



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISC. APPLICATION NO. 18 OF 2020

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....APPLICANT

-VERSUS-

RUTH WANJIRU NJENGA.....1ST RESPONDENT

MOHAMED MAHAMUD HABIB.....2ND RESPONDENT

LEGACY AUCTIONEERING SERVICES.....3RD RESPONDENT

DANIEL OLUOCH KWARO.....4TH RESPONDENT

RULING

By Chamber Summons dated 14/2/2020, Housing Finance Company of Kenya Limited has filed an application against Ruth Wanjiru Njenga and three others being a reference arising from the decision of honourable Winfred Onkunya at Kisumu delivered on 3rd October 2019 on the original Kisumu Chief Magistrates Civil Suit no. 311 of 2018 seeking orders that the court extends time within which to file a reference from the decision of the taxing officer dated 3/10/2019 and that the reference herein be deemed as duly filed within time. Moreover that the ruling of the taxing officer dated 3/10/2019 taxing the 1st respondent's Bill at Kisumu 596, 850 be set aside and the court to re-assess the fees under item 1 of the Bill of costs dated 21/05/2019. Costs of this application to be awarded to the applicant. Which application is based on the grounds that:

1. The 1st Respondent filed the Bill of Costs dated 21.05.2019 against the parties herein.
2. The said Bill was taxed on 3.10.2019 at Kshs. 596,850 against the Applicant together with the 2nd and 3rd Respondents.
3. On 4.10.2019, the Applicant filed a notice dated the same day objecting to item 1 of the instructions fees which had been taxed at Kshs. 557,500. The Applicant also requested for the reasons for the decision and which was received on 27th January 2020.
4. The Applicant is dissatisfied with the decision of the taxing officer in taxing the instruction fees at Kshs. 557,500.
5. The taxing officer failed to consider that in her Amended Plaintiff filed in Court on 28.06.2018, the Plaintiff had sought for an liquidated claim which can only be assessed at no more than Kshs. 50,000 as provided under schedule VII paragraph 2 of the Advocates Remuneration Order, 2014.
6. The taxing officer erred in calculating instruction fees by pegging it solely on the value of the subject matter of the property in question being Kshs. 18,000,000.
7. Item 1, being the instruction fee is inordinately high as the prayers in the amended Plaintiff were un-liquidated.
8. There was no justification for the increase of the instruction fees from the basic minimum by the taxing officer.
9. The decision to tax item 1 was based on an error of principle as to justify an interference of this Honourable Court.
10. Although this application has been brought outside the 14 days, from the time of receipt of the reasons from the Court, there will be no prejudice on the part of the 1st Respondent as there is an order for stay of execution pending the filing, hearing and

determination of this reference.

In the replying affidavit of Bruce O. Odeny, advocate of the High Court of Kenya appearing for the Respondents, he states that the application was filed in a court of without jurisdiction and is an afterthought and an abuse of the process of the court. He states that the taxation emanates from Kisumu ELC CMC no. 311 of 2018 which is essentially an Environment & Land case that was before a Magistrate's Court. He states that appeals from the Magistrates Court on any Environment and Land issues can only be directed to the Environment and Land Court and not the High Court and that the High Court lacks jurisdiction.

In this matter, I do hold the view that the record should be set out clearly and a position taken early enough to avoid future confusion on jurisdictions. I am aware that the matter was transferred to this court by the Honourable Judge of the High Court on the basis that the court lacked jurisdiction. I do not have powers to review the High Court Judge's orders either an appeal or on application for review.

Strangely, Mr. Bruce Odeny advocate for the respondents, who raised objection in the High Court asserting that the High Court lacks jurisdiction to entertain this dispute arguing that it was basically a land dispute, has now appealed against the decision by the Honourable Judge transferring the matter to this court. However, I am bound by the law and cannot create jurisdiction where it does not exist.

The genesis of this matter was an amended plaint wherein the plaintiff sought a declaration that she was entitled to the right of redemption of her parcel of land known as Kisumu Municipality Block 4/364. Moreover, an order compelling the 2nd Defendant to service the loan in question in default the 1st Defendant to properly serve the plaintiff with a proper statutory notice to enable the plaintiff take over the loan and make repayments and an order pre-empting eviction from the suit land. Moreover, an order that the sale of the suit land was illegal and be set aside.

The dispute revolved on a loan of Kshs. 1,000,000 advanced to another party by the 1st Defendant. The suit property was used as security. It appears there was some default and a process of realisation of the security was commenced. The security was the plaintiff's land.

It is my considered view that this was purely a commercial venture and therefore the dispute therein was neither related to environment nor Land use or title to land but recovery of security as a result of default in loan repayment. Though the Magistrates Court has jurisdiction to entertain the dispute as a commercial dispute, this court has no jurisdiction to entertain a commercial dispute,

In *Co-operative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 others* (2017) eKLR it was held:

1. "Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

2. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfilment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advances (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the charge is assured of the repayment of the money he has advanced the charger.

3. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.

4. Consequently, the assertion that a charge constitutes use of land within the meaning of article 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.

5. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the ELC Act. The said section provides that:

2. In exercise of its jurisdiction under article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland.;

6. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under section 2 of the said act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. 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 an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

7. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court in *Paramount Bank Limited vs Vagyi Syed Qamara & another* (2017) eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

"The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the Employment and Labour Relations Court act, the court could entertain the dispute in all its aspects and award damages appropriately."

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. I am bound by the court of appeals decision above mentioned. I do find that the jurisdiction in this matter is in the High Court. I decline to take up the matter. I do transfer it back to the High Court. Costs in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF OCTOBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE