



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 327 OF 2008

UNCLE SAM'S GITHURAI LIMITED.....1ST PLAINTIFF/APPLICANT

KAREN WANJIKU THUMBI.....2ND PLAINTIFF/APPLICANT

VERSUS

SAMUEL MURIITHI MURIUKI.....1ST DEFENDANT/RESPONDENT

JOSEPH NG'ANG'A MUIRURI.....2ND DEFENDANT/RESPONDENT

MERCY WAMBUI MUIRURI.....3RD DEFENDANT/RESPONDENT

HOUSING FINANCE CO. OF KENYA LTD.....4TH DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 15th May 2017, brought under the provisions of Sections 1A, IB, 3A and 3B, Section 18 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 51 of the Civil Procedure Rules and all other enabling provisions of the Law.

2. The Applicant is seeking for orders that;-

(i) That this Honourable Court be and is hereby pleased to transfer this matter to the Milimani ELC Division for hearing and determination;

(ii) That costs of this Application be provided for.

3. The Application is supported by the grounds thereon and an Affidavit dated 15th May 2017, sworn by Karen Wanjiku Thumbi, a director of the 1st Plaintiff/Applicant Company. The deponent avers that this suit was filed vide the Complaint dated 18th June 2008, wherein she sought for various orders from the Court as therein stated and that by the time the matter was filed in the Civil Division of the High Court, the various divisions of the High Court were not distinct.

4. However, during the pendency of the matter, the Environment and Land Court Division was created with the sole mandate to primarily handle disputes concerning Environment and Land. From the

pleadings herein, this matter concerns fraudulent transfer of the suit property and any orders granted will be implemented by the Chief Land Registrar, Nairobi. Therefore the same ought to be transferred to the Milimani Environment and Land Court Division of the High Court.

5. It was argued that Section 13 of the Environment and Land Court Act provides that the Environment and Land Court has jurisdiction to hear and determine all disputes relating to environment and land. That the issue of jurisdiction is a fundamental and cardinal matter which should be dealt with at the very onset. Thus the Applicants will be greatly prejudiced if the matter is prematurely dismissed and/or finalized on account of insufficient jurisdiction of the Honourable Court.

6. In that regard, it is only fair and in the interest of justice that the prayer sought in the Application be granted as none of the Defendants stands to suffer any prejudice should this matter be transferred as prayed. Even then, the full trial of this matter has not commenced and no witnesses have testified yet.

7. The 1st Respondent did not file any response to the Application, but the second and Third Defendants filed grounds of opposition dated 6th September 2017 to oppose the Application. These grounds states that the Applicants have not given sufficient reason for the Court to exercise its discretion to transfer the suit to the Environment and Land Division. That they are guilty of laches as there has been undue delay in the filing of the application and the same lacks merit. Further, the application is fatally defective, incompetent, misconceived, frivolous, vexatious, an abuse of the process of the Court and bad in law.

8. The Application was also opposed by the 4th Defendant vide a Replying Affidavit dated 14th July 2017, sworn by Joseph Lule, the Legal Officer of the 4th Defendant Company. He averred that the 2nd Plaintiff/Applicant and 1st Defendant/Respondent are husband and wife and/or directors of the 1st Plaintiff Company.

9. That by a charge dated 29th May 1997, the 1st Plaintiff charged a parcel of land known as LR No. Nairobi/Block 116/33 Zimmerman Estate, (herein “the suit property”), to the 4th Defendant in order to secure a sum of Kenya Shillings Five Million (Kshs. 5,000,000.00).

10. On or about the year 2000, a Receiver/Manager was duly appointed to manage the suit property and collect rent on behalf of the 4th Defendant/Respondent. The proceeds were remitted to the mortgage account. However, the funds collected were not enough to service the loan facility and in the year 2007, the 4th Defendant/Respondent revoked the Receivership as the rent collected was not enough to service the mortgage account.

