



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E211 OF 2021

DR. MARTIN LUTHER MC WERE..... PLAINTIFF

VERSUS

JAMES MABANGO AMBUNDODEFENDANT

RULING

(In respect to the Preliminary Objection dated 12th October 2021)

Introduction

1. By a Plaint dated 16th April 2021, the Plaintiff brought this suit against the Defendant for prayers that;

a) An order requiring the Defendant to account for all the money received during the exercise of the Power of Attorney and in the management of the two houses; B2 in Kileleshwa situated on NO. NRB/BLOCK 209/2973 and house No. 8 situated in Lavington on L.R No. 3734/929.

b) Upon accounting for all the monies received, the Defendant be ordered to remit/release/surrender all the rent money collected but did not remit to wit; Ksh 17,120,000.00.

c) An order requiring the Defendant to surrender all ownership documents to wit; Certificates of leases to L.R No. NRB/Block 209/2973 Kileleshwa and L.R No. 3734/929 to the Plaintiff.

d) An order compelling the Defendant to release proceeds of House B2 situate on L.R No. NRB/Block 209 Kileleshwa to the Plaintiff to wit 7,900,000.00.

e) An order compelling the Defendant to refund/return to the Plaintiff Ksh 3,000,000.00

f) Special damages for Ksh 163,125,614.43 , Ksh 3,000,000.00 being alleged top up for the purchase of prime property received by the Defendant plus an interest of Ksh 14,212.512.12 on the amount, plus a sum of Ksh 7,900,000.00 being the sale proceeds of Kileleshwa plus a sum of Ksh 37,426,281.92 being interest accrued on the amount received by the Defendant, plus a sum of Ksh 17,120,000.00 being unremitted rent for 107 months at the rate of Ksh 160, 000 per month for the Lavington House to the Plaintiff plus interest of Ksh 83,467,820.39 accrued.

g) Costs of this suit.

h) Interest on (g) above.

i) Any other relief that the court seems fit to grant.

2. The Defendant filed a memorandum of appearance dated 13th July 2021, Statement of Defence and subsequently a Notice of Preliminary objection both dated 12th October 2021. The Notice of preliminary objection delimited some three grounds, focusing on the suit. The grounds are reprised in this Ruling.

The Preliminary Objection

3. The Defendant's preliminary objection was raised on the following terms: -

a) That this Honourable Court lacks jurisdiction to entertain the suit herein pursuant to the provisions of Article 162 (2) of the Constitution as read with the provisions of section 13 of the Environment and Land Act, 2011 and section 128 and 150 of the Land Act.

b) That the nature of the claim and relief sought raised by the plaintiff arise from a commercial dispute therefore the court has no objection at this point.

c) The plaintiff is therefor an abuse of the process of this Honourable court and should be dismissed with costs.

4. Pursuant to the directions of this Court issued on 10th November 2021, the Court directed the preliminary objection be canvassed through written submissions. Both parties filed their respective submissions for consideration by the Court.

Objector/Defendant's Submissions

5. The gist of the Defendant's submission is that this Court lacks jurisdiction to entertain the Plaintiff's suit since the nature of the claim sought arose from a commercial dispute.

6. It was submitted that the predominant issue in the suit was that of accountability of all the monies received by the defendant in the management and or acquisition of the plaintiff's properties.

7. It was further submitted that the plaintiff gave the defendant full power and authority in regard to the suit properties to act on behalf of the plaintiff in his name, to sale and to execute such deeds or instruments as may be necessary for the purposes of the suit properties. The prayers sought emanate from a principal - agent relationship between the plaintiff and the defendant. This is because the power of attorney has to be considered as part of the wider concept of the law relating to the principal -agent relationships, as well as the limits of those relationships.

8. It was further submitted that the Court of Appeal in the case of **Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR** had held that the ELC court lacks jurisdiction to deal with such disputes to contracts of mortgages, charges, collection of dues and rents and that such disputes fall within the jurisdiction of the High Court.

