



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 309 OF 2015

(formerly Mombasa HCCC No. 315 of 2007)

NYALI CONSTRUCTION &

ELECTRICAL SERVICES LIMITED.....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH

ELC CASE NO. 308 OF 2015

(formerly Mombasa HCCC No. 283 of 2008)

PEREZ OKUMU & 2 OTHERS

(Suing as administrators of the Estate of

CLEMENT OTIENO OKUMU.....PLAINTIFFS

-VERSUS-

BARCLAYS BANK

OF KENYA LIMITED & 2 OTHERS.....DEFENDANTS

RULING

(Application by 1st defendant raising the issue that this Court has no jurisdiction to handle the suit; applicant claiming that this court has no jurisdiction to hear and determine the suit as it relates to a charge; analysis of the law of the jurisdiction of the court pointing to the conclusion that the court has jurisdiction; application dismissed)

1. The application before me is the one filed on 18 November 2020 by Barclays Bank of Kenya Limited, a defendant in this suit. The applicant seeks orders that this matter be removed from this court and be transferred to Mombasa High Court, Commercial and Admiralty Division for hearing and determination. The application is based on the grounds inter alia that :-

(i) The underlying dispute herein pending determination by this court is a contract of lending between the plaintiff and the defendant in which land is merely a security.

(ii) In particular, the suit herein is substantially a challenge by the respondent on the applicant's exercise of its statutory power of sale.

(iii) This court lacks jurisdiction to adjudicate on this matter which is commercial in nature. The High Court is the proper forum for the hearing and determination of this matter.

2. The application is supported by the affidavit of Lucas Gikungu, the Applicant's Manager Corporate Recoveries, Business Support & Corporate Recoveries Corporate Credit. Mr. Gikungu in his affidavit has deposed that the present suit was filed by the plaintiff substantially seeking orders to restrain the applicant from realizing the parcels of land known as Land Reference No. Mombasa/Block 1/28 and subdivision number 3564 (Original 3369/45) section 1 Mainland North in exercise of the applicant's statutory power of sale. He deposed that the suit land was offered as security for financial accommodation. He further deposed that the underlying dispute is a contract of lending between the plaintiff and the defendant in which land is merely a security, and the challenge is on the applicant's statutory power of sale. He believes that this court lacks jurisdiction to adjudicate on this matter, which is in his view, is commercial in nature, and that it is the High Court which is the proper forum.

3. Let me put matters into context. There are two consolidated matters before me, that is the suit Mombasa ELC No. 309 of 2015 and Mombasa ELC 308 of 2015. They were originally commenced in the High Court as Mombasa HCCC No. 315 of 2007 and Mombasa HCCC No. 283 of 2008.

4. Mombasa HCCC No. 315 of 2007 was commenced through a plaint which was filed on 11 December 2007. The plaintiff in that case is Nyali Construction & Electrical Services Limited and the defendant is the applicant herein. In that plaint, the plaintiff pleaded to be the registered owner of the land parcel Mombasa/Block 1/28 having purchased it in the year 2002. She pleaded that in the year 1996, the applicant offered to her financial facilities to the tune of Kshs 2 million secured by a charge over the property known as Subdivision No. 3546 (original number 3369/45) Section 1, MN. She pleaded that through a letter dated 13 March 2002, the applicant offered the plaintiff credit facilities being an overdraft facility of Kshs. 5,000,000/=, a guarantee facility of Kshs. 1,000,000/= and a Barclaycard facility of Kshs. 300,000/=. It is pleaded that the offer was accepted but the credit facilities never afforded to the plaintiff, as one critical condition precedent, a charge over the plot Mombasa/Block 1/28, was never executed. The plaintiff pleaded further that by two letters of 22 July 2003, the defendant offered a loan facility of Kshs. 7,000,000/= and ancillary facilities of Kshs. 1,300,000/= on security of the same land. She pleaded that though the offer was accepted, no facility was granted, and no charge created. It is pleaded that on 6 September 2006, the applicant demanded from the plaintiff, the sum of Kshs. 14,434,168.45/= without specifying how the debt arose. The plaintiff did not pay the same as in her view, it was unrecoverable for constituting illegal charges and was statute barred. On 31 October 2007, the plaintiff was served by an auctioneer appointed by the applicant with a 45 days notice to pay the sum of Kshs. 20,244,254/= or else the property will be sold through a public auction on 2 January 2008. It is pleaded that the plaintiff sought the particulars of the charge but was not supplied with the same. The plaintiff contended that the intended sale was illegal for reasons that no charge was ever created, no mandatory statutory notice was issued, no mandatory notice of sale was issued, and that there does not exist any statutory power of sale on the property. In the suit, the plaintiff sought (slightly paraphrased for brevity) :-

