



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL CASE NO 48 OF 2013
PETER ODIWUOR NGOGE..... PLAINTIFF

VERSUS

JOSEPHINE AKOTH ONYANGO.....1ST DEFENDANT

KENYA COMMERCIAL BANK

(SUED ON BEHALF OF SAVINGS & LOAN

KENYA LIMITED.....2ND DEFENDANT

WALKER KONTOS ADVOCATES.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 18th March 2015 and filed on 19th March 2015 was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer No (1) was spent. It sought the following orders:-
 1. **Spent.**
 2. **THAT this suit be transferred to the Environment and Land Division of the High Court for hearing and disposal urgently and forthwith.**
 3. **THAT the costs of this application be borne by the Defendants/Respondents.**
2. Although the court gave directions on the filing of Written Submission by all parties on 16th April 2015, the Plaintiff's did file his submissions. As at the time the court reserved the Ruling herein, he had still not done so. The 2nd and 4th Defendants did not also file their Written Submissions.

THE PLAINTIFF'S CASE

3. The said application was supported by the Plaintiff's Affidavit that was sworn on 18th March 2015.

4. The Plaintiff was apprehensive that the 1st Defendant herein had applied to be given vacant possession of L.R. No 1160/784 (hereinafter referred to as “the subject property”) before the suit herein could be heard. It was his contention that it was only the Environment and Land Court (hereinafter referred to as “the ELC”) that had jurisdiction to hear and determine the suit herein as the dispute related to the ownership of the said subject property to the 1st Defendant.
5. He denied that his firm drew the Transfer Instrument dated 22nd December 2003 that purported to transfer ownership of the subject property to the 1st Defendant. He also took issue with Senior Counsel Ahmednasir Abdullahi Advocate, who was leading Mr Nyawara representing the 1st Defendant herein, appearing in this matter as the said Senior Counsel had sat in the panel of Judicial Service Commission (hereinafter referred to as “the JSC”) in which the undersigned herein was appointed as a Judge of the High Court of Kenya.
6. He therefore urged this court to transfer the matter to the Environment and Land Court Division for determination on the ground that this court had no jurisdiction to determine the dispute herein.

THE 1ST DEFENDANTS’ CASE

7. The 1st Defendant filed her Grounds of Opposition dated 10th April 2015 on 13th April 2015. The said Grounds of Opposition could be summarised as follows:-
 - a. **THAT the court had been asked to determine whether or not the Plaintiff had *locus standi* to file suit against the Defendants and in the circumstances the present application could not be granted.**
 - b. **THAT the application herein had been brought in cohort with the Plaintiff in HCCC No 705 of 2015 (sic) and was therefore an abuse of the process of the court and calculated to deprive the 1st Defendant of her property.**
 - c. **THAT the said application was a veiled attempt to have the undersigned judge recuse herself from the matter herein by casting doubt on her integrity.**
 - d. **THAT the said application was filed almost two (2) years after the ELC was established.**
 - e. **THAT the Plaintiff had no interest over the subject property herein and was a vexatious litigant.**
 - f. **THAT the Plaintiff’s application had no merit and should be dismissed with costs.**
8. The 1st Defendant’s Written Submissions were dated 10th June 2015 and filed on 11th June 2015.

THE 2ND DEFENDANT’S CASE

9. The 2nd Defendant’s Grounds of Opposition that were erroneously indicated as belonging to the 3rd Defendant were dated 15th April 2015 and filed on 16th April 2015. They were generally as follows:-
 - a. **THAT the present application offended the provisions under which it had been brought, was ill begotten, misconceived, in bad faith, malicious, not merited, an abuse of the court process and that it was in the interests of justice that the said application be dismissed with costs to it.**
 - b. **THAT the Plaintiff had sought distinct remedies in respect of the Legal Instrument between the 1st and 3rd Defendants and was therefore a commercial matter.**
 - c. **THAT any court seized of a matter where different branches of law were intertwined could be disposed of by that court.**

THE 3RD DEFENDANT’S CASE

10. The 3rd Defendant’s Grounds of Opposition were dated and filed on 16th April 2015. The same could also be summarised as shown hereunder:-

- a. **THAT the present application was incompetent, misconceived, unmeritorious, frivolous, vexatious, an abuse of the court process and ought to be dismissed with costs to them.**
- b. **THAT the Plaintiff ought to have satisfied himself of the appropriate forum at the time he filed suit as opposed to filing the said application that would delay the hearing and determination of the suit herein.**

11. The 3rd Defendant's Written Submissions dated 18th June were filed on 22nd June 2015.

LEGAL ANALYSIS

12. In his Complaint dated and filed on 11th February 2013, the Plaintiff sought the following reliefs, jointly and severally against the Defendants herein, for:-

- a. **A permanent injunction to be issued urgently to restrain the Kenya Commercial Bank Limited from selling or advertising for sale or from interfering howsoever with the Land Reference Number 1160/784 owned by Sehit Investments Limited who is not the 2nd Defendant chargor and whose fundamental rights enshrined by Article 40 of the constitution (sic) and Article 14 of the African Charter is being violated with impunity.**
- b. **An order that all entries made fraudulently in the Lands Register pertaining to Land Reference Number 1160/784 on 22nd March 2005 and subsequently starting with the fraudulent Registration (sic) of the Transfer Instrument dated 22nd December 2003 and the fraudulent Registration (sic) of the charge document dated 4th April 2005 be declared invalid null and void ab initio (sic) and the same be cancelled by the Registrar of lands (sic) to revert the title unencumbered back to Sehit Investments Limited in the interests of justice.**
- c. **General damages be assessed and awarded to the plaintiff (sic) as sought herein above.**
- d. **Orders and declarations in terms of paragraph herein above.**
- e. **Costs of the suit and interests (sic) thereon.**
- f. **Any other or further relief which this Honourable Court deems fit and just to grant the plaintiff (sic) in the circumstances including the hearing of the suit HCCC No 705 of 2009 or alongside the suit given the plaintiff (sic) intended to leave the country permanently to the United States of America.**

13. The 1st Defendant argued that the Plaintiff had not shown any legal interest in the subject property but was a witness in **HCCC No 709 of 2009 Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others** having sworn an affidavit in support of the Plaintiff therein.