11. Be that as it were, the Plaintiff Company has admitted its indebtedness and by letters dated 22nd and 25th October 2007, it requested the 4th Defendant/Respondent to allow the suit property to be sold by private treaty rather than have the 4th Defendant/Respondent exercise its statutory power of sale. The 1st Plaintiff/Applicant through its directors then signed an agreement dated 31st January 2008 giving authority for the sale of the suit property by private contract for a sum of Kenya Shillings Eight Million One Hundred and Fifty Thousand (Kshs. 8,150,000).

12. The Respondent argued that the cause of action in this suit arises from that sale by private treaty of the suit property. That despite the Plaintiff/Applicant’s averments that the sale was fraudulent and denies signing the agreement for Sale of the suit property, the main prayers seeks for a nullification of the transaction entered into by the 1st Defendant/Respondent. Therefore this is not a dispute that revolves around the ownership of property but a wrangle and dispute between two directors with a view of depriving the 3rd and 4th Defendants/Respondents of their accrued rights. Therefore the claim herein is purely Commercial in nature and that in any event, the hearing was certified on 23rd March 2015.

13. The parties agreed to dispose of the Application by filing submissions. The Applicants filed their submissions dated 5th October 2017 and argued that their intention is not to interrogate whether the

Charge was entered into procedurally and details thereto. But their primarily concern is how the suit property changed hands without the involvement of the Directors of the 1st Plaintiff Company. That the commercial aspect of the Charge does not concern the Plaintiff particularly with regard to what amount of money the suit property was charged and whether or not the Chargor honoured his contractual obligations.

14. The Applicants therefore contend that the 1st Defendant/Respondent had no authority to dispose of the property to the 2nd and 3rd Defendants/Respondents or anyone else and that the matter herein involves the legal and rightful registered owner of the suit property. That based on the provisions of Article 162 (2)(b) of the Constitution which establishes the status of Environment and Land Court and Section 13 of Environment and Land Act, which confers jurisdiction on the Environment and Land Court, the Court with jurisdiction to hear this matter is the Environment and Land Court Division and not the High Court Division whose jurisdiction is provided for under Article 165(5)(b) of the Constitution.

15. The Applicants relied on the case of; **Owners of the Motor Vessels "S" vs Caltex Oil (Kenya) Limited (1989) KLR 1** where the Court held that jurisdiction is everything and without it the Court cannot move. It was held that;

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

16. The Applicant further relied on the provisions of Article 159 of the Constitution to argue that the issues raised in the grounds of opposition herein are of a technical nature and that the Court should disregard procedural technicalities as provided for under the said Article. The said legal issues are matters that can be canvassed at the main trial.

17. However, the 4th Defendant/Applicant in submissions reiterated the matters deposed in the Replying Affidavit and submitted that the main issue for determination in this suit is; whether the sale and transfer of the suit property was fraudulent, whether the 2nd and 3rd Defendants/Respondents are bona-fide purchasers for the value and whether the 4th Defendant/Respondent was required to ascertain if the internal management rules had been complied with by the Directors of the 1st Plaintiff Company.

18. It was argued that the Environment and Land Court does not have jurisdiction to deal with these issues raised in the Plaint and Statement of defence.

19. Reliance was placed on the case of; **Kisimani Holdings Limited & Another vs Fidelity Bank Limited (2013) eKLR**, where the Court held that, the Environment and Land Court does not have jurisdiction to hear and determine the cases relating to banking transactions. Further that the charging of the property as security is a secondary issue to the main cause of action being the banking transactions.

20. Similarly, the case of; **James Odhiambo Oyugi vs Kenya Commercial Bank Limited & Another (2015) eKLR**, was cited where the court held that it had jurisdiction to deal with the matter filed before it which was in relation to transactions of the Charge Instrument and declined to transfer the suit to the Environment and Land Court. It was held that;

"I have considered the submissions of the parties on this issue and I hold the view that in a matter such as this, the High Court has jurisdiction because what is at issue is the charge instrument."

21. At the conclusion of the arguments by the parties and in considering the submissions tendered alongside the grounds and the Affidavits in support and in reply and the grounds in opposition thereto, I

find the issue to determine is whether the matter herein and in particular the prayers sought for are within the ambit and/or the jurisdiction of the Environment and Land Court Division or the High Court Division.

