



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 705 OF 2009

SEHIT INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

JOSEPHINE AKOTH ONYANGO.....1ST DEFENDANT

SIMON OTIENO.....2ND DEFENDANT

SAVINGS & LOAN KENYA LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 6th March 2015 and filed on 9th March 2015 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Sections 4(3) and 13 of the Environment and Land Court Act Cap 12A Laws of Kenya, Articles 50, 159 and 162 (2)(b) of the Constitution of Kenya, 2010 and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following orders **THAT:-**

1. Spent.
2. **This Honourable Court be pleased to have this matter placed before the Presiding Judge of the High Court Commercial & Admiralty Division before the 20th day of March 2015 for orders that this suit be transferred to the Environment and Land Court.**
3. Any other Orders this Honourable Court may deem fit.

THE PLAINTIFF'S CASE

2. The said application was supported by the Affidavit of Rose Mbithe Mulwa that was sworn on 6th March 2015. The Plaintiff's Written Submissions were dated 30th March 2015 and filed on 31st March 2015.
3. The Plaintiff was apprehensive that in the event the 1st and 2nd Defendants' Notice of Motion application dated and filed on 3rd March 2015 that had sought vacant possession of L.R. No 1160/784 (hereinafter referred to as "the subject property") proceeded for hearing on 20th March 2015, then adverse orders could be made against it.

4. The Plaintiff contended that the main dispute in this suit was the ownership of the said subject property and fell squarely within the jurisdiction of the Environment and Land Court (hereinafter referred to as “the ELC”). It therefore urged this court to transfer the matter to the ELC Division for determination on the ground that this court had no jurisdiction to determine the dispute herein.

THE 1ST, 2ND AND 3RD DEFENDANTS’ CASE

5. The 1st and 2nd Defendants’ filed their Grounds of Opposition dated 13th April 2015 on even date while the 3rd Defendant’s Grounds of Opposition were dated 16th March 2015 and filed on 18th March 2015. The said Grounds of Opposition could generally be summarised as follows:-
 - a. **THAT the Plaintiff’s application was ill begotten, misconceived, in bad faith, full of malice, an abuse of the court process and was intended to delay the conclusion of the matter herein.**
 - b. **THAT the Plaintiff’s suit had sought distinct and particular remedies against the Defendants and that the dispute was a commercial matter as it largely attacked the Legal Charge Instrument between the 1st and 3rd Defendants.**
 - c. **THAT any court seized of a matter where different branches of the law are intertwined can competently dispose of and determine the same.**
6. The 1st and 2nd Defendants’ Written Submissions were dated 30th March 2015 and filed on 2nd April 2015. Those of the 3rd Defendant were dated and filed on 15th April 2015.

LEGAL ANALYSIS

7. In its Plaint dated 24th September 2009 and filed on 25th September 2009, the Plaintiff sought the following reliefs:-
 - a. **A permanent injunction restraining the defendants by themselves their servants or agents from entering, trespassing alienating, transferring or in any other manner dealing with the suit premises being L.R. 1160/784 Karen.**
 - b. **A declaration that the transfer of the suit premises from the Plaintiff to the 1st Defendant Josephine Akoth Onyango registered on the 22nd March 2005 as entry No 2 on L.R. No 1160/784 was undertaken on the basis of no consideration, fraud and misrepresentation on the part of the 1st and 2nd Defendants and therefore null and void and that the same be revoked and cancelled forthwith.**
 - c. **An order directing the Registrar of Titles to cancel the transfer aforesaid and rectify the register by reinstating the Plaintiff as the registered proprietor of the suit premises L.R. No 1160/784 forthwith.**
 - d. **An order that all funds held in savings accounts No 015101386299 at Savings and Loan, Kenya Limited Salama House Branch be preserved and that all such funds be transferred to Mortgage account No 315128151018 at the same branch and be applied to the repayment of the loan outstanding on the said mortgage account to facilitate the discharge of charge registered on the 14th April 2005 against the title to the suit premises L.R. No 1160/784.**
 - e. **An order directing the 3rd Defendant to discharge the charge and to release discharge of charge and all title documents in respect of the suit premises to the Plaintiff.**
 - f. **An order that the 1st Defendant do execute all documents necessary to effect the transfer of the suit premises to the Plaintiff within a time frame to be given by this court and in default thereof the Deputy Registrar of the court do execute the suit the transfer and all other relevant documents of the suit premises to transfer L.R. No 1169/784 to the Plaintiff.**
 - g. **An order that the 1st Defendant do pay back to the Plaintiff the sum of Shs 13,570,000/= being the money paid to the 3rd Defendant towards the loan repayment.**
 - h. **General damages as against the 1st and 2nd Defendant to be assessed.**
 - i. **Costs of this suit.**
 - j. **Any other relief that this court may find just and expedient to grant.**

