



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 658 'A' OF 2012

DEKOMA SLAUGHTER HOUSE MEAT VENDORS & LIVESTOCK

DEALERS CO-OPERATIVE SOCIETYAPPELLANT

VERSUS

MAINA MAMO MATO.....RESPONDENT

RULING

The application before me for determination is dated 1st July 2015. It seeks for stay of further proceedings in Nairobi Co-Operative Tribunal Case No. 469 of 2010 pending hearing and disposal of the Notice of Motion application dated 20th November 2013.

The application is premised on the grounds that the Notice of Motion dated 20th November 2015 was scheduled for hearing on 30th June 2015 but was not listed; The Co-operative Tribunal Case was scheduled for hearing on 9th July 2015 (now 20th July 2015; if the Tribunal's case proceeds to hearing the appeal herein will be rendered nugatory; it is the registry that erred in failing to list the matter for hearing; and that the applicant will be greatly prejudiced if the tribunal's case proceeds for hearing before this appeal is heard and determined because they will be forced to take part in the proceedings for a claim of land without a sale agreement as required by law.

The application is supported by sworn affidavit of Ochieng Ogotu advocate, which depositions mirror grounds replicated above in support of the Notice of Motion.

The said application dated 1st July 2015 was canvassed before me with Mr Cohen counsel for the appellant, applicant, relying on the grounds and supporting affidavit and annexure 00-1 which is a letter to the Deputy Registrar dated 1st July 2015 complaining that the application was not listed for hearing on 30th June 2015 as scheduled. Mr Cohen added that the matter before the co-operative tribunal is due for hearing on 20th August 2015 and that if the matter is heard, then this appeal will be rendered nugatory. He submitted that the court has the power to safeguard its orders and to ensure that the appeal is not futile. He also submitted that the duty of this court is to safeguard the rule of law since the appeal herein challenges the ruling of the tribunal on a point of law hence if the tribunal continues to hear and determine the dispute, then the appellant/applicant shall be prejudiced and will suffer injustice. Further, Mr Cohen submitted that an appeal is a right which should not be violated. The appellant contests an agreement for sale and that cross examining witnesses on the same does not help.

In opposition to the Notice of Motion dated 1st July 2015 the respondent filed grounds of opposition dated 21st July 2015 contending that the application lacks merit, violates Article 159(2) (b) of the Constitution by seeking to delay the ends of justice, an abuse of the court process; based on a misapprehension of law; the appellant has a chance to cross examine the respondent and his witnesses at the hearing; the appellant's preliminary objection was heard, and properly dismissed; stay of proceedings delays the expedition conclusion of the matter; and the appeal is contrary to judicial process expressed in Article 159(2)(d) of the Constitution.

In his submissions, Mr Kinyanjui advocate for the respondent stated that the motion was a backdoor attempt to amend the earlier notice of motion dated 20th November 2013 hence an abuse of the court process.

Mr Kinyanjui also submitted that the earlier Notice of Motion dated 20th November 2013 did not have any prayer for stay of proceedings which prayer had now been sneaked in the present motion, which in effect was seeking to split stay orders and as a result, waste judicial time.

In his view, stay orders under Order 42 of the Civil Procedure Rules must be sought with expedition. He explained that in this case, the appeal was filed on 3rd December 2012 out of time and that it took the appellant over 2 ½ years to seek for stay. That the 2013 application was made almost one year after the ruling. Mr Kinyanjui further submitted that it had not been shown what loss the appellant was likely to suffer if the application was not granted since the said case before the tribunal was scheduled for hearing on 9th July 2015 and no stay was obtained. He maintained that no prejudice would be occasioned since the appeal is against an interlocutory application ruling. That more injustice will be occasioned if tribunal proceedings are stayed since the appeal was filed in 2011.

In rejoinder Mr Cohen for the applicant submitted that the application was not an abuse of the court process as the same had not been proved to be frivolous, vexatious and or intended to annoy. The applicant's counsel further submitted that the matter was not for striking out the appeal and that the contested contract was not signed. He therefore urged the court not to allow tribunal proceedings and appeal to go on concurrently. Further, he maintained that the appeal was filed in time within 30 days and urged the court to allow the application.

