



VG Patel & Sons Limited v Ombasa, The Liquidation Agent, Middle Africa Finance Company Limited (In Liquidation) & another (Environment & Land Case E017 of 2021) [2022] KEELC 2950 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E017 OF 2021**

JO OLOLA, J

MAY 26, 2022

BETWEEN

VG PATEL & SONS LIMITED PLAINTIFF

AND

JOHN MASEGA OMBASA, THE LIQUIDATION AGENT, MIDDLE AFRICA FINANCE COMPANY LIMITED (IN LIQUIDATION) 1ST DEFENDANT

PETER NJOROGE GICHUKI T/A SPOTLIGHT INTERSEPTS AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiffs – V. G. Patel & Sons Limited instituted the suit on 1 August 1, 2021 seeking Judgement against the two defendants jointly and severally for:
 - (a) An order directing the defendants to furnish true and actual accounts for the purported loan borrowed by the plaintiff, specifying the principal amount, amount paid, outstanding balance, interests and penalties;
 - (b) An order declaring the actual amount due, if any, and an order giving the Plaintiff time to redeem the same;
 - (c) An order of permanent injunction do issue against the Defendants by themselves, agents, servants, proxies, employees or any other person claiming any right under them restraining (them) from advertising for sale, offering for sale, selling, transferring Title No. 2787/1/12 in the names of Lenana Steelcom Limited and Title No. 2787/140 in the names of Laikipia Saw Mill Limited to any 3rd Parties and in the unlikely event, any sale happens to have taken place, the same be declared null and void ab initio;



- (d) An order restraining the Registrar of Titles in Nairobi from registering , (or) transferring properties herein or part thereof to any 3rd party at the instance of the 1st and 2nd defendants, their agents, servants proxies, employees or any other person claiming any right under them' and
- (e) Costs of the suit and interest.
2. Filed contemporaneously with the suit was the notice of motion dated August 10, 2021 wherein the plaintiff sought an order of temporary injunction restraining the two defendants from attaching, advertising for sale or selling the suit properties pending the hearing and determination of the suit. The application further sought to have the 1st defendant ordered to forthwith render accounts of the purported loan claimed by it and or how it arrived at the figure of Kshs.138,523,464.40.
3. The said application is supported by an affidavit sworn by one Alpana Kumari Vishhubhai Patel, an administrator of the estate of V.G. Patel who was a director of the Plaintiff Company and is premised on the grounds inter alia;
- (i) That the plaintiff's immovable properties have been proclaimed unlawfully and are about to be sold by public auction by the 2nd defendant at the instance of the 1st defendant;
- (ii) That on July 2, 2021, the plaintiff received a belated notice of sale of its properties for an unascertained loan amounting to Kshs.138,523,464.40 a figure which is disputed, contested and not proved by the defendant;
- (iii) That the defendants are unreasonable and hell bent to sell the plaintiff's properties to their friends and proxies to the great detriment and prejudice of the plaintiff;
- (iv) That the defendant has deliberately declined to provide true accounts of the loan statements to demonstrate how it arrived at the purported amount claimed by the defendants;
- (v) That the plaintiff shall suffer irreparable loss if an order of temporary injunction restraining the purported sale is not granted;
- (vi) That there is no order or decree of court sanctioning any such purported sale or at all, hence the same is invalid, null and void;
- (vii) That the procedures provided under the *Land Act* 2012 have not been followed and complied with by the Defendants and hence the purported sale is illegal and unlawful; and
- (viii) That the plaintiff's case is that it has paid off the entire loan and the defendants should prove otherwise.
4. Upon being served with the suit and the application, John Masega Ombasa, the Liquidation Agent, Middle Africa Finance Company Limited (in Liquidation) (the 1st defendant herein) filed a notice of preliminary objection dated October 13, 2021 objecting to both the suit and the application on the grounds:
1. That this honourable court lacks jurisdiction to hear and determine this matter pursuant to the Court of Appeal Judgment delivered in *Co-operative Bank of Kenya Limited -vs- Patrick Kang'ethe Njuguna & 5 others* (2017) eKLR: and
2. That the dispute before this honourable court is not one of land, but of the commercial nature whose determination is not within the jurisdiction of the Environment and Land Court.



5. Consequent upon directions given herein on October 14, 2021 it was agreed that both the plaintiff's motion and the 1st defendant's preliminary objection be disposed of together by way of written submissions. I have accordingly carefully considered both the motion and the preliminary objection raised thereto. I have similarly perused and considered the rival submissions by the Learned Advocates acting for the parties. The 2nd defendant neither entered appearance nor responded to the plaintiff's claim.
6. It is trite law that where the issue of a court's jurisdiction is raised, the court must first determine that issue at the very earliest opportunity. That is so because, as the courts before me have declared, jurisdiction is everything and where it is determined as a matter of fact that the court lacks jurisdiction, the Court must down its tools at once and cannot proceed one step more with the matter.
7. The gist of the 1st defendant's objection is twofold. First, the 1st defendant asserts that this court lacks jurisdiction to hear and determine the matter pursuant to the Court of Appeal decision in *Co-operative Bank of Kenya Limited -vs- Patrick Kang'ethe Njuguna & 5 Others* (2017) eKLR. Secondly and perhaps arising from the first limb the 1st defendant objects to this court dealing with the matter on the basis that the dispute before the court is not one of land, but of a commercial nature and its determination is therefore not within the jurisdiction of this court.
8. The leading authority in matters regarding preliminary objections is without doubt the decision of the East African Court of Appeal in *Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors Limited* (1969) EA 696. Commenting on what would amount to a proper preliminary objection in the said case, Law J. A. observed thus:

“So far as I am aware, a preliminary objection consists of a pure 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. Examples are an objection on the jurisdiction of the Court, or a plea of limitation or a submissions that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”
9. Commenting on the same issue in the same Mukisa Biscuits Case (Supra) Newbold P added that:

“A preliminary objection is in the nature of what used to be a demurer. It raises a prime 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 ...”
10. Arising from the foregoing, it was clear that a preliminary objection can only arise from a pure point of law which has been pleaded or which arises by clear implication out of the pleadings. A preliminary objection cannot therefore be raised where any fact has to be ascertained from elsewhere.
11. In the matter before me, the 1st defendant entered appearance vide a memorandum of appearance dated September 17, 2021 and filed herein on October 13, 2021. On the same day and without filing any other pleadings, the 1st defendant filed the preliminary objection herein dated the same 13th day of October, 2021.
12. That being the case, the notion that the dispute herein is not one of land but of a commercial nature was being raised by the 1st defendant in the objection for the first time and did not arise from any pleadings filed herein. For the court to ascertain that fact the court would certainly be forced to ascertain that fact from elsewhere and the same cannot therefore amount to proper ground of preliminary objection.



13. As a matter of fact, the 1st defendant did not even in their submissions herein produce the authority in *Co-operative Bank of Kenya Limited -vs- Patrick Kang'ethe Njuguna*. I have however had occasion to look at the said decision. At Paragraph 40, thereof, the Learned Judges of Appeal observed as follows:

“[...] However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of enforceable interest thereunder, were disputed. The main question to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.”

14. In my view and arising from the foregoing, the court was by implication stating that where the creation of a charge and enforceable interest are in dispute the Environment and Land Court would assume jurisdiction. In the matter before me, it is apparent that the Plaintiffs are disputing the existence of the charge and any other enforceable interests thereunder.

15. While it is true that the Court of Appeal at Paragraph 35 of the *Kang'ethe* holding expressly declared that charging land does not connote land use as described under article 162(2) of *the Constitution* and section 13(2) of the *Environment and Land Court Act*, I note from the plaintiff's pleadings herein that one of the issues in contention was whether the properties were charged to the 1st defendant in the first place.

16. From the material placed before me, it was apparent that the last surviving director of the plaintiff Company was indisposed for a long time and the surviving beneficiaries, have sought details of the purported charge from the 1st defendant to no avail. That much is clear from paragraphs 4 to 7 of the Plaintiff wherein the plaintiff pleads as follows:

“4. It is purported by the 1st defendant that the plaintiff secured an unknown amount of loan and at unknown time, by the legal charge over Title N. 2787/1/12 in the names of Lenana Steelcom Limited and Title No. 2787/140 in the names of Laikipia Saw Mill Limited respectively, and that the purported loan together with the interests and penalties, amounts to Kshs.138,523,464.40 as at August 24, 2017;

5. In fact the 1st defendant has deliberately withheld and failed to disclose what the principal sum borrowed was and how much has been paid off and what the penalties and interests are to date, despite several appeals and enquiries made to that effect and the 1st defendant alleged that the security file was lost or misplaced and it was not able to ascertain the actual figures;

6. The 1st defendant vide letters dated August 24, 2017 and September 7, 2017 respectively, purported that the plaintiff is in default of an unknown amount of loan from the 1st plaintiff which amount was in arrears and has accrued interest and penalties to the tune of Kshs.138,523,464.40, which amount is exaggerated, cooked up with the sole aim and intention to unlawfully rob the plaintiff of the properties used to secure the purported loan;

7. Vide a letter dated September 30, 2017 and November 11, 2017 respectively, the plaintiff asked the 1st defendant to disclose documentation or the loan statements to demonstrate how the figure of Kshs.138,523,464.40 was arrived at, but the 1st defendant has deliberately failed, ignored and refused to disclose the same to-date.”

17. Arising from the foregoing, I was persuaded that this case was distinguishable from the *Kang'ethe* case and that this court had jurisdiction to intervene where the property in dispute was about to be alienated without any apparent reason.



18. At any rate, it was clear to me that the dispute herein fell within the provisions of the Land Act, 2012. Section 2 of the said Act defines the word court as follows:

“Court” means the Environment and Land Court Act established under the Environment and Land Court Act, No. 19 of 2011.”

19. In regard to the question of jurisdiction, section 150 of the said Land Act provides as follows:

“The Environment and Land Court and the Subordinate Courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

20. That being the case, I was not persuaded that this court had no jurisdiction under article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act to hear the dispute herein.

21. The plaintiff has demonstrated in the supporting affidavit to the application that the 1st and 2nd defendants have proclaimed the two properties with a view to disposing off the same by way of the public auction. It is their case that the 1st defendant claims an unknown loan from them said to be in the sum of Kshs.138,523,464.40.

22. The plaintiff has told the court that when they requested for the particulars of the alleged loan, the 1st defendant informed them that the security file had been misplaced.

23. Those averments have not been rebutted by the defendants and it was unclear as at the moment the reason if any why the Defendants want to dispose of the suit properties by way of public auction. In the circumstances herein, I am persuaded that there is reason to protect the suit properties from the danger of alienation pending the hearing and determination of this suit.

24. Accordingly and for the avoidance of doubt, the 1st defendant’s preliminary objection dated October 13, 2021 is hereby dismissed. The plaintiff’s motion dated August 11, 2021 is allowed as prayed.

25. The costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 26TH DAY OF MAY, 2022.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