8. The Plaintiff argued that the prayers therein were seeking cancellation of the Transfer registered on 22nd March 2005 and rectification of the register to reflect it as the registered proprietor of the subject property. It pointed out that the 1st and 2nd Defendants had contended in their Statement of Defence and Counter- Claim dated 24th September 2009 that they had acquired the subject property from the Plaintiff and that they were therefore the registered owners of the said subject property.
9. On the other hand, in the 1st and 2nd Defendant's Statement of Defence dated 24th November 2009 and filed on 26th November 2009, they averred that the 1st Defendant was the registered owner of the subject property in which the Plaintiff was a tenant but that it had refused to pay rent. They sought the following reliefs:-
 - a. **An order for vacant possession of all those premises being Land Reference Number 1160/784 now occupied by the Plaintiff and/or its directors and/or agents.**
 - b. **In the alternative and/or in default of prayer 1 above, an eviction order do issue against the Plaintiff, its directors, agents and/or servants from the said premises being Land Reference Number 1160/784.**
 - c. **Mesne profits.**
 - d. **Costs of this suit.**

10. There did not appear to be a Statement of Defence for the 3rd Defendant in the court file. The court wishes to point out right at the outset that the Plaintiff's reliance of the provisions of Section 18 (1)(a) of the Civil Procedure Act Cap 21 (Laws of Kenya) to transfer suits was misplaced and inapplicable herein as the said section relates to transfer of suits before the High Court to subordinate courts competent to dispose of the same and ELC is not a subordinate court to the High Court but rather, it is a court of equal and competent jurisdiction.

11. Be that as it may, as the Plaintiff correctly submitted, Article 162(2) (b) of the Constitution of Kenya, 2010 provides that Parliament shall enact law to establish courts with the status of the High Court to hear and determine disputes relating to the environment, use and occupation of and title to land and that the High Court shall not have the jurisdiction to hear matters within the jurisdiction of the said courts. In this regard, the court agreed with the holding of the case of **Daniel N Mugendi vs Kenyatta University & 3 Others [2013] eKLR** that was relied upon by the Plaintiff.

12. Having said so, the court cannot ignore Article 262 of the Constitution of Kenya that deals with the transitional and consequential Provisions set out in the Sixth Schedule Clause 22 of the Sixth Schedule stipulates as follows:-

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or (emphasis court) corresponding court established under this Constitution or (emphasis court) as directed by the Chief Justice or (emphasis court) the Registrar of the High Court.”

13. In the Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 13573 dated 20th September 2012, it was expressly stipulated as follows:-

“ 6. All new cases relating to the environment and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.”

14. This was the same direction that had been contained in the Practise Direction Gazette No 1617 dated 9th February 2012 that was superseded by Gazette Notice No 13573 cited hereinabove.

15. Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 16268 relating to the Environment and Land Court Act No 19 of 2011 dated 9th November 2012 subsequently superseded Gazette Notice No 13573 cited hereinabove. The same provided as follows:-

“ 4. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence (emphasis court) shall be transferred to the Environment and Land Court as directed by the Chief Registrar.

- 16.If the dispute was as straightforward as the Plaintiff put it, the court would have had no hesitation in transferring this matter to the ELC Division because as has been seen hereinabove, any disputes relating to the matters set out in Article 162(2)(b) of the Constitution of Kenya shall ideally be heard by the ELC Division.
- 17.Unfortunately, the nature of this matter is not as straightforward as the Plaintiff made it seem. In fact, transfer of this suit to the ELC Division is not a procedural technicality within the meaning of Article 159 (2)(d) of the Constitution that would be widely interpreted to include the transfer of suits as had been contended by the Plaintiff. In arriving at this conclusion, the court had due regard to critical and pertinent historical facts in this matter.
- 18.The Plaintiff filed the suit herein on 25th September 2009. Although the ELC had not been established by that time, the Plaintiff had an option of applying to have the suit transferred to the ELC Division immediately the said court was established in 2012, a position that was well articulated by the 1st, 2nd and 3rd Defendants or before the rendering of a substantive ruling of its Chamber Summons application dated 24th September 2009 and filed on 25th September 2009.
- 19.The Plaintiff did not do so, leading to the reading of the Ruling of Njage J (as he then was) by Ogola J on 19th February 2013, which Ruling was, however, set aside due to a purported leakage of the same before it was delivered. The Plaintiff's failure to have the suit transferred to the ELC before the rendering of the said Ruling essentially brought dispute within the jurisdiction of the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division.
- 20.The Plaintiff's reliance on the case of **Owners of Motor Vessels "Lillians" vs Caltex Oil (K) Limited (1989) KLR 1** was therefore clearly misplaced as this court became and was properly seized of this matter with jurisdiction to hear and determine the dispute between the parties herein.
- 21.On the other hand, the court was, in agreement with the holding of **Twiga Chemicals Industries Limited vs Game Ranching Limited [2012] eKLR** that was relied upon by the 3rd Defendant and took the view that once a matter is heard by one (1) court, a party is estopped from subsequently asserting that that court does not have jurisdiction to hear the said matter.
- 22.In addition to the above, while the crux of the suit herein revolves around the subject property, it was not lost to the court that it made a very substantial Ruling dated 22nd January 2015 in which it found that the Plaintiff had not made out a good case for the granting of either an interlocutory injunction pending the hearing and determination of the suit herein or a mandatory injunction as it had sought in its aforesaid Chamber Summons application.
- 23.Notably, a court should not insist on hearing a matter if it can be adequately handled by another court. Unless issues in a matter can be separated and distinct causes of action filed in different courts, it would be an absurdity for one (1) court to substantially hear and conclusively determine a matter and for a party to seek to have another court re-hear the same issues that had been determined by that court with the expectation that the subsequent court will come to a decision that will be favourable to it.
- 24.As could be seen from the reliefs sought by the Plaintiff, the issues before the court were intertwined and could not be said to lie within the sole jurisdiction of either the High Court or the ELC. The dispute appeared to have been largely based on the granting of a facility to the 1st Defendant by the 3rd Defendant which in the particulars in its Complaint, the Plaintiff contended it has had to repay following the 1st Defendant's default. The dispute also brought into sharp focus the circumstances under which the transfer was effected in the 1st Defendant's name, which the Plaintiff averred was as a result of fraud and misrepresentation. The 1st and 2nd Defendants claimed vacant possession and mesne profits from the Plaintiff. The 3rd Defendant also had a stake as a Chargor of the subject property herein, a matter that was commercial in nature.
- 25.As it was agreed by all parties herein, both the High Court and the ELC are courts of equal and competent jurisdiction. None can reverse or review the orders of the other. This court rendered a Ruling that substantially determined the rights of the parties herein at an interlocutory stage. The