None of the parties relied on any case law to support their respective positions.

I have carefully considered the application by the appellant/applicant and the opposition thereto by the respondent. The history of this matter is critical to the determination of this application. The record shows that vide a statement of claim dated 21st December 2010, the claimant Maina Mamo Mato filed a claim against the appellant herein Dekoma Slaughter House, Meat Vendors & Livestock Dealers Co-operative Society before the Nairobi Co-operative Tribunal on 22nd December 2010, claiming for entitlement to occupation, possession and ownership and or mesne profits and damages for being denied such possession ownership and or use of plots purchased at a consideration from LR 4148/166 Original 4148/11/137, plots 122,606,611 and 612 paying kshs 149,000 out of kshs 350,000.

The respondent herein was allegedly a member of the appellant Co-operative Society and although he did file a claim before the Environment and Land Court vide ELC 258 of 2010, he withdrew it as Cap 490 mandates parties to a dispute involving members of a co-operative society to file the dispute before the Co-operative tribunal. The respondent therefore sought for declaratory orders, an injunction and mesne profits against the appellant herein.

The appellant then raised a preliminary objection to the claim by the respondent before the Co-operation tribunal, seeking the suit/claim to be struck out on the grounds that the claim offends Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya which require that a contract for the disposition of an interest in land shall be in writing and signed by all the parties thereto and the signatures thereof attested by a witness who is present when the contract was signed by such party, otherwise no suit lies.

The Tribunal heard the preliminary objection which was opposed and by a ruling delivered on 2nd November 2012, it dismissed the preliminary objection with costs to the respondent /claimant. It is that ruling/order which gave rise to this appeal and hence the application for stay of proceedings of the tribunal pending hearing and determination of this appeal dated 20th November 2013 filed on 27th November 2013 which has never been heard and determined by this court.

According to the appellant, there is no sale of plot/land agreement in writing between the appellant and respondent and witnesses, as required by the provisions of Section 3(3) of the Law of Contract Act.

The above issues invite this court to first and foremost, inquire the jurisdiction of this court to hear and determine this appeal, leave alone the application for stay of proceedings pending before the cooperative tribunal pending the hearing and determination of the application dated 20th November 2013 and or the appeal herein.

I am conscious of the fact that the parties advocates did not raise issues of jurisdiction of this court and neither did they rely on any case law to support their respective positions.

Nonetheless, this court is duty bound to, before embarking on the merits of the application, to determine its jurisdiction. As was held in the case of owners of the **Motor Vessel “Lilian S” v Caltex Oil(K) Ltd (1989) KLR 1**: “ **By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matter presented in a formal way for its decision. The limits or this authority are imposed by statute Charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts in order to decide whether it has jurisdiction, but, except where the court or tribunal has been given power to determine conclusively whether the facts exist where the court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given**”

Thus, without jurisdiction, a court of law acts in vain by purporting to determine a matter on dispute between the parties and in effect, amounts to nothing.

From the claim pending in the Cooperatives Tribunal, this court finds that the claim is over ownership, occupation/possession and or title to land. The preliminary objection which gave rise to the decision which is subject of this appeal and application, was challenging the validity of the contract between the parties on account that such contract was in contravention of the Provisions of Section 3(3) of the Law of Contracts Act, which espouse that no suit can be founded on a contract for disposition of an interest in land unless it is in writing and witnesses in writing. The respondent herein was claiming that he owns the subject land having bought it.

The above position being the prevailing legal and factual position, my attention has been drawn to Article 165(5) (b) of the Constitution which bars the High Court from hearing and determining disputes which are preserved for the courts contemplated in Article 162(2) (b). The Constitution contemplated the establishment of courts with specialized jurisdiction to hear and determine disputes relating to the Environment and the use and occupation of, and title to, land. Article 162(3) mandates Parliament to enact legislation to determine the jurisdiction and functions of the said court contemplated in Clause 2 of Article 162.

In compliance with the above constitutional provisions Parliament did in 2011 enact the Environment and Land Court Act. Section (4) thereof establishes the Environment and Land Court. The said Act under Section 13(1) confers jurisdiction on the court, both original and appellate. The court has the power to make orders including declaratory, damages, specific performance injunctions, among others.