- (a) A declaration that any purported charge over the suit property title number Mombasa/Block 1/28 is invalid and unenforceable.*
- (b) A declaration that the monies demanded by the defendant against the plaintiff in the sum of Kshs. 20,244,254/= is unrecoverable.*
- (c) An injunction be issued to restrain the defendant from selling the suit land Mombasa/Block 1/28.*
- (d) Costs*
- (e) Any further relief deemed fit.*

5. The suit Mombasa HCCC No. 283 of 2008 was commenced on 9 October 2008 by Clement Otieno Okumu as plaintiff, with the applicant and two other persons, Pareshkumar Nanjibhai and Bhudia Arjan Harji, being the defendants. In that suit, the plaintiff pleaded to be the registered owner of the land parcel Subdivision No. 3564 (Original number 3369/45) Section I, Mainland North. He pleaded that in May 1996 and September 2003, he charged that land to the applicant for an aggregate maximum sum of Kshs. 4,000,000/=. He pleaded that he made repayments and completed the loan and overdraft on 9 November 2007. He pleaded that in September 2006, the applicant issued to him a notice threatening to sell the land for debts owed by Nyali Construction & Electrical Services Limited (the company). He averred that the applicant could not exercise its alleged power of sale as the charges, one under which the power was sought to be exercised were invalid. The plaintiff referred to two charges, one dated 2 May 1996, and a further charge dated 24 September 2003, as invalid and unenforceable. He did mention that the applicant had issued another notice to sell the property Mombasa/Block1/28 which led to the filing of the case Mombasa HCCC No. 315 of 2007, referred to above. He pleaded that while the suit was pending the company entered into negotiations with the applicant for an amicable settlement of the disputed amount due to the company. It is pleaded that unknown to him, the applicant fraudulently sold his Plot No. 3564 to the 2nd and 3rd defendants in March 2008. He claimed that the purchase was also fraudulent. He pleaded inter alia that the sale was at an undervalue; that the applicant purported to exercise a power of sale which did not exist; that the sale was effected by private treaty in order to bypass the invalid charge and further charge. He pleaded that the purchasers were now trying to evict him. In the suit, he sought the following orders (slightly paraphrased for brevity) as contained in the amended plaint filed on 16 October 2008:-

- a) A declaration that the charge dated 2 May 1996 and the further charge dated 24 September 2003 are invalid and unenforceable against the plaintiffs.*
- b) A permanent injunction restraining the defendants from trespassing into and alienating the Plot No. 3564/I/MN*
- c) A declaration that the sale and transfer of subdivision number 3564/I/MN in March 2008 was fraudulent and the same be set aside.*
- d) An order for rectification of the title No. CR. 17376 cancelling Entry Number 9*
- e) Cost of the suit.*

6. In the suit Mombasa HCCC No. 283 of 2008 (now ELC 308 of 2015), the applicant filed defence where she inter alia pleaded that the suit property was properly charged to it and denied that the charge and further charge were invalid. She pleaded further that the plaintiff was a director in the company. It was denied that the property was fraudulently sold and averred that a sale by private treaty was in accordance with the law. She pleaded that in the suit Mombasa HCCC No. 309 of 2015, an application for injunction had been dismissed.

7. Clement Otieno Okumu, the original plaintiff in Mombasa HCCC No. 283 of 2008 died on 14 December 2013. An application for his substitution was filed and allowed and the suit is now being continued by his administrators. A further amended plaint was filed on 4 December 2017 to reflect this change but the prayers in the plaint remained the same.