- proper forum for a reversal of the said court's Ruling was by the Court of Appeal.
26. Notably, being dissatisfied with this court's said substantive Ruling of 22nd January 2015, the Plaintiff filed **Civil Appeal Case No 27 of 2015 (UR 25/2015) Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others** which M' Inoti JA declined to certify as urgent on 18th February 2015. It appeared to this court that the said application was yet to be heard and determined.
 27. The court was unable to visualise what matters the Plaintiff wanted placed before the ELC when there was already pending for determination, an appeal of this court's aforesaid Ruling of 22nd January 2015. Indeed, the Plaintiff did not demonstrate what issues it wanted heard and determined by the ELC. Notably, transfer of the suit to the ELC Division can only embarrass the logical conclusion of this matter as any decision made by the Court of Appeal would be against the decision of this court and not that of the ELC.
 28. Assuming the Court of Appeal were to uphold this court's decision, would it not cause confusion of the matters that would be expected to be heard by the ELC? The answer is in the affirmative, as matters before ELC would essentially be *res judicata*.
 29. The court noted that the Plaintiff has or has had several matters relating to the subject matter adjudicated in different fora. In its Written Submissions, the Plaintiff disclosed that the National Land Commission was also looking into the legality of the title of the subject property herein.
 30. There were criminal proceedings to wit **Cr Case No 6531 of 2012 and 2178 of 2013** or a consolidation thereof that had been instituted by the Plaintiff against the 1st and 2nd Defendants herein. In his Ruling of 10th March 2014, Majanja J granted an injunction restraining the Plaintiff from prosecuting the 1st and 2nd Defendants and observed that continuation of the said criminal proceedings would amount to an abuse of the court process.
 31. Accordingly, having considered the pleadings, the affidavit evidence, the oral and written submissions and the case law that was relied upon by the parties herein, the court came to the conclusion that while the Plaintiff was entitled to a fair hearing as contemplated in Article 50 of the Constitution, it would appear that the Plaintiff's present application seeking to transfer the suit herein to the ELC Division was nothing more than an attempt to circumvent the Ruling that was delivered by this court on 22nd January 2015 and that of the Court of Appeal that declined to certify its application dated and filed on 5th February 2015 as urgent.
 32. It was apparent that the Plaintiff was seeking a second bite at the cherry. Its action amounted to forum shopping with a view to delaying the final determination of the matter herein. As was rightly pointed out by the 1st, 2nd and 3rd Defendants, the said application was dilatory and an abuse of the court process. It clearly negated the overriding objectives of Sections 1A and 1B of the Civil Procedure Act that mandate the court, parties and their advocates to have disputes before courts determined expeditiously.
 33. As was rightly held by Ogola J in the case of **Timothy Rintari vs Madison Insurance Co Ltd [2015] eKLR**, a party cannot hold another at ransom with the sole intention of forestalling justice. Indeed, due process of the law ought to be followed to the letter. Great injustice and prejudice would be suffered by the 1st, 2nd and 3rd Defendants if the court were to allow the Plaintiff's application while an appeal of this court's Ruling was pending hearing and determination at the Court of Appeal. The Plaintiff's best shot is to ventilate its case at the Court of Appeal.
 34. It was the firm view of this court that the Plaintiff ought to prosecute its case in a systematic manner. The court was thus in agreement with the 1st and 2nd Defendants' submissions that the use of the word "**or**" in Article 262 of the Constitution of Kenya gives a court wide and unfettered discretion to determine when a matter can be transferred to the ELC and this is clearly not one of those straight forward matters that can be solely heard by the ELC.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's Ruling is that the Plaintiff's Notice of Motion application dated 6th March 2015 and filed on 9th March 2015 was not merited and the same is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.
36. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 18th day of June, 2015

J. KAMAU

JUDGE