



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 04 OF 2014

ESTHER NYANGANYI ONYANGO..... PLAINTIFF

VERSUS

1. HOUSING FINANCE COMPANY OF KENYA

2. JAMES O. ONYANGO..... DEFENDANTS

RULING

Introduction

1. This is a decision on a notice of preliminary objection filed by the Defendant against the plaintiffs and seeking to strike out the suit on the basis that this court lacks jurisdiction on the basis of the provisions of Article 165(5) as read with Section 13 of The environment And Land Court Act, expressly and in unequivocal terms divests and ousts the jurisdiction of the High Court to entertain it. The suit is grounded on a contract of lending between the parties concluded by a legal charge created and registered over the plaintiff's parcel of land known as ELDORET MUNICIPALITY/BLOCK 21(KINGONGO) 1696, KAHOYA AREA.

2. In urging the preliminary objection, Mr. Kongere summarised the points raised in the Notice dated 30.4.2014 into 2 issues:-

(a) Whether the High Court has jurisdiction to entertain a suit challenging the exercise of statutory power of sale by the chargee under the Land Act.

b) Whether a party other than the chargor and a spouse of the chargor can obtain remedies under section 105 of the Land Act.

3. The objection was thus argued on the basis that it merits determination on the two issues and I adopt the same as the only issues for determination by the court.

Background

4. The two parties to this dispute take a common stand that there indeed exists a charge created by the second defendant in favour of the first defendant over the suit property to secure the borrowings of the said second defendant from the first defendant. The suit therefore resists the defendant's right to realise

the security by way of a public auction. The defendant on its side, without going to the merits, says his court has no jurisdiction to entertain the matter as the jurisdiction has been ousted by the constitution and vested in the Environment and Land court by operation of the clear and unambiguous provisions of Article 165(5) as read with section 13 of The Environment and Land Court Act.

Analysis

5. Article 165 (5) (b) the constitution divests the High Court of jurisdiction over matter reserved for the courts established under Article 162(2). The question that avails itself for answer is what matters have been reserved for the exclusive jurisdiction of court created under Article 162(2) and in circumstances of this case the Environment and Land Court and whether that jurisdiction was intended to be and remain exclusive.

6. I take judicial notice that historically, Kenyans have had a long struggle with how to handle land disputes owing to the special place the subject land as a factor of production, means of livelihood and, to a large number, a sense and measure of success and therefore in many instances emotions are abound, not on the title but even just association with the occupation of land.

7. It was therefore not surprising that when the Kenyan Constitution was promulgated in 2010, the whole chapter 5, (Articles 6—72) were devoted to Land And Environment and a special court created under Article 162(2) b to determine disputes relating to, **the environment and the use and occupation of and title to land**. Parliament is then mandated by the Constitution under Article 162 (3) to determine the jurisdiction of the court. in exercise of that mandate and in furtherance of the will of sovereign, parliament enacted Environment and Land Court Act 2011 and set the jurisdiction at section 13 in the following words:-

(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.

(Emphasis provided)

8. It is this section that the defendant in this matter contends divests this court of jurisdiction in the

matter. In order to determine the issue whether or not there is jurisdiction, the cause of action as pleaded in the plaint must be interrogated and related to the statute vesting jurisdiction. That relationship must however be further related to the constitution regard being had to the fact that Act in terms of Article 162(2) is a normative derivative of the constitution and must be seen to further and foster the value systems, principles and purposes of the Supreme law. This court will therefore seek to find out the very reason why there was need to create a specialised court in the general architecture of our constitution.

9. The court as a state organ derives its powers from the people of Kenya courtesy of Article 159. The court therefore operates within those parameters set at Article 159 as read and interpreted with other provisions of the constitution setting out value systems, principles and purposes. In my view those value systems include:

- expeditious disposal of legal disputes by the courts;
- observance of access to justice as a fundamental right
- Elimination of obstacles presented by procedural technicalities including the need to minimise costs.

10. To me therefore the constitutional powers donated to parliament to establish and vest the Environment and Land Court with jurisdiction must of necessity further and bolster the purpose for which the Kenya people created the judiciary to work for and on their behalf; the just, expeditious, cost effective (inexpensive and proportionate dispute Resolution).

11. The dispute before me is pleaded at paragraphs 5 & 6 of the plaint to the effect that by a legal charge executed between the 1st and 2nd defendants, without the knowledge of the plaintiff, a parcel of land known as ELDORECT MUNICIPALITY/BLOCK 21 (KINGONGO/1696 was offered as security by the 2nd defendant to the 1st defendant. As a result of that transaction the 1st defendant has set in motion a process to sell the property to recover the loan it advanced to the 2nd defendant. The plaintiff felt aggrieved by that action and seeks orders of injunction stopping the sale and an order opening the charge to enable the plaintiff liquidated the debt.

