



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO.1353 OF 1998

JOSEPH KAARA HENRY MWETHAGA.....PLAINTIFF

VERSUS

CHRIS M. GATURU

T/A CRIMA ENTERPRISES.....1ST DEFENDANT

THABITI FINANCE COMPANY LIMITED

(IN LIQUIDATION).....2ND DEFENDANT

MUGUNANDU FARM LIMITED.....3RD DEFENDANT

JOEL GATIMU KIBUCHI.....4TH DEFENDANT

RULING

1. By his motion dated 31 October 2017, the Plaintiff seeks to have this court transfer the instant suit to the Environment and Land Court for final determination as, according to the Plaintiff, the subject matter of the dispute does not fall within the jurisdiction of this court.
2. From the face of the motion the application appears to have been prompted by the decision of the Supreme Court of Kenya in the case of **R-v- Karisa Chengo & 2 others** Petition No. 5 of 2015. Counsel for the Plaintiff also copiously referred to this decision which stands for the proposition that matters within the recluse of the High Court's jurisdiction cannot be handled by the Environment and Land Court, and by the better reason the High Court should also not handle matters which fall within the jurisdiction of the Environment and Land Court.
3. There is no doubt that the decision in **R-v- Karisa Chengo & 2 others (Supra)**, by virtue of provisions of Article 163(7) of the Constitution binds this court. Matters and claims which fall within the ambit of Article 162 (2) (b) and Article 162 (3) of the Constitution as read together with Section 13 of the Environment and Land Court Act, No. 19 of 2011 cannot be adjudicated upon by this court.
4. Does the claim herein fall within the exclusive purview of Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act?
5. A quick and closer look at the Plaintiff's amended statement of claim reveals that the Plaintiff seeks to

challenge the exercise of a chargee's statutory right of sale and the rights which accrue by virtue of such sale. The Plaintiff in his statement of claim accuses the Defendants of failure to provide accounts. The Plaintiff also indicts the Defendants with false representation. The Defendants are accused of disposing of the suit property at an under-value. The Plaintiff then seeks damages for loss of user and for the loss sustained in the course of reconstruction. There are also allegations of fraud and failure to comply with the provisions of both the Auctioneers Act and the Land Control Act. The Defendants have denied the Plaintiff's claims seriatim.

6. Counsel for the Plaintiff, Mr. Wachira was of the opinion that the matter substantively relates to land. The Defendants counsel Mr. Mocha and Mr. Ohenga held the contrary view. According to the Defendants, this is a purely commercial matter.

7. There is no doubt that a court's jurisdiction emanates from the constitutional and statutory provisions and no court should ever seek to extend or overreach its jurisdiction by craft. By the same vein as well, a jurisdictional issue is one of substance and not merely a technical one. The court when the issue arises is enjoined to wholly reflect on the claim as well as the relevant constitutional and statutory texture.

8. I must hasten in these respects to point out that not all land related matters were intended by the Constitution to be handled by the Environment and Land Court. The relevant Constitutional indexation may be fetched to Article 162(2) (b) of the Constitution which dictated the creation of the Environment and Land Court to handle disputes relating *"to the environment and the use and occupation of and title to, land"*. The Constitution does not say that all disputes relating to land to be handled by the Environment and Land Court. The provisions of S.13 of the Environment & Land Court Act again sought to amplify the jurisdiction of this specialty court. Inter alia, the section talks of the Environment and Land Court having jurisdiction to deal with disputes relating to *"public private and community land and contracts, choses in action or other instrument granting any enforceable interest in land"*.

9. A charge creates no interest in land. It is purely a commercial transaction. The chargee's right is in the form of a security which is enforceable in a particular manner subject to both statute and the provisions of the charge instrument. This is the gist of S.80(1) of the Land Act, 2012.

10. The Plaintiff in the instant suit has an issue with the manner in which the chargee exercised its rights of sale. It is the process that the Plaintiff questions. It is the impugned process that the Plaintiff alleges has occasioned him loss. I do not find that the Plaintiff's claim concerns or touches on any interest in land. Rather the dispute concerns the exercises of a commercial and contractual right as conferred by statute. It is not in my view even a matter of a predominant claim over land or a commercial contract. The provisions of S. 80 (1) of the Land Act are clear that a Charge creates no interest or right in land which either party to the charge instrument may claim. Any claim pegged on the charge or exercise of rights under a charge, as in this case, must be limited to the commercial nature of the transaction and no more. This applies as well in my view to any subsequent rights including a claim in damages by either party.

11. In my view, the claim herein is not primarily about land. It's about the exercise of powers conferred by statute and the consequences of such exercise. I am therefore not convinced that the application dated 30 October, 2017 is merited.

12. It is dismissed but with no order as to costs.

Dated, signed and delivered at Nairobi this 8th day of December, 2017.

J.L.ONGUTO

JUDGE

Ruling delivered in the presence of:

Counsel for the Plaintiff

Counsel for the Defendant