU T/A

SANFORD & DAUGHTERS.....2ND RESPONDENT

RULING

1. This ruling is premised on the preliminary objection raised by the 1st respondent challenging this court's jurisdiction to entertain the Notice of Motion dated 25.6.2016 brought by the applicant.
2. In the aforementioned Motion, the applicant is seeking for *inter alia*, an order for a stay of execution of the decree issued on 28th May, 2019 in Nairobi CMCC NO. 1355 OF 2015 involving the parties herein pending the hearing and determination of an intended appeal against the ruling delivered by Hon. K.I. Orange learned Senior Resident Magistrate delivered on 16th May, 2016 and a further order for a stay of the proceedings. The applicant is also seeking for leave of this court to lodge an appeal out of time.
3. In his oral arguments in respect to the preliminary objection Mr. *Mandala* learned advocate for the respondent contends that the background of the matter relates to a land dispute, hence this court lacks jurisdiction to entertain the application currently before it. He also pointed out that there is a similar application pending before the trial court, thus there is no reason for this court to entertain the present application at this point in time.
4. Mr. *Ratemo*, learned advocate for the applicant opposed the preliminary objection arguing that the order being appealed against solely concerns the issue of costs awarded by the trial court, which costs emanate from the eviction of the applicant from the property known as LR. No. 209/1635/2 hereinafter referred to as the suit property.
5. The learned advocate further to argued that a preliminary objection ought to be based on uncontested facts and in the present instance, the profits arising out of the suit property are being contested. He also averred that in the event that this court takes the view that the matter concerns a land dispute, then the suit be transferred to the Environment and Land Court (ELC).
6. I have considered the rival arguments taken by the parties. This court has been called upon to determine the question as to whether or not this court has jurisdiction to handle the application. The preliminary objection is basically based on two main grounds..
7. The *first* ground is that the motion is res subjudice since a similar application is pending before the trial court. Both parties are in agreement that the applicant filed an application dated 25th June, 2019 before the trial court seeking for orders for a stay of execution and a stay of proceedings pending the hearing and determination of the intended appeal. The respondent has pointed out that the aforesaid application is still pending before the trial court, a fact which remains undisputed by the applicant.
8. It is therefore clear that the applicant has breached the subjudice rule by filing two similar applications, one in this court and the other before the trial court. It would appear the two applications are of the date. In my view the applicant's action amounts to an abuse of the court process.
9. The second ground which was ably argued by the respondent is that the dispute is a land dispute hence the court lacks jurisdiction to entertain it. It is apparent from the material presented to this court by the parties that the 1st respondent instituted a suit against the applicant and the 2nd respondent on 18th March, 2015 seeking for an order of mandatory injunction for the applicant's eviction from L.R no. 209/1635/2.

10. It is in dispute that upon hearing the applicant's application dated 10th April, 2015, the trial court made an order to set aside the eviction orders on the condition that the applicant refunds the 1st respondent a sum of Kshs.1,239,000/= being the costs incurred in commencing the execution process of the eviction orders. The applicant has indicated that the award on costs is the subject of the intended appeal, though it is admitted that there is a contest regarding the suit property before the trial court.

11. I have carefully considered the rival submissions and further perused the trial court's ruling delivered on 15th June, 2015, and it is apparent that the disputed ownership of L.R. no. 209/1635/2 is the crux of the matter. Moreover, the costs being appealed against were derived from the purported eviction of the applicant from the suit property. The dispute which gave rise to the award of costs is basically a land dispute. The two issues cannot be separated as suggested by the respondent.

12. Having ascertained that the dispute revolves around a land dispute, I am of the view that the relevant statute which donates and defines jurisdiction is the **Environment and Land Court (ELC) Act** passed pursuant to Article 162(2) (b) of the Constitution, of Kenya, 2010. **Section 13** of the aforesaid Act provides inter alia as follows:

“(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.”

13. Further to the above, **sub-section 7** of the above section stipulates that the Environment and Land Court has the power to grant either of the following reliefs:

(a) interim or permanent preservation orders including injunctions

(b) prerogative orders

(c) award of damages

(d) compensation

(e) specific performance

(g) restitution

(h) declaration

(i) costs

14. It is clear from the provisions of the Environment and Land Court Act that the dispute herein squarely falls within the realm of the Environment and Land court. With respect, I agree with the submissions of the 1st respondent that the motion is improperly before this court. This court has been urged to strike out the motion. I am however persuaded that the preliminary objection should be upheld but in broad interest of justice a faire order to make is to order that the matter be transferred to the Environment and Land Court instead of striking it out. Consequently, this matter is withdrawn from this court and transferred to the Environment and Land Court for hearing and determination. Costs of the preliminary objection assessed at kshs.6000/= is awarded to the 1st respondent.

Dated, signed and delivered at **NAIROBI** this 31st of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent