



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 118 OF 2019

BONIFACE MWANGI KAHUNGA PLAINTIFF

= VERSUS =

TIMOTHY NJUGUNA KARANJA 1ST DEFENDANT

ASSAL LIMITED 2ND DEFENDANT

RULING

1. The plaintiff, **Boniface Mwangi Kahunga**, initiated this suit through a plaint dated 5/7/2019. He subsequently amended the plaint on 12/6/2020. His case was that between August 2017 and 15th October 2018, he agreed to lend the 1st defendant a total sum of Kshs 42,000,000 which the 1st defendant agreed to repay by 31/1/2019. Around 15/1/2019, the 1st defendant borrowed more money from him, bringing the total debt to Kshs 50,000,000. This culminated in the signing of an agreement by the two parties, dated 17/1/2019. Subsequent to that, the 1st defendant sought extension of the repayment period, and this culminated in the signing of an agreement dated 1/4/2019, through which the 1st defendant agreed to repay the debt which had risen to Kshs 62,000,000 by 31/5/2019.

2. The plaintiff further contended that under the agreement dated 1/4/2019:

(i) the 1st defendant acknowledged owing the plaintiff the sum of Kshs 62,000,000; (ii) the parties agreed that the said debt would be secured by various parcels of land whose survey numbers were itemized in the agreement; and (iii) the parties further agreed that in the event of default and/or non-compliance with the agreed repayment date, the plaintiff would proceed to "secure the proprietary interest in all the parcels of land in lieu of full repayment of the monies advanced to the 1st defendant."

3. The plaintiff further averred that he subsequently came to learn that the properties which had been offered as security belonged to the 2nd defendant, an entity in which the 1st defendant was a director. He added that the 2nd defendant subsequently agreed to transfer the said properties to the plaintiff if the 1st defendant defaulted to repay the debt. He added that the 1st defendant failed and/or refused to repay the debt when it fell due on 31/5/2019. With a view to enforcing the terms of the said agreement, the plaintiff demanded the original deed plans and titles relating to the said properties from the 1st defendant, but the 1st defendant refused to surrender them to the plaintiff.

4. Consequently, the plaintiff brought this suit seeking the following primary reliefs against the defendants:

a) Payment of the sum of Kshs 62,000,000.

b) Interest on (a) above at prevailing commercial rates from 31/5/2019 until payment in full.

5. As an alternative relief to the above primary reliefs, the plaintiff sought a permanent injunction restraining the defendant from, in any way selling, charging, leasing or in any way dealing with Land Reference Number 6944/2 Thika. Further, as part of the alternative reliefs, the plaintiff sought an order compelling the defendants to sign all documents necessary to confer title of the properties whose survey numbers were itemized in the agreement to the plaintiff and forward them to the plaintiff within seven (7) days of grant of the order. Lastly, as a limb of the alternative reliefs, the plaintiff sought an order enjoining the Deputy Registrar of this court to sign all documents necessary to confer title of the itemized properties to the plaintiff and forward them to the plaintiff within 7 days of grant of the order.

6. The 1st defendant filed an amended defence dated 29/6/2020 in which he denied being indebted to the plaintiff. The 1st defendant admitted that the properties itemized in the plaint belonged to the 2nd defendant but denied all the other substantive averments made in the amended plaint. He admitted that the cause of action arose within the jurisdiction of this court and that there was no pending suit and there had been no previous proceedings between the parties, relating to the subject matter of this suit. He urged the court to dismiss the plaintiff's suit.

7. The 2nd defendant filed an amended statement of defence dated 1/7/2020. Except for the averment that the properties itemized in the amended plaint belonged to it, the 2nd defendant denied all the substantive averments made in the amended plaint. The 2nd defendant urged

the court to dismiss the plaintiff's suit.

8. Subsequently, on or about 16/10/2020, the 1st defendant brought a notice of preliminary objection, objecting to this suit on the following verbatim grounds:

1. This court lacks jurisdiction to hear and determine this suit upon the grounds that the agreement dated 1st April 2019 which forms the subject of the dispute between the parties is not an agreement for sale of land and that the said agreement titled Agreement on Loan Advancement is a commercial dispute and does not disclose a land or boundary dispute and therefore is wrongly filed before this honorable court.

2. That the 1st defendant raises objection on a point of law that it is a legal requirement that one cannot dispose of company property without a company resolution and or the agreement signed by the directors of the company under seal. The loan advancement agreement improperly filed before this honorable court is not signed under seal and the same cannot confer interests of company property to another.

3. That the said agreement is illegal. The basis of the agreement titled Agreement on Loan Advancement is that allegedly the plaintiff lent money to the 1st defendant and therefore took some parcels of land belonging to the company, the 2nd defendant herein, as security. The plaintiff is not a financial institution and therefore is not licensed to lend money and charge interest. The plaintiff does not have the power to secure a charge upon the said properties or to auction the same.

4. That the property or parcel of land belongs to Assal Limited, the 2nd defendant herein. The said agreement was purportedly signed between the plaintiff and the 1st defendant. The company is a separate legal entity and therefore land that belongs to the company cannot be disposed off or used as security by the 1st defendant.

5. That the said agreement and indeed his signature was

obtained through coercion, undue influence, treachery, duress and misrepresentation of facts and the same cannot be relied on.

6. That the plaintiff has not provided this honourable court with evidence indicating how the said money was advanced to the 1st defendant. The 1st defendant raises an objection on a point of law that Kshs 42,000,000 purportedly advanced to the 1st defendant in cash amounts to money laundering and the same is criminal.

7. The subject agreement and the acknowledgement refers to a debt and a loan which is to be repaid and not sale of land. The plaintiff should be praying for repayment of the said amount, a prayer which is not within the jurisdiction of this honorable court but a commercial court.

8. The 1st defendant raises an objection on a point of law that the said subject agreement is void and or voidable on the basis that consideration as stipulated in the said agreement was never paid and the plaintiff has not provided any evidence to prove that consideration was paid as alleged.

9. That the suit is frivolous, vexatious and an abuse of the court process.

9. The said preliminary objection is the subject of this ruling. The

preliminary objection was canvassed through written submissions dated 12/5/20, filed through the firm of *Odaga & Partners Advocates*. In response, the plaintiff filed written submissions dated 4/6/2021 through the firm of *Henia Anzala & Associates*. I will refer to the parties' respective submissions when analysing the grounds raised in the notice of preliminary objection.

10. The first ground in the notice of preliminary objection focuses on the jurisdiction of this court to adjudicate this dispute. Because jurisdiction is what gives this court the mandate to adjudicate this dispute, including the mandate to dispose all the other grounds raised in the preliminary objection, I will first dispose the first ground in the notice of preliminary objection because it challenges the jurisdiction of this court to adjudicate this dispute. [see **Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited (1989) KLR 1**].

11. On the issue of jurisdiction, counsel for the 1st defendant submitted that the question which fell for determination was whether this court had the jurisdiction to hear and determine the dispute in this suit. Counsel added that **Article 162(2)(b)** of the Constitution vested in this court jurisdiction to hear and determine disputes relating to the environment and the use and occupation, and title to land. Counsel added that **Section 13 of the Environment and Land Court Act** specifies in details the jurisdiction of the court. Counsel contended that the dispute in this suit did not fall under the jurisdictional purview spelt out under **Article 162(2)(b)** of the Constitution and **Section 13** of the Environment and Land Court Act. Counsel urged the court to find that the agreement on the advancement of a loan to the 1st defendant was purely a commercial dispute and that this court lacked jurisdiction to hear and determine this dispute.

12. On his part, counsel for the plaintiff submitted that the matters raised in the notice of preliminary objection did not raise pure points of law as envisaged in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**. Counsel contended that the issue of whether this court lacked jurisdiction to hear this dispute could not be determined unless the court delved into the evidence of the matter, hence defeating the essence of a preliminary objection. Counsel for the plaintiff added that **Section 13(2)(d) and (e)** of the Environment and Land Court Act granted this court jurisdiction to hear and determine disputes relating to private, public and community land, contracts, choses in action or other instruments granting an enforceable interest in land. Counsel contended that the dispute in this suit was within the jurisdiction of this court as set out in **Section 13 (2) (d)** of the Environment and Land Court Act. Counsel urged the court to reject the preliminary objection.

13. I have considered the limb of the preliminary objection which focuses on the issue of jurisdiction as set out in Grounds Nos 1 and 7 of the notice of preliminary objection dated 16/10/2020. I have also considered the parties' respective submissions on that limb. Three key questions fall to be answered under that limb of the preliminary objection. The first question is whether that limb of the preliminary objection meets the threshold of a preliminary objection. If the answer to the above question is in the affirmative, the second question would be, whether this court is the proper court vested with jurisdiction to adjudicate the dispute in this suit. The third question is, if the answer to the 2nd question is in the negative, what is the appropriate order to be made? I will dispose the three questions sequentially in the above order.

14. The definition and essential features of a preliminary objection were outlined by Law JA in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 at page 700** in the following words:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

15. The first ground of the notice of preliminary objection focuses purely on the jurisdiction of this court. All it requires is an examination of the amended plaint and the relevant constitutional and statutory frameworks which set out the jurisdiction of this court. It does not require ascertainment of facts through evidence as contended by counsel for the plaintiff. It has all the features of a preliminary objection as envisaged in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**. The court is therefore satisfied and finds that ground No 1 in the notice of preliminary objection raises a pure point of law and properly meets the threshold of a preliminary objection.

