



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 86 OF 2019**

**ALPHOSE YANKULIJE..... PLAINTIFF**

**VERSUS**

**ONE TWIGA ROAD LIMITED.....1<sup>ST</sup> DEFENDANT**

**LEAKEY'S AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**I & M BANK LIMITED.....3<sup>rd</sup> DEFENDANT**

**RULING**

1. Before me for determination is the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants notice of Preliminary objection dated 27<sup>th</sup> May, 2019 seeking to have the order issued by this court on 16<sup>th</sup> May, 2019 vacated and the application dated 15<sup>th</sup> May 2019 and the entire suit struck out on the following grounds that:

**i. This Honourable Court has no jurisdiction to hear and determine or issue orders in this case as the dispute is in respect of mortgages and charges which fall within the jurisdiction of the High Court.**

**ii. The Sale Agreement between the 1<sup>st</sup> defendant and the plaintiff is unenforceable against the 3<sup>rd</sup> Defendant as the 1<sup>st</sup> Defendant did not obtain consent from the 3<sup>rd</sup> Defendant to sell the said charged property contrary to Section 59 of the Land Registration Act No.3 of 2012 and Section 87 of the Land Act No.6 of 2012.**

**iii. This Application and the entire suit should be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

2. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that this court has been improperly moved by the plaintiff in getting an order of injunction over statutory power of sale by the 3<sup>rd</sup> Defendant. It was submitted that this court has no jurisdiction on charges and mortgages. Mr. Ondego for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relied on the case of **Cooperative Bank of Kenya Limited –v-Patrick Kangethe Njuguna & 5 Others(2017)eKLR**, and **Kisimani Holdings Limited & Another –v- Fidelity bank Limited (2013)eKLR** and submitted that matters to do with commercial transactions such as mortgages and charged are matters reserved for the High Court.

3. It was further submitted that there was no consent issued by the bank to either the 1<sup>st</sup> Defendant or its agents to sell the suit property when there is an existing charge over the said property contrary to Section 59 of the Land Registration Act and Section 87 of the Land Act.

4. Mr. Thiaka learned counsel for the Plaintiff submitted that this court has jurisdiction over the matter but added that if the court was of the view that it does not have jurisdiction, it could transfer the suit to the High Court.

5. I have carefully considered the pleadings filed by the parties. I have also considered the submissions made by counsel for the parties. The issue for determination by this Court is whether the court has no jurisdiction and whether the application and the suit should be struck out.

6. The dispute herein relates to the parcel of land known as **MN/I/11278** on which the 1<sup>st</sup> Defendant was developing duplex apartments for sale. The Plaintiff avers that he entered into an agreement of sale with the 1<sup>st</sup> Defendant dated 26<sup>th</sup> January, 2016 to purchase one 4 bedroom duplex apartments known as Apartment Number 2A2 which is part of the estate that the 1<sup>st</sup> Defendant was developing on **Land Reference Number MN/I/11278** at the price of Kshs.31,500,000/= out of which he paid a deposit of Kshs.9,000,000/=. The plaintiff avers that on or about 29<sup>th</sup> April 2019, the 2<sup>nd</sup> Defendant advertised the said parcel of land together with the developments thereon including the said apartment.

7. In this case, the following prayers are sought by the Plaintiff:

- a. A declaration that the plaintiff legally bought apartment number 2A2 which is part of the estate erected or constructed on the suit property MN/1/11278.**
- b. An order of mandatory injunction to stop the defendants from disposing off the suit property by public auction through the 2<sup>nd</sup> Defendant.**
- c. An order of permanent injunction to restrain whether by themselves, servants or agents, from offering for sale, selling, advertising, disposing of, alienating, or in any way interfering with, dealing with or purporting to deal with the suit property upon which the plaintiff has bought an apartment.**
- d. An order for specific performance by the 1<sup>st</sup> Defendant as the Plaintiff is ready and willing to pay the remaining balance of the purchase price upon completion of his apartment.**
- e. In the alternative, an order compelling the 1<sup>st</sup> Defendant to reimburse the plaintiff the deposit of KShs.9,000,000/= plus KShs.1,622,820/= being the costs associated with the sale transaction that the plaintiff incurred.**
- f. Any other further reliefs that this court may deem just and expedient in the circumstances of this case.**
- g. Costs of is suit.**

8. At the time of filing the suit the plaintiff simultaneously filed the notice of motion application dated 15<sup>th</sup> May 2019 seeking orders of mandatory and permanent injunction against the defendants pending the hearing and determination of the Application and the suit. When the application came up before me on 16<sup>th</sup> May, 2019 I granted interim orders of injunction pending inter parties hearing. It is this interim orders that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants want vacated and the application and the entire suit struck out on the grounds, inter alia, that this court has no jurisdiction.

9. The Environment and Land has its root in Article 162 of the Constitution which provides as follows:

**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.**
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).**
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.**

10. Parliament did proceed to enact the Environment and Land Court Act No.19 of 2011 to give effect to Article 162 (2) (b) of the Constitution. The jurisdiction of the court is contained in Section 13 of the said Act which provides as follows:

- 13 (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 written law 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 relating to environment and land, including disputes-**
  - a) Relating to environmental planning and protection, trade, 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.**

3) –

4) –

5) –

6) –

7) – **In exercising of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –**

a) **Interim or permanent preservation orders including injunctions;**

b) **Prerogative orders;**

c) **Award of damages;**

d) **Compensation;**

e) **Specific performance;**

f) **Restitution;**

g) **Declaration; or**

h) **costs**

11. Other statutes that give the Environment and Land Court jurisdiction are the Land Act, 2012 and the Land Registration Act, 2012. Part of what these statutes address are land transactions and dispositions including charges.

12. In assessing the decision of the Court of Appeal in the case of **Cooperative Bank of Kenya –v- Patrick Kangethe Njuguna (supra)**, I wish to associate myself with the decision of Munyao Sila, J in the case of **Lydia Nyambura Mbugua –v- Diamond Trust Bank & Another (2018) eKLR** in which he stated as follows:

**“My own understanding of the above decision, is that the Court of Appeal was of opinion that the particular dispute was more in relation to accounts of which the High Court had jurisdiction to hear. I do not think that the Court of Appeal was holding the position that once the Environment & Land Court (ELC) sees the word “charge” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what constitution under Article 162 (2) (b), Parliament under Section 13 of the Environment and Land Court Act No.19 of 2011, have prescribed as being the jurisdiction of the ELC. This would also go contrary to the Supreme Court decision in the case of R Karisa Chengo & 2 Others (2017)eKLR where the Supreme Court stated as follows at paragraph 51 of its decision:-**

**“...in this instance, the jurisdiction of the specialized courts is prescribed by parliament, through the said enactment of legislation relating, respectively to the ELC and ELRC.”**

13. From the prayers that I have outlined earlier, it is clear that the predominant issue in this case is the sale of apartment 2A2 which is part of the estate erected or constructed on the suit property. The plaintiff is seeking an order for specific performance among others which are disputes within the power of this court to determine. The issue of accounts has not arisen, although there is an alternative prayer for refund. The issues in this suit, in my view, fall within the jurisdiction of this court.

14. I am thus not persuaded that this preliminary objection is well grounded and the same is hereby dismissed with costs to the plaintiff.

15. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of July 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Wawire for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

Thiaka for plaintiff

No appearance for 1<sup>st</sup> Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**