



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.85 OF 2019

SPIRE BANK LIMITED.....APPELLANT/APPLICANT

-VERSUS-

EMERGING INVESTMENTS LIMITED.....RESPONDENT

(Being an appeal from an order of the chief magistrate's court at Nakuru of Hon. J. B. Kalo, Chief Magistrate delivered on 16th April 2019 in Nakuru CMCC No.1192 of 2018)

RULING

1. This is a ruling on **application** dated **14th May 2019** and **preliminary objection** dated **20th May 2019**. The application seeks temporary injunction to restrain the respondents or their servants or agents from leasing the premises identified as **Nakuru Municipality/Block 9/34** specifically the banking hall previously occupied by **Dubai Bank** measuring 1900 square feet on the ground floor pending hearing and determination of this appeal.
2. The respondent filed preliminary objection on ground that this court lacks jurisdiction to hear this appeal by dint of **Articles 162 (2) (b), 165 (5) (b) of the constitution of Kenya 2010** and **Section 13 of Environment and Land Act, section 101 of Land Registration Act and Section 38 (1) and 150 of land Act** as issues revolve around contract for disposition of land more specifically lease.
3. Grounds on the face of the application are that a ruling was delivered on **14th April 2019** to **strike out the applicant's suit** with costs to the respondent on ground that it lacked pecuniary jurisdiction to hear and determine the suit.
4. That the applicant is aggrieved by failure by the trial magistrate to construe the nature of the transaction between the parties which was agreement to lease but not lease itself; and owing to the foregoing, the applicant has a *prima facie* case which will be rendered nugatory if injunctive orders are not granted pending the hearing and determination of the appeal.
5. That upon expiry of 30 days from delivery of the ruling, the applicant stand to lose the premises, which will have serious negative effects; reason being that the premises had been strategically identified for banking business and the applicant may not find a suitable place, will lose deposit held by the respondent and would also be condemned to pay costs in the lower court; and appeal filed will be rendered nugatory.
6. The applicant averred that the application herein has been filed without delay; further that if injunctive order is not granted, the applicant will suffer loss which cannot be quantified by an award of damages; that the applicant is ready to abide by the conditions as may be imposed by this court.
7. In response, the respondent filed **replying affidavit** sworn on 22nd May 2019 by **Amit Shah** a director of the defendant company.
8. Respondent averred that the application is frivolous, vexatious and fatally defective; that the application and affidavit as filed are full of misrepresentation and this court should not grant any equitable remedies.
9. Respondent aver that in suit filed in the lower court, the plaintiff sought specific performance for contract to lease property and in the alternative damages for breach of contract; that plaintiff particularized breach of contract which precipitated the prayers sought which meant the plaintiff was to compel the defendant/respondent to lease the property to it.
10. Respondent averred that for the applicant to claim that it wanted the court to compel the plaintiff to enter into the contract for lease is a misrepresentation of material facts and also a position which is not tenable in law; that the applicant herein intend to change the cause of action and or misconstrue material facts as they were in court to be granted injunctive orders.

11. Further that facts as presented before the trial court, consideration for specific performance was kshs 28,000,000 as monthly rent was 400,000 plus 16% VAT for 6 years, which is way beyond jurisdiction of chief magistrate's court.

12. Respondent further averred that the applicant is guilty of misrepresentation of material facts and non-disclosure of material facts as no evidence was adduced in the trial of payment of any deposit; that the applicant failed to disclose that it has existing tenancy with the respondent where respondent leases another wing of the building and deposit held by respondent is in respect of the existing lease; that the applicant has come to court with unclean hands and is not therefore deserving of equitable reliefs sought.

13. Respondent averred that this application has been brought under **Order 40 of Civil Procedure Rules** and conditions set out in the case of **Giella vs Cassman Brown** should be satisfied. Conditions being that *prima facie* case has been established, the applicant is likely to suffer irreparable harm if injunctive orders are not granted and if court is in doubt to decide the case on a balance of probabilities.

14. The respondent contend that the applicant has not established *prima facie* case with high chances of success; reason being that the trial magistrate did not have pecuniary jurisdiction to handle this matter and this court cannot confer jurisdiction to the trial court.

