



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 632 OF 2012

[CONSOLIDATED WITH ELDORET E & L CASE NO. 267 OF 2014]

KENYA RAILWAYS CORPORATION.....PLAINTIFF

VERSUS

MAMUSU ENTERPRISES LTD.....1ST DEFENDANT

ELDORET HOTEL LTD.....2ND DEFENDANT

THE COMMISSIONER FOR LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. **Eco Bank Kenya Ltd**, the 1st Defendant/Applicant in Eldoret ELC No. 267 of 2014, that was on 11th June, 2015 consolidated with Eldoret ELC 632 of 2012, seeks vide the Motion dated the 13th June, 2019 to have the consolidation order set aside and ELC No. 267 of 2014 transferred to Eldoret High Court for hearing and disposal. It also seeks for each party to bear its own costs. The application is based on the six (6) grounds on its face marked (a) to (f) and is supported by the affidavits sworn by **Elizabeth Hinga**, Advocate and Head of Recovery and Remedial Services with the 1st Defendant on the 13th June, 2019 and 6th December, 2019. That their case is that ELC No. 267 of 2014 is a commercial dispute which in view of the Court of Appeal's decision in ***Co-operative Bank of Kenya Ltd Vs Patrick Kangethe Njuguna & 7 Others [2017] eKLR***, jurisdiction lies with the High Court. That ELC No. 632 of 2012 is over the ownership of **Eldoret Municipality/Block 3/58** between **Kenya Railways Corporation** as Plaintiff and **Mamusu Enterprises Ltd & 3 Others** as Defendants.

2. Kenya Railways Corporation, the Plaintiff/Respondent in ELC No. 632 of 2012 opposed the application through the replying affidavit sworn by **Stanley Gitari**, the Senior Legal Officer with the Corporation on the 7th October, 2019. That it is their case that as the Applicant had participated in the proceedings leading to the consolidation order of 11th June 2015, then the issue of ownership of the suit land should be decided first before the Applicant can commence any proceedings to realize the security for the loan advanced.

3. That on the 7th October, 2019, the Court gave directions on among others filing, and exchanging written submissions. That subsequently, the learned Counsel for 1st Defendant/Applicant and Plaintiff/Respondent filed their written submissions dated the 6th December, 2019, and 19th February, 2020 respectively.

4. The following are the issues for the court's determinations;

(a) Whether the Court has jurisdiction on the issues raised for determination in ELC No. 267 of 2014.

(b) Whether the 1st Defendant/Applicant in ELC No. 267 of 2014 has made a reasonable case for setting aside or varying the order of 11th June, 2015 consolidating the suit with ELC No. 632 of 2012, and transferring ELC No. 267 of 2014 to the High Court, Eldoret for hearing and determination.

(c) Who pays the costs of the application?

5. The Court has carefully considered the grounds on the Motion, affidavit evidence filed, the written submissions by both Counsel and come to the following determinations;

(a) That **Eldoret Hotel Limited** commenced ELC No. 267 of 2014 through the Plaint dated the 14th August, 2014 against **Eco**

Bank Kenya Limited & Another. That the dispute therein is clearly of a commercial nature and affidavit evidence and submissions filed are all in agreement that following the court of Appeal's decision in **Co-operative Bank of Kenya Vs Patrick Kangethe Njuguna & 5 Others [2017] eKLR**, jurisdiction in commercial disputes lies with the High Court.

(b) That **Kenya Railways Corporation** had earlier commenced ELC No. 632 of 2012 under the previous reference of Eldoret High Court Civil Suit No. 105 of 2010, against **Mamusu Enterprises Ltd & 3 Others** vide the Complaint dated the 9th August, 2010. That the pleadings thereof confirms that the dispute is over the title held by Mamusu Enterprises Ltd over the suit land. That the issues in this matter undoubtedly falls squarely under the jurisdiction of this suit under **Article 162(2)(b) of the Constitution of Kenya, 2010**, and **Section 13 of the Environment and Land Court Act No. 19 of 2011**.

(c) That the proceedings of 11th June, 2015 in both ELC No. 267 of 2014, and 632 of 2012 confirms that an order consolidating the two matters was made after hearing the two Counsel present pursuant to an oral application. That however, the hearing of the main suits has not commenced up today.

(d) That prior to the Court of Appeal's decision in the **Co-operative Bank of Kenya** case cited above, matters of commercial disputes like the one in ELC No. 267 of 2014 were being filed, and determined in this court. That it must have been with that background that the Plaintiff in ELC No. 267 of 2014 filed that matter before this Court and the consolidation order of 11th June, 2015 must be understood to be a reflection of the jurisdiction situation existing then. That obviously, that situation changed after the Court of Appeal pronounced itself on the 12th October, 2017 in the Co-operative Bank of Kenya case. That there is no doubt that this Court is bound by the Court of Appeal decision. That as jurisdiction cannot be divested or conferred by consent, the Court understands the Motion dated the 13th June 2019 to be aimed at complying with the Court of Appeal's verdict on where jurisdiction in commercial disputes lies. That the fact that the 1st Defendant's/Applicant's Counsel participated or was represented in the proceedings that led to the consolidation order of the 11th June, 2015 does not stop them from moving the Court, as they did through the Motion subject matter of this ruling.

(e) That as it is evidently clear that ELC No. 267 of 2014 concerns itself with commercial dispute, and jurisdiction in such disputes lies with the High Court, the Court finds and holds that the 1st Defendant/Applicant has made a reasonable case for both the setting aside of the order of 11th June, 2015, and also the transfer of ELC No. 267 of 2014 to the High Court, Eldoret.

(f) That in view of the foregoing, it is only fair that each party in the application bears their own costs.

6. That flowing from the above findings, the Court finds merit in the Motion dated the 13th June, 2019 and is allowed in the following terms:

(a) That the order of 11th June, 2015 consolidating Eldoret ELC No. 267 of 2014 and 632 of 2012 is hereby set aside.

(b) That Eldoret ELC No. 267 of 2014, being a commercial dispute is hereby ordered to be separated from the consolidated record, and transferred to the High Court Eldoret for hearing, and determination. That a mention date before the duty Judge High Court, Eldoret be fixed.

(c) That each party bears their own costs in the application.

Orders accordingly.

Dated and delivered at Eldoret this 7th day of May, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy Registrar through the online media given by Counsel/Parties.

Christine: Court Assistant