22. I note from the Plaint filed in Court dated 18th June 2008, the Plaintiffs/Applicants seeks for the following orders;-

(i) That a declaration that the Transfer of the parcel of land known as Nairobi/Block 116/33 registered on 20th May 2008 in favour of Joseph Nganga Muiruri and Mercy Wambui Muiruri (the 2nd and 3rd Defendants herein) as joint tenants was obtained through fraud and/or forgery;

(ii) That an order that the registration of the said Joseph Nganga Muiruri and Mercy Wambui Muiruri as joint tenants of the leasehold title No. Nairobi/Block 116/33 be annulled, and/or cancelled, and the Land Register at the Nairobi District Registry be so rectified;

(iii) That a permanent injunction to issue to restrain the Defendants, particularly the 2nd and 3rd Defendants, from alienating, taking over, assuming ownership, dispossessing, ousting, trespassing, and/or in any other manner whatsoever from interfering with the First Plaintiff's quiet and peaceful user and occupation of that property known as Nairobi/Block 116/33;

(iv) That costs of the suit herein;

(v) That any other or further relief that this Honourable Court may deem fit and just to grant.

23. In my considered opinion, the factor to consider is the circumstances under which the alleged transfer of the suit property was transferred from the 1st Plaintiff's Company to the 2nd and 3rd Defendants. As already stated herein, the suit property was used as a security for a loan advanced to the 1st Plaintiff and that the alleged sale that took place upon default to repay the loan. However, the question that arises is whether in the first place, the charge over the suit property was lawful, legal and whether it created a valid transfer of any legal rights from the 1st Plaintiff's Company to the 4th Defendant. This in itself is a commercial issue.

24. I also take cognizance the prayers in the Plaint and in particular prayer (c) where the Plaintiffs/Applicants seeks that the Defendants/Respondents be permanently enjoined from interfering with the 1st Plaintiff's/Applicant's quiet enjoyment and peaceful user and occupation of the suit property. Once again, this prayer cannot be considered independent of the rights of the 4th Defendant/Respondent (if any) in the suit property. This again is an issue of Commercial nature.

25. Be that as it were, as already stated this suit was filed in Court in the year 2008, it has been in Court for a period of about ten (10) years. The Plaint was filed alongside a Notice of Motion Application of the same date seeking basically for an interim injunction order to restrain the 2nd and 3rd Defendants/Respondents from interfering with the quiet possession of the suit property by the 1st Plaintiff.

26. I note from the record that, that Application was heard and a ruling delivered thereon on 18th March 2009, whereby the Court declined to grant the injunction order arguing that in view of the fact that the property was already registered in the name of the 2nd and 3rd Defendants/Respondents and that the suit property has ascertainable value damages would be adequate remedy in the event that the Plaintiffs/Applicants were to succeed in the suit.

27. After the Ruling, and the promulgation of the Constitution and/or the establishment of the Environment and Land Court, eight (8) years ago, the matter continued in the Commercial & Admiralty Court. The record reveals that after the year 2010, the Applicant filed a Notice of Motion Application dated 29th March 2011, seeking for orders that the Court do set aside, vary and/or review its orders made on 28th March 2011 which dismissed the Plaintiff's suit for want of prosecution. That Application was

resolved vide a consent order entered into by the parties on 16th June 2011.

28. On 27th September 2011, the Court delivered a ruling on the Notice of Motion Application dated 22nd March 2012 whereby the Plaintiffs/Applicants were seeking for orders for extension of validity of the summons. The Court held that the issuance of summons to enter appearance in the matter be dispensed with as all the parties were properly before the Court. Thereafter the parties commenced compliance on the pretrial directions. The matter was subsequently certified as ready for hearing on 17th October 2014.