14. She submitted that on 11th February 2013, the Plaintiff herein ought to have filed the suit in the forum he wished to hear and determine the dispute herein as the ELC was established by the Environment and Land Court Act No 19 of 2011 which came into effect on 30th August 2011 and that being an advocate, he ought to have known in which court the suit herein ought to have been filed. It was her contention that this was a commercial matter as the Plaintiff had alluded to what she referred to as "commercial fraud."

15. These were the same arguments that were advanced by the 3rd Defendant who pointed out that the Chief Justice issued Practice Directions on Proceedings relating to the Environment and the Use and Occupation of and Title to Land Gazette Notice No 16268 which 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. The 3rd Defendant contended that the Plaintiff had himself raised a preliminary objection to his own suit by questioning the jurisdiction of this court. In this regard, they referred the court to the case of **Republic vs Commissioner of Lands, Cabinet Secretary Ministry of Lands Housing &**

Urban Development Pamela Mutegi & 5 Others Ex parte Samuel Miciri W'njuguna [2014] eKLR in which Odunga J stated as follows:-

“...it is trite that a matter filed in a Court or Tribunal without jurisdiction is a nullity and is incapable of being transferred since in law it does not exist and it is trite that where an act is a nullity it is trite that it is void...there is no need for an order of the Court to set it aside though sometimes it is convenient to have the Court declare it to be so.”

17.They also placed reliance on the case of **Tasmac Limited vs Roberto Marci & 2 Others [2013] eKLR** in which Angote J expressed himself as follows:-

“Where a dispute raises matters which fall within the jurisdiction of the High Court and the Environment and Land Court, any of the two courts should be able to adjudicate upon it and make a determination. The two courts have concurrent jurisdiction.”

18.The court wishes to point out right at the outset that the Plaintiff’s reliance of the provisions of Section 18 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.

19.Be that as it may, 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.

20.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 that 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.”

21.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.”

22.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.

23.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.

24.Unfortunately, the nature of this matter is not as straightforward as the Plaintiff made it seem. It is clear from Paragraphs (6), (7), (8), (9), (10), (11), (12), (13), (14) and (15) of his Complaint all related to the legality or otherwise of a Transfer Instrument dated 22nd December 2003 and the Charge dated 4th April 2005. Paragraph (18) of the said Complaint made reference to land fraud.

25.It is therefore evident that the issues therein cut across and could be heard and determined by the ELC or the High Court of Kenya Commercial Division, Milimani Law Courts. However, a glaring fact was that there was no dispute as to ownership, use or occupation of subject property between the Plaintiff and the Defendants herein thereby removing the matter from the jurisdiction of the ELC.

26.Indeed, the court did find in its Ruling of 18th June 2015 that **HCCC No 709 of 2009 Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others** ought to continue being heard in the Commercial Division as the matter therein had substantially been heard in the said Commercial Division despite there having been issues the Plaintiff therein strongly felt were intertwined and which ought to be heard and determined by the ELC.

27.In Paragraph (22) of the said Ruling, the court stated as follows:-

“In addition to the above, while this 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 make 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.”

28.In Paragraph (24) of the said Ruling, this court observed as follows:-

“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 Environment and Land Court. 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 Plaint, 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.”

29.As the Plaintiff herein was categorical that the two (2) matters should be heard together, the only option is to have his case ventilated in the Commercial Division where **HCCC No 709 of 2009 Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others** is also scheduled to be heard and determined.

30.As regards the Plaintiff’s argument that the matter ought to be heard in the ELC on account of the undersigned having been recommended for appointment as a judge of the High Court of Kenya by the JSC in which Senior Counsel Ahmednasir Abdullahi was member of the panel, the same would not hold any water as all the current sitting ELC judges were recommended for appointment as judges in the same panel where the said Senior Counsel was present when the undersigned was also recommended as a judge of the High Court of Kenya.

31.The question the court poses is, what then would be the need for this matter to be transferred to the ELC when the judges in that court, would in the eyes of the Plaintiff, not be impartial or fair having been recommended for appointment as judges in the same panel the said Senior Counsel was sitting? It is the view of this court that it would be purely an academic exercise to transfer this matter to the ELC on the aforesaid ground.

32.Accordingly, having considered the pleadings, the affidavit evidence, 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 of Kenya, it would appear that his present application seeking to transfer the suit herein to the ELC was nothing more than an attempt to circumvent the Rulings that were delivered in **HCCC No 709 of 2009 Sehit Investments Limited vs Josephine Akoth Onyango & 3 Others** by several courts in the Commercial Division.

33.It was apparent to the court that the Plaintiff’s action amounted to forum- shopping. As was rightly pointed out by the 1st, 2nd and 3rd Defendants, the present application was dilatory and an abuse of the court process. It clearly negates 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.

DISPOSITION

34. For the foregoing reasons, the upshot of this court's Ruling was that the Plaintiff's Notice of Motion application dated 18th March 2015 and filed on 19th March 2015 was not merited and the same is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

35. It is so ordered.

DATED and SIGNED at NAIROBI this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED AT NAIROBI this 25th day of September 2015

F. AMIN

JUDGE