15. That the controversy in the trial court revolved around the question of disposition of an interest in land therefore the court's jurisdiction to hear the appeal has been ousted by **Article 162(2) (b), 165 (5) (b)** of the **Constitution of Kenya 2010, Section 3 of the Environment and Land Court Act and Section 101 of the Land Registration Act and Section n 38(1) and 150 of the Land Act.**

16. Respondent further averred that the plaintiff had a prayer of alternative prayer of damages for breach of contract meaning the loss can be quantified into monetary terms and it is not therefore irreparable

17. That the applicant is conducting business on the same floor as the premises subject to this dispute and that the applicant has not made any payments towards the new premises that would be considered as consideration and cannot plead to have suffered or will suffer any loss; that the balance of convenience lies with applicant not being granted injunctive orders sought as they have not demonstrated any loss that they are likely to suffer.

ANALYSIS AND DETERMINATION

18. I have considered arguments by both parties herein. I first wish to consider the issue of jurisdiction raised in the preliminary objection (P.O).

19. It is important for this court to determine the issue of jurisdiction first as if the court find that it has no jurisdiction to entertain this matter then it cannot proceed to consider prayer for injunction.

20. In the Supreme Court decision in **Samuel Kamau Macharia & Another -vs- KCB & 2 Others application No. 2 of 2011 the Supreme Court** held that:

“a court's jurisdiction flows from either the Constitution or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or both or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

21. The Jurisdiction of the High Court is provided under **Article 165(3)** of the Constitution thus subject to Clause 5 the High Court shall have :

(a) **Unlimited original jurisdiction in criminal and civil matters.**

Section 65(5) States that:

The high court shall not have jurisdiction in respect of matters

(b) **Falling within the jurisdiction of the courts contemplated in Article 162(2).”**

22. The courts contemplated under the said **Article 162(2)** are (a) **the Employment and Labour Relations** (b) **the Environment** and the use and occupation of, and title to land.

23. From pleadings filed in the lower court and averments and submissions filed, there is no dispute that the dispute in this matter arise from contract for lease of premises. The applicant sought specific performance for contract to lease property. This not disputed by the appellant/applicant.

24. In the case **Karisa Chengo & 2 other -vs- Republic Court of Appeal** at **Malindi Criminal Appeal Nos. 44, 45 and 76 of 2014**, the Court rendered itself, while discussing the issue of jurisdiction of the High Court, that the High Court cannot deal with matters set out under **Section 12** of the **ELRC Act** and **Section 13** of the **ELC Act ---”**

25. From the foregoing, it is clear that the constitution of Kenya 2010 has ousted jurisdiction of matters provided under Section 13 ELC Act and Section 12 of the ELC Act from High Court to the two courts of equal status ELC and ELRC respectively.

26. Section 13(2) (d) of The Environment and Land Court Act establishes Environment and Land courts to hear and determine matters

...

(d) Relating to public land, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land.

27. I now wish to look at definition of land. Article 260 of the Constitution, states that unless the context requires otherwise, 'land' includes-

- a. The surface of the earth and the subsurface rock;
- b. Any body of water on or under the surface;
- c. Marine waters in the territorial sea and exclusive economic zone;
- d. Natural resources completely contained on or under the surface; and
- e. The air space above the surface."

28. In Mombasa Civil Appeal No. 83 of 2016 Co-Operative Bank of Kenya Limited Vc Patrick Kangethe Njuguna & 5 others the court of appeal stated as follows:-

“Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as *Cujus est solum, eius est usque ad coelum et ad inferos* (*cujus* doctrine)which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell". As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well. The doctrine restricts the definition of land use to necessary and ordinary use and enjoyment of the land and structures upon it (see. Lord Bernstein of Leigh v. Skyviews and General Limited [1978] QB 479). “

29. From the above definitions, there is no doubt that land mean the surface of the land, and/or the surface above it and/or below it.

30. As for land use, the **Black’s Law Dictionary, 9th Edn**; gives the basic definition of the word ‘use’ as being:-

“the application or employment of something; especially a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ **Emphasis added.**”

31. From the foregoing Premises described herein as subject matter of this suit fall within the above definitions; the Environment and Land Court is therefore seized with jurisdiction to hear and determined this matter.

32. Having found the above, I will not consider the application dated 14th May 2019 but transfer this matter to Environment and Land court (ELC) for hearing and determination.

33. FINAL ORDERS

- 1. Matter transferred to ELC
- 2. Costs in the cause.

Ruling dated, signed and delivered at Nakuru this 28th day of November, 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Ms. Ngugi holding brief for Malenya Counsel for Appellant

No appearance for Counsel for Respondent