29. On 23rd March 2015, the Plaintiffs sought for an adjournment on the ground that the 2nd Plaintiff was not feeling well. The matter was adjourned subsequently to 21st July 2016. On that date, the Plaintiffs once again sought for an adjournment on the ground that the 2nd Plaintiff/Respondent who is the key witness was unwell. The Application was allowed and the Plaintiffs were granted a final adjournment to prosecute the matter in view of the fact that there was no evidence of indisposition. The matter was stood over to 23rd January 2017. However, the matter was not heard. The Plaintiffs had not complied with the Court orders that awarded costs to the 2nd and 3rd Defendants/Respondents and that occasioned several adjournments due to the non-compliance. The matter was then fixed for mention on 31st March 2017, to confirm compliance and for further orders and before that was done, the Plaintiffs filed their Application.

30. I have made reference to the record of the Court. The Applicants have taken over eight (8) years to file this Application and have all along participated in this matter by fixing hearing dates with the full knowledge of the establishment and/or jurisdiction of the Environment and Land Court Division. Similarly, although the Applicants have argued that they are not faulting the Charge and/or any matters related thereto, I find that from the averments in the Plaint, the issue of the charge cannot be divorced from this matter as evidenced by the 2nd Plaintiff's averments in particular at paragraph (8) of the Plaint that;-

“the second Plaintiff avers that in or about 1997, the 1st Plaintiff borrowed a sum of Kshs 5 million from the 4th Defendant whose repayment was secured by a Charge in favour of the 4th Defendant in respect of the said property known as Nairobi/Block 116/33.”

31. It is therefore clear that the reference to the Charge created over the suit property is a great consideration in deciding this matter. In addition, the 2nd Plaintiff avers under paragraph (9) that;-

“the 2nd Plaintiff avers that it is the 1st Defendant who is actually involved in the day to day running of the affairs and activities of the 1st Plaintiff and does not fully involve the 1st Plaintiff in the same as she has for a long period been indisposed and concentrated on the upbringing and schooling of their children.”

32. This is also evident that the issue of management of the 1st Plaintiff Company in terms of the Powers of the Directors thereof and the authority to act and bind the Company will be an issue for determination, to ascertain whether there was a valid Charge created in favour of the 4th Defendant/Respondent which would have given it the rights to exercise its power of sale over the suit property either by public or private treaty. This in my opinion is a matter that can be canvassed and be determined before Commercial Division of the High Court.

33. It is also important to note and without considering the merit of the case that in the entire Plaint there is no allegation of forgery of the 2nd Plaintiff's signature although in the Affidavit in support of the Application at paragraph 7(a) the 2nd Plaintiff depones as follows;-

“that I am therefore apprehensive that this being a purely land matter concerning forgery and fraud, the same ought to be transferred to the Milimani ELC Division of the High Court.”

34. It is therefore clear that, the issues herein involve both the validity of the Charge in favour of the 4th

Defendant, the resultant power of sale and/or the legality of the transfer of the title to the suit property from the 1st Plaintiff's Company to the 2nd and 3rd Defendants/Respondents. Similarly, to establish the validity of the Charge, the Court will have to interrogate the issues raised by the Plaintiffs in relation to having been kept in the dark as the property was being charged to the 4th Defendant.

35. If for one reason or another the Court determines that there was no valid Charge under which the 4th Respondent could have exercised its power of sale, either through public or private treaty, then the transfer of the property to the 2nd and 3rd Respondents will be invalid, and in that case there will be no need to refer the matter to the Environment and Land Court. Thus this matter can be heard in this Commercial and Tax Division.

36. All in all, I find that the Plaintiffs will not suffer any prejudice if this matter is heard before this Court, and I hold that this Court has jurisdiction to hear and determine the issues raised herein. The upshot is that the Application is dismissed with the costs to the Respondents.

37. Those then are the orders of the Court.

Dated, delivered and signed in open Court this 15th day of March, 2018.

G.L. NZIOKA

JUDGE

In the presence of :-

Mr. Githinji for Mr. Muchoki for the Plaintiffs/Applicants

No appearance for the 1st Defendant/Respondent

Ms. Mwangome for the 2nd and 3rd Defendants/Respondents

Ms. Gulenywa for Ms. Mugo for the 4th Defendant/Respondent

Lang'at -----Court Assistant