The above being the situation, it is apparently clear that this court’s jurisdiction to hear and determine

the dispute herein on appeal is expressly ousted by the Constitution and an Act of Parliament, the Environment and Land Court Act, 2011.

Albeit Section 22 of part 5 of the Transitional and consequential provisions of the Constitution on Administration of Justice makes provision that any judicial on the effective shall continue to be heard and determined pending the establishment of the corresponding court or as may be directed by the Chief Justice or Registrar of the High Court, I note that the above provisions were only applicable in the transitional period prior to the establishment and operationalization of the Environment and Land Court which was established in 2011 and fully operationalised in 2012 with the appointment of judges to preside over the said court.

This court also noted that prior to the respondent herein filing the claim before the Co-operatives Tribunal in 2010 it had vide ELC 258/10 filed a similar claim in the High Court before the effective date on 27th May 2010 over the same subject matter (see page 63 of record of appeal) which suit was withdrawn prior to the filing of the claim before the Cooperatives tribunal.

It therefore follows that albeit the claim was filed during the transitional period, by the time the tribunal was rendering its decision /ruling on 2nd November 2012, the Environment and Land Court was fully established and therefore any appeal arising from the order or decision of the tribunal could only lie in the Environment and Land Court under section 13(1) of the Environment and Land Court Act and not in the High Court. The Environment and Land Court came into actual operation on 5th November 2012 when the judges of that court were sworn into office and posted or deployed to various stations after their gazettelement on 3rd October 2012 vide G/N 14346.

A court of law can only operate within its limits conferred by the Constitution or legislative enactment. In **Samuel Macharia & another v KCB** the Supreme Court was clear that:

***“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or either written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, it is not one or mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings.*”**

.....where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

In addition, Article 2(2) of the Constitution is emphatic that:

“No person may claim or exercise state authority except as authorized under this constitution.”

It therefore follows that the jurisdiction of this court (High Court) to hear appeals where the primary dispute relates to the Environment, use of, occupation or title to land was effectively ousted by the operationalization of the Environment and Land Court.

Consequently, I find that this court has no jurisdiction to hear and determine this appeal.

I would therefore proceed to strike it out. However, as the said appeal was lodged barely one month after the swearing in of the judges of the Environment and Land Court, it follows that the Environment and Land Court was still in transition, with the newly appointed judges still trying to find office space and a bearing. The High court had not and todate, it has not fully set up a clearing house to sort and transfer all the Environment and Land Court matters to the Environment and Land Court where they ought to be domiciled though initially filed in this court. On many occasions and nearly on

a daily basis, this court has had to relocate matters to Environment and Land Court for similar reasons.

The interest of justice therefore in this case dictates that I do not strike out the appeal and application as filed and I accordingly direct that the file herein in its entirety be and is hereby re-located to the Environment and Land Court forthwith for further directions as to the disposal thereof as the Court may deem fit.

Dated, signed and delivered in open court at Nairobi this 18th day of August, 2015.

R.E. ABURILI

JUDGE

18.8.2015

Coram R.E. Aburili J

C.C. Adika

No appearance for the appellant/applicant

No appearance for the respondent.

Court- Today's date was given to both parties in open court after the hearing of the application dated 1st July 2015 interpartes on 22nd July 2015.

The court considered the plea by the applicant that the main dispute is due for hearing before the Co-operatives Tribunal on 20th August 2015 and that it was important to have this ruling which regards whether or not there should be stay of the proceedings before the tribunal delivered before 20th August 2015.

The court has been ready since 10.00am as scheduled but neither party has appeared. The registry too confirms that no inquiries have been made by either party to this ruling. Albeit the matter was not listed, the date was taken in court which was on vacation and only returned to deliver this ruling as assured to the parties. Accordingly, I hereby read and pronounce the ruling in open court as scheduled.

File to be taken to the registry for perusal by the parties at their own appointed time before typing of this ruling and transfer to the Environment and Land Court as directed herein.

R.E. ABURILI

JUDGE

18/8/2015