



Patel & another v Limuru Hills Limited & another (Environment & Land Case E027 of 2021) [2024] KEELC 6835 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6835 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E027 OF 2021**

**JG KEMEI, J
OCTOBER 15, 2024**

BETWEEN

KIRITKUMAR RAMBHAI PATEL 1ST PLAINTIFF

ARUNABEN KIRITKUMAR RAMBHAI 2ND PLAINTIFF

AND

LIMURU HILLS LIMITED 1ST DEFENDANT

EQUITY BANK KENYA LIMITED 2ND DEFENDANT

RULING

1. To place this Ruling in context, a brief summary of the case is necessary. Vide a Plaint dated 25/2/2021 the Plaintiff inter alia sought a permanent injunction order restraining the Defendants from selling, transferring or disposing in any other way property known as Log Home No. 19 to any other persons and an order of specific performance compelling the 1st Defendant to complete the sale agreement dated 26/5/2017 between it and the Plaintiff upon the payment of the balance of the purchase price to the 2nd Defendant.
2. According to the Plaintiff, the gist of their suit was that the 1st Defendant had failed to complete the sale agreement by way of issuance of the Architect's Certificate of Practical Completion within 14 days in respect of the suit unit, Log Home No.19 which was sold on off-plan basis, located on the suit land described as L. Rs 4967/37 and 4967/38. That in an attempt to protect his interests, the Plaintiff applied to cautions over the entire suit land which were not registered because the suit land was charged on 17/4/2015 in favor of the 2nd Defendant in the sum of USD 13,015,000.00 and a Further charge dated 3/4/2018 for USD 8,985,000.00.
3. Through an application of even date, the Plaintiff also sought an order of temporary injunction against Defendants which was dismissed on 9/2/2022. The suit was slated for hearing on 13/10/2022 but was adjourned on ground that the Plaintiff's witness was indisposed. The next hearing dated was 5/6/2023



but the suit was again adjourned because the Plaintiff's counsel was engaged in the Court of Appeal Election Petition No. E30 of 2023. The matter was further adjourned on 17/10/2023 in light of Plaintiff's counsel submission that the suit property had been sold by the bank and thus she needed to take fresh instructions. A last adjournment was granted and hearing set for 19/2/2024. On 19/2/2024 the Plaintiffs yet again did not proceed having filed an application dated 15/2/2024 seeking inter alia leave to amend their Plaintiff which is vehemently opposed.

4. The suit is opposed by the 2nd Defendant only vide a Statement of Defence dated 22/4/2021.
5. It is against that background that the Court sua moto asked the parties to address it on the question of jurisdiction to entertain the suit before hearing the Plaintiff's application dated 15/2/2024.
6. Parties have filed skeleton submissions which I have read and considered.
7. On behalf of the Plaintiff, the firm of Issa & Company Advocates filed submissions dated 4/6/2024 while the 2nd Defendant's submissions dated 5/6/2024 are filed by Njuguna Kahari & Kiai Advocates. The 1st Defendant did not file any submissions.
8. The Plaintiff submitted that the 2nd Plaintiff rested on 2/6/2022 and that the bank had exercised its statutory powers of sale on the developed parcels on which the suit property was situate. Citing section 12(2) of the *Environment and Land Court Act* (ELCA) the Plaintiff maintained that the Court has requisite jurisdiction to entertain the suit. That in light of the amended Plaintiff, the cause of action now no longer pertains to the use, transfer or occupation of land but a refund of the deposit (Kshs. 2.6M) paid pursuant to the sale agreement dated 26/5/2017 and a claim for loss of bargain (Kshs. 5M) which can be litigated in the Chief Magistrate's Court. That Section 18 of the *Civil Procedure Act* empowers this Court to transfer a suit to the subordinate Court for trial should it find that it has no jurisdiction to entertain it.
9. The 2nd Defendant is emphatic that this Court lacks jurisdiction to entertain the suit because the substratum of the suit was lost on 6/9/2023 when the suit property was sold by way of private treaty. That in the instant suit, the issue of ownership was never in contestation. That the issue was the subject property was subject to a charge as a result of a loan advanced by the 2nd Defendant to the 1st Defendant. That this is demonstrated by one of the Plaintiffs' prayers in the Plaintiff seeking specific performance upon payment of the balance of the purchase price to the 2nd Defendant. Reliance was placed on the Court of Appeal decision in the case of *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR to the effect that the Environment and Land Court (ELC) jurisdiction to matters relating to the use of land do not include matters touching on mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.
10. Opposing the Plaintiff's submission on the Court's power to transfer the suit to the Chief Magistrate's Court in light of the amended Plaintiff, the 2nd Defendant submitted that the draft amended Plaintiff also challenges the 2nd Defendant's sale of the property by way of private treaty and prayer A therein seeking the sale to be declared null and void for breach of the doctrine of Lis Pendens. That in any event the private treaty of Kshs. 8,000,000/- is way above the pecuniary limits of the Chief Magistrate's Court.
11. Further the 2nd Defendant submitted the proposed amendments in the Plaintiff will oust the ELC jurisdiction and the only available to the Court would be to dismiss the suit. The Court of Appeal case of *Equity Bank Limited vs Bruce Mutuku T/A Diani Tour & Travel* [2016] eKLR was cited. In totality the 2nd Defendant concluded that this Court lacks jurisdiction to hear and/or transfer the suit before it in light of the exercise of statutory power of sale.