8. The 2nd and 3rd defendants in the suit Mombasa HCCC No. 283 of 2008 entered appearance and filed defence which they later amended on 4 October 2018. They denied that the sale of the land to them was fraudulent. They pleaded that as the owners, they are entitled to possession and to deal with the premises. They also filed a counterclaim seeking the following orders (slightly paraphrased for brevity) :-

- (a) *A declaration that the sale and transfer of LR No. MN/I/3564 (CR No. 17376) to them be declared valid.*
- (b) *A declaration that they are the absolute and indefeasible owners of the suit property.*
- (c) *General damages for loss of use of the suit property.*
- (d) *That the plaintiff's suit be dismissed with costs.*
- (e) *A permanent injunction restraining the plaintiff's agents, servants or anyone acting on his behalf from trespassing into and dealing with the suit property.*
- (f) *Any other relief deemed fit.*
- (g) *Costs of the counterclaim.*

9. On 9 November 2015, parties appeared before P.J. Otieno J, in the High Court. It was mentioned that the matter was a land matter and therefore fell for the jurisdiction of this court. This was agreed by all counsel present, including counsel for the applicant, and by consent, the judge transferred the matter to this court. It is after that order of transfer that this court got seized of the matter and the two cases re-numbered as Mombasa ELC case numbers 308 and 309 of 2015. I have conducted pre-trial in the matter and indeed certified the case for hearing.

10. Turning back to the application, it will be seen that it contends that this court has no jurisdiction. After the application was filed, on 17 February 2021, parties filed a written consent allowing the application and transferring the matter to the Mombasa High Court, Commercial and Admiralty Division. I rejected that consent, and pointed out to counsel that jurisdiction is never granted by consent, but by law, and unless I am persuaded that this court has no jurisdiction, then I am properly seized of the matter. I thus directed counsel to file submissions to justify their position on the application. Only Mr. Wafula, learned counsel for the applicant filed submissions. There was mention that Mr. Mogaka, learned counsel for the plaintiff would file submissions, but none were ultimately filed on his behalf. Mr. Njanga, learned counsel for the 2nd and 3rd defendants in the suit Mombasa ELC 308 of 2015, stated that he would not file submissions as he was not opposing the application.

11. In his submissions, Mr. Wafula, learned counsel, submitted that the jurisdiction of this court emanates from Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. Counsel referred me to the Court of Appeal decision in *Cooperative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others (2017) eKLR* and also cited the case of *Paul Gatete Wangai & 13 others vs. Capital Realty Limited & another (2020)*. He made submissions that were more or less in line with what was held in the *Cooperative Bank of Kenya* case. Counsel added that whereas the plaintiffs in ELC 308 of 2015 have sought rectification of the title, the said prayers stem out from the 1st defendant's exercise of its statutory power of sale, and the said prayer cannot be divorced from the 1st defendant's exercise of its statutory power of sale. Mr. Wafula submitted that the predominant issue for determination is on the contractual relationship between a chargor and a chargee.

12. I will start by acknowledging that jurisdiction is everything, and without it, a court would have to down its tools. On the other side of the coin, a court is obligated to proceed and determine a matter where it has jurisdiction, for that will be the exercise of its very mandate and existence. A court cannot shirk a matter where it has jurisdiction.

13. The jurisdiction of this court is spelt out in Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act. They are drawn as follows:-

Article 162 (2) of the Constitution

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) ...*
- b) The environment and the use and occupation of, and title to, land.”*

Section 13 (2) ELC Act

(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”

(emphasis mine)

14. The issue before me squarely relates to a charge, and the rights given by law to a chargee. There is also the question of whether title was properly transferred to the 2nd and 3rd defendants in Mombasa ELC No. 308 of 2015. A charge is an interest in land. Indeed, Section 2 of the Land Act, defines a charge as follows:-

“charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge”

15. Being an interest in land, the land statutes must apply and the two key land statutes in Kenya are the Land Act, 2012 and the Land Registration Act, 2012. These statutes provide for the court that has jurisdiction to hear and determine disputes relating to land and interests in land. For the Land Act, Section 150 provides as follows :-

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act 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.

For the Land Registration Act, Section 101, provides as follows:-

101. Jurisdiction of court.

The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

16. The manner of creation of charges is covered in Part V of the Land Registration Act, and as I have demonstrated above, Section 101 of that statute provides that the court with jurisdiction is the Environment and Land Court. The Land Act, at Part VII, makes general provisions in relation to charges, including the manner of exercise of the statutory power of sale. I have also pointed out that the Land Act specifies that the court with jurisdiction is the Environment and Land Court. Now, if charges are created and governed by a statute which provides that it is this court with jurisdiction, on what basis can it be argued that this court has no jurisdiction to determine a dispute relating to charges? I am unable to understand the logic in the argument that because the issue before court is a charge, then this court has no jurisdiction, whereas the very land statutes that will be referred to provide that it is this court which has jurisdiction.