9. In support of this position, the Defendant maintained that the instant suit was frivolous, vexatious and an abuse of the court process and that this Court lacked jurisdiction to hear the matter. The Defendant cited various authorities including the decision of **Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) eKLR, Kipnetich Saina (suing as the legal representative of the Estate of the late Kipsaina Arap Tarus (deceased) vs Rachel Tarus & 7 Others [2018] eKLR and Al – Riaz International v Ganjoni Properties Limited [2020] eKLR.**

Plaintiffs' submissions

10. The Plaintiff opposed the preliminary objection though grounds of opposition and submissions dated 7th December 2021. He contended that the suit was properly before this Court by dint of **Article 162 (2) (b) of the Constitution, Section 13 of the Environment and Land Court Act and Section 150 of the Land Act.**

11. It was his contention that the dispute before this court was in respect to the ownership of two houses; B2 in Kileleshwa situated on L.R No. NRB/BLOCK 209/2973 and house No. 8 situated in Lavington on L.R No. 3734/929. It was further submitted that it was only the defendant who could tell the Court the owner of the properties and where the ownership of the documents are.

12. According to the Plaintiff, the authorities that were referred to by the defendant were distinguishable and that they did not apply to the current case.

13. He urged the Court to dismiss the preliminary objection with costs and allow the matter to proceed before this Court to its logical conclusion. He however concluded by submitting that should the Court find that it lacks jurisdiction then it ought to transfer the matter to the High Court as a way of rendering substantive justice.

Analysis and Determination

14. I have considered the preliminary objection, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objection is merited.

15. The case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** has been the watershed as to what constitutes preliminary objections. The Court of Appeal in **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

16. This statement of the law has been echoed time and again by the courts: see for example, **Oraro –v- Mbaja [2007] KLR 141.**

17. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that

“... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.[emphasis added]

18. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with first.

19. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA expressed himself as follows:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

20. **Article 162(2)(b) of the Constitution** states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, **Section 13 of the Environment and Land Court Act** expounds on the jurisdiction of this Court 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.”

21. From a careful examination of the pleadings herein, the suit relates to monies due and owing to the plaintiff in respect to the management and or acquisition of two properties namely house B2 in Kileleshwa situated on No. NRB/BLOCK 209/2973 and house No. 8 situated in Lavington on L.R No. 3734/929. Towards this end, the specific prayers sought by the Plaintiff also relate to an order requiring the defendant to account for all the money received during the exercise of the power of attorney that was issued to him by the plaintiff. I would therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to recovery the monies due to the plaintiff and not ownership of the two properties as partly submitted by the plaintiff. Clearly this is a dispute or declaration that can only be resolved by the High Court. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).

22. I am guided by the Court of Appeal case of Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to ‘use’ of land and do not include mortgages, charges, collection of dues and rents are within the civil jurisdiction of the High Court. The Court further held that exclusive jurisdiction of the ELC is limited to **Articles 162 (2) (b) of the Constitution and Section 13 of the ELC Act** which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by **Article 165(3) of the Constitution**.

23. In his submissions, the Plaintiff appreciates that should this Court find that these proceedings could have been instituted before the High Court, then this Court should exercise its inherent power and have the matter transferred to the High Court with a view of ensuring that substantive justice is achieved.

24. I find that this matter falls within the jurisdiction of the High Court (Commercial and Tax Division). In the premises the order which commends itself to this Court and which I hereby make is that these proceedings be heard and determined by the High Court (Commercial and Tax Division) and the Deputy Registrar of this Court is directed to facilitate the same.

25. The costs of the Preliminary Objection will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2022.

E. K. WABWOTO

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MS. WANYAMA FOR THE PLAINTIFF.

N/A FOR THE DEFENDANT/OBJECTOR.

COURT ASSISTANT: CAROLINE NAFUNA.

E. K. WABWOTO

JUDGE