16. The second question in the first limb of the notice of preliminary objection is whether this court is the proper court vested with jurisdiction to adjudicate the dispute in this suit. In **R v Karisa Chengo (2017) eKLR**, the Supreme Court of Kenya defined jurisdiction as follows:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

17. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR**, the Supreme Court of Kenya outlined the following jurisprudential principle on the source and scope of jurisdiction of a court:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

18. The broad jurisdiction of the Environment and Land Court of Kenya is spelt out in **Article 162(2)(b)** of the **Constitution** in the following words:

“162(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.”

19. Pursuant to Article 162(2)(b), Parliament enacted the Environment & Land Court Act which established and operationalized this Court. **Section 13** of the Environment & Land Court Act elaborates the above constitutional mandate of the court in the following framework.

“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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise 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;

(g) restitution;

(h) declaration; or

(i) costs.

20. The above constitutional and statutory frameworks have been the subject of interpretation in a number of decisions by our superior courts [see the **Supreme Court** and **Court of Appeal** decisions in the **Karisa Chengo Petition of Appeal** and **Appeal** respectively, and the **Court of Appeal** decision in **Kibos Distillers Limited & 5 others v Benson Ambuti Adega & 2 others**].

21. From a perusal of the plaint in this suit, this is primarily a claim for

recovery of money allegedly lent to the 1st defendant by the plaintiff. Indeed, this suit is reflected in the primary relief sought by the plaintiff in this suit. As alternative reliefs, the plaintiff seeks orders allowing him to realize the securities that were allegedly offered to him. The dominant issue in this suit therefore is the repayment of money owed to the plaintiff by the 1st defendant on account of the loan advancement agreement dated 1/4/2019.

22. Confronted with a question and pleadings similar to what is before this court, the **Court of Appeal** in **Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 others** [2017] eKLR held thus:

“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..”

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.”

23. In light of the pleadings in this suit, and the prevailing jurisprudence on jurisdiction to adjudicate claims for recovery of money lent, whether secured or not secured by land, it is my finding that the High Court is the proper court to adjudicate the dispute in this suit, notwithstanding that it is alleged in the plaint that parties intended to use land as security for the money lent to the 1st defendant by the plaintiff.

24. The third question relates to the appropriate orders which should be made in the circumstances of this preliminary objection. The High Court and this court are courts of equal status. From time to time, the two courts are confronted with disputes that have cross-cutting issues or what has come to be known as mixed grill disputes. Indeed, in the present suit, the “use of land” features, but as a collateral. It is for this

reason that the Court of Appeal developed the test of “dominant issue.”

25. On its part, the Supreme Court of Kenya in **Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others v [2020]eKLR** developed the test of “appropriate reliefs or appropriate remedies”, focusing on the need to avoid shutting litigants out of the seat of justice in mixed grill disputes. The Supreme Court rendered itself in the **Kibos Distillers** case as follows:

“The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the Environment & Land Court did not have the jurisdiction to hear and determine the Petition, the appellate court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the Environment & Land Court did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

26. In the circumstances, the appropriate orders to make in disposing the preliminary objection dated 16/10/2020 would be to transfer this suit to the relevant High Court Station for adjudication and disposal.

27. Having found that this court is not the appropriate court vested with jurisdiction to adjudicate this dispute, I will down my tools in tandem with the prevailing jurisprudence [see **the principle in Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 1 as articulated by Nyarangi JA**]. **The effect of this is that the other grounds in the notice of preliminary objection will be disposed by the court seized of jurisdiction to adjudicate this dispute.**

Disposal Orders

28. In light of the above findings and observations on the prevailing jurisprudence on the issue of jurisdiction as raised in Grounds Nos 1 and 7 of the 1st defendant’s notice of preliminary objection dated 16/10/2020, the court makes the following disposal orders:

a) Although the dispute in this suit has some bearing on land as a collateral for money lent, the dominant issue in this suit relates to recovery of money allegedly lent to the 1st defendant by the plaintiff and alleged to have been secured by some properties. Consequently, this court is not the proper court to adjudicate the dispute in this suit.

*b) In line with the Supreme Court decision in **Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR**, I order that this suit be and is hereby transferred to the High Court at Kiambu for disposal by the*

said High Court.

c) Other than the issue of jurisdiction which has been disposed, the other issues raised in the preliminary objection shall be disposed by the High Court, which is the court seized of jurisdiction to adjudicate this dispute.

d) Costs of the preliminary objection up to this point shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Njugi holding brief for Mr Anzala for the Plaintiff

Ms Waswa holding brief for Mr Odanga for the Defendant

Court Assistant: Lucy Muthoni