17. I am aware of the Court of Appeal decision in the case of *Cooperative Bank vs Kangethe* which Mr. Wafula has in fact heavily relied on. I have had occasion to discuss what I think was the ratio in that case in my decision in the case of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] eKLR*. I did state that my understanding of the ratio in that case is that the Court of Appeal was of the view that it was dealing with a case where the predominant issue was accounts, and by dint of that, the High Court had jurisdiction. I stand by my reasoning in that case. Given the rather explicit provisions regarding jurisdiction in the Land Act and Land Registration Act, I am certainly not persuaded that this court would have no jurisdiction over a matter relating to a charge and would need to down its tools every time a matter comes before it where the subject matter is a charge over land. I do not see how you can separate a charge created over land from rights over that land. If this court has jurisdiction to hear and determine rights over land, and instruments related to land, and if a charge is one such instrument, how can the court not be having jurisdiction to hear a case which contests the validity of the charge instrument? Maybe if the issue is only accounts, and not the charge, one may argue that the charge is not in issue, but simply the accounts, and since the charge is not in issue, then the land is not in issue, and the High Court may thus have jurisdiction. But even then, I wouldn’t agree that this court cannot have jurisdiction to deal with accounts. If such accounts cannot be separated with an issue that the court has jurisdiction, then the court will have to deal with the whole of the dispute including the bit on accounts. For example, you could have a sale of land and title transferred where a party is paying by instalments and/or interest. A party may sue to cancel that title to land on the basis that payment has not been made as provided for in the contract. This court would certainly have jurisdiction to determine whether or not the title should be cancelled, but it cannot make that determination without taking accounts. In such instance, can you say that this court has no jurisdiction because some accounts need to be taken? I suppose not.

18. Even assuming that all my arguments above are wrong and misplaced, what are the prayers before me in the two suits? In the suit originally filed as Mombasa HCCC No. 315 of 2007, the plaintiff therein inter alia wants a declaration that any purported charge over the land parcel Mombasa/Block I/28 is invalid and unenforceable. She also seeks an injunction to restrain any sale of that land. There is a prayer

for declaring a sum money as unrecoverable. In the suit, originally filed as Mombasa HCCC No. 283 of 2008, the plaintiff wants orders inter alia for a declaration that a charge and further charge are invalid. He also wants an order of permanent injunction and declaration that the purported sale by chargee was fraudulent. There is a counterclaim that seeks inter alia an order for a declaration that the land parcel MN/I/3564 belongs to the 2nd and 3rd defendants in that suit. There is also a prayer in the counterclaim for general damages for loss of use of the property, and a prayer to have the plaintiff permanently restrained from the land. In fact, I have seen no prayer at all, in either pleadings, for any accounts to be taken. Is the applicant now saying that this court has no jurisdiction to make orders of declaration of ownership of land ? Is the applicant now arguing that this court has no jurisdiction to hear a case asking for orders to permanently restrain a person from certain land ? Is the applicant saying that this court cannot nullify a sale of land ? Is the applicant saying that this court has no jurisdiction to make an award of mesne profits ? Well, if that is not what the applicant is saying, then I wonder where to place this application, because in this application, the applicant is contending that this court has no jurisdiction to hear the suits herein, and that can only mean that the applicant is saying that this court has no jurisdiction to hear a case contesting the title of a person, and has no jurisdiction to issue a permanent injunction to restrain a person from land, and has no jurisdiction to rectify or cancel title, and has no jurisdiction to hear a dispute relating to transfer and/or sale of land, and has no jurisdiction to hear a case seeking mesne profits or general damages for loss of use of land and/or trespass. These are the nature of cases that this court hears on a daily basis and for which jurisdiction is never contested, for the simple reason that it is pretty obvious that these are the very cases for which this court was created to hear.

19. I probably have a lot to say on the jurisdiction of this court, but it is not necessary, for I think that I have said enough to demonstrate that I am not persuaded that this court has no jurisdiction to hear the two suits now before it. The application is hereby dismissed but since no party opposed it, I make no orders as to costs.

20. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:

Mr Wafula for the applicant

Ms Kimaita holding brief for Mr. Njanga for 2nd & 3rd defendants

Court Assistant; Wilson Rabong'o