



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. E001 OF 2021

MARY JUSTER CHEPLETING.....PLAINTIFF

-VERSUS-

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

BENJAMIN KISOI SILA

T/A LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

EVANS KEMBOI KOECH.....3RD DEFENDANT

SPACELER COMPANY LIMITED.....4TH DEFENDANT

EMILY TARUS.....5TH DEFENDANT

RULING

[1] The plaintiff filed this suit vide her **Plaint** dated **20 January 2021**, praying for Judgment and orders against the defendants jointly and severally as follows:

[a] A declaration that the exercise of the statutory power of sale by the 1st defendant conducted on **9 September 2016** and the subsequent sale and any dealings by the defendants in respect of that parcel of land known as **LR 3209/1** situated at **Arbabuch Area**, Moiben in Uasin Gishu County, was null and void and ought to be set aside.

[b] An injunction restraining the defendants by themselves, their servants, agents and/or employees or whosoever is acting on their behalf from trespassing, encroaching, selling, tilling, ploughing, planting, wanton destruction of trees, crops, stocking of animals and doing acts which are inconsistent with the plaintiff's rights over **LR No. 3209/1** situated at **Arbabuch Area**, Moiben in Uasin Gishu County.

[c] An eviction order against the 3rd and 5th defendants, their agents, servants and/or employees, evicting them from the suit land **LR 3209/1** measuring 305 acres.

[d] An order that land title **LR No. 3209/1** be valued by an independent valuer to ascertain its current market value.

[e] An award of damages and compensation for loss of income from the suit parcel of land from **2016** to date.

[f] Costs of the suit together with interest at court rates.

[g] Any other relief the Court may deem fit to grant.

[2] Along with her **Plaint**, the plaintiff filed the **Notice of Motion** dated **20 January 2021** seeking, *inter alia*, a temporary injunction, restraining the defendants by themselves, their servants, agents, employees and/or agents, employees and/or contractors or whosoever is acting on their behalf from trespassing onto, encroaching, gaining entry, ploughing, tilling, planting, destroying properties, trees and stocking animals or in any way carrying out any activity on all that parcel of land known as **LR No. 3209/1** measuring 305 Acres situated in **Arbabuch Area**, Moiben, Uasin Gishu County, pending the hearing and determination of the main suit. In response to that application, **Mr.**

Katwa, learned counsel for the 3rd, 4th and 5th Defendants, filed a Notice of Preliminary Objection dated **29 January 2021** seeking that the entire suit be dismissed *in toto* on the grounds that:

[a] The suit is *res judicata* and that there is legal and factual estoppel, estopping this Court from entertaining and determining it, as all the issues raised herein were the subject of **Eldoret Environment and Land Case No. 124 of 2017**;

[b] That under **Sections 98(4) and 99(3)** of the **Land Act, 2012**, as well as **Section 24** of the **Land Registration Act**, any party aggrieved by the exercise of the statutory power of sale has recourse in damages and not vacant possession, injunction or ownership;

[c] That the suit has been fronted through criminal perjury under, *inter alia*, **Sections 108** of the **Penal Code** and **Section 5 and 11** of the **Oaths and Statutory Declarations Act, Chapter 15** of the **Laws of Kenya**, because the Verifying Affidavit makes a conscious false allegation that there is no pending or previous suit touching on the same subject matter.

[d] That the plaintiff's claim being a land claim, inclusive of its use, occupation and title, should be dismissed for lack of jurisdiction, based on **Article 162(2)(b)** of the **Constitution**.

[e] That there has been inordinate delay of over 6 years in challenging the exercise of the statutory power of sale; and therefore third party interests have been created since the year **2016**.

[3] Accordingly, **Mr. Katwa** prayed that the suit be dismissed *in toto*; that the Court do censure the plaintiff for perjury and gross abuse of the court process; and that costs be awarded to the 3rd, 4th and 5th defendants.

[4] Pursuant to the directions given herein on **1 February 2021**, the Preliminary Objection was canvassed by way of written submissions; whereupon **Mr. Katwa** filed his written submissions herein on **8 February 2021**. He reiterated his assertion that this suit is *res judicata*; and that all the issues arising in this suit, including questions to do with the loan accounts, ownership and possession of the suit property, as well as the exercise of the 1st defendant's statutory power of sale, have been raised in previous suits; particularly **Eldoret ELC Case No. 124 of 2017**. He relied on **Maithehe Malindi Enterprises Limited vs. Kaniki Karisa Kaniki & 2 Others** [2018] eKLR for the principle that judicial decisions once made must be accepted as final.

[5] Counsel further submitted that the Plaintiff herein discloses no cause of action against his clients, granted the provisions of **Sections 98(4) and 99(3)** of the **Land Act** and **Section 24** of the **Land Registration Act**; which provide that a party aggrieved by the exercise of statutory power of sale has recourse in damages. He relied on **Maxwell Hudson Kaduki Diggs & Another vs. I&M Bank & 2 Others** [2018] eKLR and **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others** [2005] eKLR to buttress his arguments.