In relating the cause of action to the pleadings, I will seek to find out whether there is indeed a question as to use, occupation of and title to land as asserted by either side. In doing so, I appreciate that the second defendant has not filed a defence to the action

12. This decision is not on the merits of the plaintiffs' suit but on whether or not this court has jurisdiction to determine the issue. My reading of the constitution leads me to the conclusion that having created the court to handle matter relating to environment and the use and occupation and title to land, and given the power to determine the jurisdiction to parliament, the basis of that power must be traced to the purpose for which the court was being created and no more.

13. In urging the objection, Mr.Kongere, Advocate for the defendant, underscored the fact that section 13(2) d of Act No.19 of 2011 divests the High Court of jurisdiction in that the dispute relates a contract of charge as an instrument granting an enforceable interest in land.

14. To this court the purposive interpretation I give to the provision is that the instrument and the right it creates must be capable of vesting a right to occupy, use or title to the land. A charge or mortgage is never a transfer. It only creates a security for the payment of moneys advanced. It vests on the chargee no right to occupy or use the land so offered neither does it vest upon the chargee the title to the land. In fact, the charge is a mere collateral to the loan agreement itself initiated and grounded on the letter of offer.

15. To that extent the other question would be to explain the use grounds exclusive jurisdiction as used in section 150 of the Land Act. It appears to me that the decision by my broker Sila Munyao j, in Nakuru Hcc No. 345/2014 JOHN KIMANI NJONGA -VS- MARGARET WANJIRU KANYIRI& OTHERS decided on 14.5.2015 like all the other decisions made prior to 15.12.2015 were made with reliance on the provisions of the Land Act.

16. It appears to me that parliament in execution of constitutional mandate under Article 93 has relooked the definition of the court and the jurisdiction given to it under the Land statutes and by the statute Law (Miscellaneous Amendment) Act 2015, the exclusive jurisdiction has now been repealed.

17. I am minded to take the view that the experience by Kenyans since the operationalization of the Environment and Land Courts is that Kenyans have appreciated the work load that section 13 of the Act places on the shoulders of that court. I equally take judicial notice that presently the court is manned by only twelve (12) Judges. The question one would ask is how effective would that court be if all and every dispute that involve an interest in land; say even a dispute on where to inter the remains of a member of a disputing family, would be buried. This coupled with the fact that land forms a very large foundation of Commercial transactions in this country. With the appreciation of that fact, for many years, we have developed systems of dispute resolution including a fully fledged Commercial division of the High court, The Business Premise Rent Tribunal and the Rent Restriction Tribunal. These courts have served Kenyans for many years and deliberate efforts have been made to improve on their delivery.

18. If one was to construe the provisions of section 13 of the Environment and Land Court Act to exclude all except the court as defined then it would mean that the Act has by inference repealed both cap 296 and 301 and rendered irrelevant even own in-built special power of the Registrar to determine boundary disputes under section 18. The practice on the ground reveals that has not happened. In fact the statute law (Misc Amendment) Act, aforesaid specially recognises such tribunal as capable of rendering decisions capable of generating appeals to the court. Of great note to the court is the amendment to section 7 of the Act, on the power of the Chief Justice to transfer a judge of the High Court to the court or other court of equal status to the court.

19. This to me underscores the fact that these courts must and are manned by judges of equal ranking able to appreciate and interpret law as presented in any particular case, but for the higher constitutional dictate that justice shall not be delayed, there is need for specialization. That to me does not make one judge less or more qualified on his calling than the other. The purpose of any court manned by a judge is to determine a dispute before it evenly and justly. In performing that duty this court is bound to be directed in terms of Articles 3 and 259(1) to interpret Article 162(2) in a manner that furthers timely determination of land disputes. Faced with an almost situation of strict interpretation of jurisdiction on one hand and need for timeous disposal of electoral disputes, the court of appeal in *Jared Odoyo Okelo vs IEBC AND 3 OTHER* (2014) Eklr said:-

There is little doubt in our minds that timeliness in the resolution of disputes in general, and electoral disputes in particular, is a core purpose, value and principle of the Constitution of Kenya, 2010. **Art 159(2) (b) of the Constitution** recognises, the principle that “*justice shall not be delayed*” as one of the key principles that must guide courts in the exercise of judicial authority.

20. For the foregoing reasons I refuse to construe the statute, section 13 (2) d of the Environment and Land Court Act with the strictures Mr. Kongere has sought from the court. I hold that commercial transactions even of grounded on land must remain commercial transaction unless they vest or create rights that can result in and touch on Environment, the use and occupation or title to land. in the instant case the question is whether or not the bank should recover its debt in terms of the collateral and not otherwise. I therefore find no merit in the preliminary objection and dismiss the same with costs.

21. By way of active case management I direct that for the matter to be directed towards its logical conclusion on the merits. Let all the parties file any pleadings and documents they wish to file within 21 days from today and to settle and file agreed issues within 40 days from today.

22. The filed be mentioned in court on 11.7.2016 to confirm compliance and to take a date for a case conference.

Dated, signed and delivered at Mombasa this 13th day of May 2016.

In the presence of:

Mr. Nyangoe for the Plaintiff.

Mr. Busieka for Mr. Kongere for the Defendant.

P.J.O.OTIENO

JUDGE