12. The Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara and Six Others*, [2014] eKLR stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis. Accordingly, jurisdiction goes to the root of a matter and as such it is a pure point of law. In the case of celebrated case of Owners of Motor Vessel ‘Lilian S’ v Caltex Oil Kenya Ltd [1989] eKLR it was stated thus;

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. In *Jamal Salim v Yusuf Abdulabi Abdi & Another* Civil Appeal No. 103 of 2016 [2018] eKLR the Court of Appeal stated:

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”

14. This Court is established from Article 162 of *the Constitution* of Kenya which states;

“162. System of Courts

- (1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to-
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”

15. Section 13 of the *ELCA* elaborately provides for the jurisdiction of the Court that;

“13. Jurisdiction of the Court

- (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.”

16. As it is the Plaintiff before Court is the one dated 25/2/2021 inter alia seeking an Order of permanent injunction against the Defendants from interfering with Log Home No.19 and an order of specific performance compelling the 1st Defendant to complete the sale agreement dated 26/5/2017 to transfer Log Home No. 19 to the Plaintiffs upon payment of the balance of the purchase price to the 2nd Defendant. This is important to state because there is a pending application seeking to amend the Plaintiff which is yet to be heard and determined and therefore the Court will not refer to it.
17. However, the Court record shows that on 19/2/2024 the Plaintiff and 2nd Defendant agreed about the non-existence of the subject matter of the suit – i.e. the suit property was sold way back in October 2023 during the pendency of the suit rendering the suit nugatory. It is also for that reason that the Plaintiff then seeks to amend his Plaintiff.
18. Flowing from the above and in light of the Plaintiff's prayers sought, I do not agree with the 2nd Defendant's submission that this Court's jurisdiction is ousted because the Plaintiff's prayers are commercial in nature. Indeed, the 2nd Defendant's reference to the amended Plaintiff is declined because what the Court is determining is its jurisdiction in respect of the suit as it currently filed. In my view the Plaintiff's cause of action is majorly completion of the sale agreement entered on 26/5/2017 between the 1st Defendant and the Plaintiff's late wife, Arunaben Kiritkumar Rambhai and an order compelling the 2nd Defendant to issue partial discharge of the suit unit.
19. The 2nd Defendant relied on the Court of Appeal decision in Co-operative bank supra. I have read the said binding decision and wish to distinguish it as follows. The respondents in the Court of Appeal were the Plaintiffs' in the High Court and through two charge agreements, both dated 18th August, 2010, they had charged the suit land to the Appellant, a banking institution. Thereafter, they defaulted in servicing the charge facility, prompting the Appellant to exercise its statutory right of sale of the suit land. On their part, the respondents felt that the Appellant's right to statutory sale was being unlawfully exercised because the purported sale was said to be premature and that the Appellant had failed to issue the requisite statutory notices prior to commencing the sale process.
20. Objecting to the respondents' suit and application for injunction, the Appellant raised an objection impugning the Court's lack of jurisdiction. To this end, it was contended that the High Court lacked jurisdiction to entertain the matter by virtue of Article 162 (2) (b) as read with Article 162 (3) of



the Constitution and thus the proper Court was the ELC. In rejecting the objection, the High Court held that the dispute before it was not one of land, but of a commercial nature; whose determination was within its jurisdiction. The High Court thus proceeded to determine the matter and granted the temporary injunction pending determination of the suit. It is this Ruling that provoked the appeal and the CoA in dismissing the appeal was emphatic that;

“ 42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the *ELC Act* and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of *the Constitution* ...”

21. In the instant case, the Plaintiff neither raised any accounting questions touching of the 2nd Defendant’s charges over the suit land nor challenged the exercise of statutory power of sale by the 2nd Defendant. All he pleads for is for completion of the sale agreement entered into with the 1st Defendant.
22. The upshot of the forgoing is that the Court finds that it has requisite jurisdiction over the suit as currently filed.
23. No orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mrs. Ahomo for 1st and 2nd Plaintiffs

1st Defendant – Absent

Ms. Gitau HB Njuguna for 2nd Defendant

Court Assistants – Phyllis/Oliver