[6] Regarding counsel's allegations of criminal perjury, the attention of the Court was specifically drawn to paragraph 4 of the Verifying Affidavit, wherein the plaintiff averred that there is no pending or previous suit touching on the subject matter herein. Counsel urged the Court to note that the averment was deliberately and consciously made, despite the existence of the following cases between the parties in respect of the same subject matter:

[a] **Eldoret ELC Case No. 124 of 2017**

[b] **Eldoret HCCC No. 50 of 2006**

[c] **Eldoret HCCC No. 151 of 2015**, and

[d] **Kisumu HCCC No. 108 of 2016**

[7] Counsel cited **David Omwenga Maobe vs. Republic** [2015] eKLR and **Speaker of the County Assembly, Kisii County & 2 Others vs. James Omariba Nyaoga** [2015] eKLR in urging the Court to find that the averment in paragraph 4 of the aforementioned affidavit amounts to criminal perjury; and that a suit based on such a foundation is null and void. On jurisdiction, **Mr. Katwa** relied on the provisions of **Article 162(2)(b)** of the **Constitution** and **Re Estate of Prisca Ong'ayo Nande (Deceased)** [2020] eKLR to underscore his submission that disputes concerning the environment, use and occupation of, as well as title to land, fall within the exclusive jurisdiction of the Environment and Land Court; and therefore that this Court is precluded from entertaining not only the instant application but also the entire suit.

[8] Lastly, **Mr. Katwa** faulted the plaintiff for what he considered an inordinate delay of over 6 years before challenging the exercise of 1st defendant's statutory power of sale. He made reference to **Kawaljeet Singh Rekhi vs. Peter Wainaina Kamau & 2 Others** [2016] eKLR and **Julius Musili Kyunga vs. Kenya Commercial Bank Ltd & 2 Others** [2015] eKLR. Thus, he urged the Court to dismiss the plaintiff's suit *in toto* and censure the plaintiff for perjury and gross abuse of the court process. He, likewise, asked the Court to award the costs of the suit to his clients.

[9] On behalf of the plaintiff, written submissions were filed herein on **5 February 2021** by **Mr. Omboto**. He urged the Court to proceed on the premise that it has inherent power to administer substantive justice. He pointed out that **Eldoret ELC Case No. 124 of 2017** was in fact withdrawn with costs to the defendant therein; and therefore cannot be treated as a final determination of the issues in dispute between the parties. On the issue of jurisdiction, counsel resorted to **Section 2** of the **Land Act** and **Cooperative Bank of Kenya Ltd vs. Partick Kangethe Njuguna & Others** [2017] eKLR in his endeavor to distinguish land use from a charge, mortgage or disposition. His posturing therefore was that this Court has the requisite jurisdiction to hear and determine this suit. He similarly took the view that the question of delay is a non-issue; granted the confirmation by the 1st defendant that there were difficulties in processing the title in favour of the purchaser. Thus, **Mr. Omboto** prayed that the Preliminary Objection be dismissed with costs.

[10] I have given careful consideration to the grounds raised in the Notice of Preliminary Objection dated 29 January 2021 in the light of the pleadings thus far filed. I have also considered the written submissions filed herein by learned counsel as well as the useful authorities cited by them. As was well-explicated in **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd [1969] E.A 696**, a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

[11] Accordingly, a Preliminary Objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. Hence, the expressions of Sir Newbold, P. in the **Mukisa Biscuits Case** are apt. Here is what he had to say:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

[12] With that in mind, it is noteworthy that, on *res judicata*, the contention on behalf of 3rd, 4th and 5th defendants, namely, that the issues in dispute have been determined and finally resolved, has been disputed by Mr. Omboto for the plaintiff. According to him, a final merit consideration and determination is yet to be made on the issues raised in **Eldoret ELC No.124 of 2017**. Moreover, the specific factual issues raised regarding the argument that the matter is *res judicata* and that the suit is barred by factual and legal estoppel, were issues to do with the loan accounts, and the exercise of the 1st defendant’s statutory power of sale. Hence, whether a final decision has been made thereon is a matter of fact that would have to be inquired into for this Court to come to a determination in that regard. Likewise, the assertion that the plaintiff’s suit is premised on criminal perjury cannot be effectually determined without reference to paragraph 4 of the Verifying Affidavit as well as evidence proving the existence of the previous suits referred to by learned counsel.

[13] Accordingly, I would adopt the words of Hon. Ojwang, J. (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141** that:

“...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

[14] Thus, the only proper subject raised herein as a preliminary issue is that of jurisdiction, from the standpoint of **Article 162(2)(b)** of the Constitution. Indeed, in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court held that:

“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 by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

[15] Accordingly, **Article 162(2)(b)** of the Constitution stipulates that:

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

...

(b) the environment and the use and occupation of, and title to, land.

[16] **Section 13** of the **Environment and Land Court Act**, on the other hand provides thus with regard to the jurisdiction of the Environment and Land 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

[17] The question to pose then is whether a charge and the exercise of a bank's/financial institution's statutory power of sale entailed thereby amounts to land use for purposes of **Article 162(2)(b)** of the **Constitution** and **Section 13** aforesaid. This question fell for determination before the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others** [2017] eKLR, and here is what it had to say:

“...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.

36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment 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 advanced (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 chargee is assured of the repayment of the money he has advanced the chargor.

37. 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.

[18] Consequently, the Court of Appeal held that the dominant issue in that case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender; and therefore that the High Court, as opposed to the ELC, had the requisite jurisdiction to handle the suit. It, accordingly, concluded that:

38. ...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.

...

40. 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.

41. 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.”

[19] On the basis of that Court of Appeal decision, it is plain the Preliminary Objection raised herein on behalf of the 3rd, 4th and 5th defendants, is entirely misconceived. Accordingly, the same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF MARCH, 2021

OLGA SEWE

JUDGE