



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMM E 2489 OF 2019

I & M BANK RWANDA LIMITED.....APPLICANT/JUDGMENT-CREDITOR

VERSUS

ATULKUMAR MAGANLAL SHAH.....RESPONDENT/JUDGMENT-DEBTOR

SAMEER VIPIN SHAH.....1ST INTERESTED PARTY-RESPONDENT

VIPIN SHAH.....2ND INTERESTED PARTY- RESPONDENT

RULING

INTRODUCTION

1. On **30th** January 2020, this court allowed the applicant's/Decree-Holders application dated **23rd** October 2019 and ordered that the foreign judgment rendered by the High Court at Kigali, Rwanda in Case No. ROCMA 00828/2018/CHC/HCC, *Atulkumar Maganlal Shah v I & M Bank Rwanda Limited* on **26th** April 2019 be registered. The court also ordered that the Notice of registration of the judgment do issue and the same be served upon the Respondent. Lastly, it ordered the Respondent to bear the costs of the application. Pursuant to the said orders, a decree was issued on **17th** July 2020.

2. The applicant commenced execution proceedings against the Respondent, but apprehensive that the Respondent's only known asset, namely; Land Reference Number **21976/35** situate in Nairobi may be disposed, the applicant obtained a prohibitory order on **19th** November 2020 prohibiting any dealings on the said property. However, in the intervening period, the Respondent transferred or caused the said property to be transferred to the Interested Parties. Aggrieved by the said transfer, the applicant now seeks this court's intervention by way of the application the subject of this determination.

The instant application

3. Vide the Notice of Motion dated **23rd** December 2020, the subject of this ruling, the applicant sought a raft of prayers, some of which are spent. The applicant prays for an order that the registration of the **1st** and **2nd** Interested Parties as owners of the said Property be nullified and ownership to reverts back to the Judgment-Debtor for purposes of execution against the Judgment-debtor.

4. The applicant also prays for an order that upon grant of the above order, the court be pleased to issue a prohibitory order forbidding any further dealings on the said property to protect the applicant's interests as a judgment creditor pending issuance of warrants of attachment and sale of the immovable property. Lastly, the applicant prays for costs of the application.

5. The grounds in support of the application are that on or about **30th** January, 2020 this court delivered a ruling in favour of the Judgment-Creditor and ordered that the judgment entered on **26th** April, 2019 issued by the High Court at Kigali in case RCOMA 00828/2018/CHC/HCC be registered and notice of registration of the judgment be issued and the same be served upon the Respondent.

6. The applicant states that pursuant to the said ruling, the Judgment-debtor is required to pay the Judgment-Creditor RWF 931,897,198.00, the equivalent to **Kshs. 104,105,303.06**, and notice of entry of judgment was served upon the Respondent-Judgment-Debtor who was also notified that execution would proceed unless payment is made but he has failed/refused/neglected to pay. The applicant states that owing to the said default, it commenced execution proceedings and also conducted a search on the said and confirmed that it was registered in the name of the Judgment-Debtor after which it applied for execution to attach the said property.

7. Further, the applicant states that attempts to register the aforesaid prohibitory against the property were unsuccessful because the Judgment-Creditor had transferred the same to his nephews Sammer Vipin Shah and Ameet Vipin Shah, the Interested Parties on 12th June, 2020 at a consideration of Kshs. 10,0000/= even though the Property was valued at Kshs. 47,000,000/=. The applicant states that the judgment debtor has no other assets capable of satisfying the debt and that that the transfer and subsequent registration of the subject property to the Interested Parties was done in bad faith, malicious, illegal, fraudulent and unlawful with the sole intention of defeating the Judgment- Creditor's claim.

The applicant's counsel's submissions

8. M/s Purity Mwangi, the applicant's counsel submitted that she was seeking an order that the registration of the 1st and 2nd Interested Parties as the proprietors of the said title be nullified to enable the judgment debtor to execute the judgment. She also urged the court upon grant of the said order, it issues a prohibitory order prohibiting any dealings on the Property. Counsel reiterated the grounds on the face of the application and argued that the transfer to the Interested Parties was done to defeat the Decree-Holders attempt to execute and to defeat justice. She relied on *Aklfred K, Njoroge v Fredrick N. Kamau & 5 others*^[1] for the proposition that the court can make adverse orders against a party who has attempted to defeat execution. She submitted that the court can cancel such a transfer which done to defeat execution and urged the court to order that the property reverts to her.

Determination

9. The facts presented in this case raise several fundamental issues which warrant an early resolution. *First*, is the manner in which the Interested Parties were introduced in these proceedings is worrying. The proceedings were commenced by way of an Originating Summons in which only Atulkumar Mannganlal Shah is the only Respondent. The Interested Parties were introduced in these proceedings vide the Notice of Motion dated 7th January 2021 in which they were named as Interested Parties. No application either formal or informal was made to enjoin them. The Interested Parties were not formally admitted into these proceedings. A party cannot be added into proceedings in the manner in which the applicant purported to do in this case. The Interested Parties are total strangers to these proceedings because no formal order was sought and obtained enjoining them into these proceedings. It follows that there are no competent proceedings against them before his court because they are non-parties. On this ground alone the application collapses.

10. *Second*, it is admitted that the land has since been transferred to the Interested Parties. This court is now being invited to cancel the title in favour of the Interested Parties on the strength of the incompetent application before me. Determining the question whether or not the transfer was done fraudulently requires a full trial. The issues cited by the applicant which include fraud cannot be resolved by way of an application. They require a full trial. Again, on this ground, the application collapses.

11. *Third*, cancellation of a title if granted is a final order which will determine the ownership rights. It is a settled proposition of law that a final order should not normally be granted which has the effect of granting the final relief. The law has been laid down in catena of cases. Even where mandatory injunctions are allowed, the general proposition of law is that it is only under exceptional circumstances.

12. *Forth*, the applicant seeks a drastic and a final order against the Interested Parties by way of an application as opposed to a Plaint or an Originating Motion. Cancellation or revocation of a title by its nature determines the party's rights conclusively. Such a prayer can only be granted after a full hearing of a Plaint or an Originating Motion but not by Notice of Motion. In any event, no allegations have been made against the Interested Parties. The moment the applicant learnt that the title had changed hands, it ought to have learnt that the ground has shifted and the Interested Parties may have acquired some rights hence they deserve a hearing. The law protects the new owner just as it protects the applicant's rights.

13. *Fifth*, for avoidance of doubt had the prohibitory order been registered in time, execution could have proceeded. However, the biggest hurdle is the manner in which the Interested Parties were enjoined and failure to bring a substantive suit seeking declarations that the transfer was effected fraudulently to evade a court decree. However, as concluded in the next issue, I am afraid, such a suit would be outside the purview of this courts jurisdiction.

14. *Sixth*, is the question of jurisdiction. Much as the issue at hand is execution of a court judgment, this court is being invited to cancel a transfer of land on grounds of fraud. The invitation looks innocent but it has a serious jurisdictional imperative. By jurisdiction is meant the authority, which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The statute, charter, or commission under which the court is constituted imposes the limit of this authority. The authority may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

15. 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist.

16. If a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.^[2] A court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedents.^[3] The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (supra) where the late Justice Nyarangi JA stated: -

".... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. A reading of the application before me shows that the applicant seeks to cancel title to land. The South African Constitutional Court^[4] had this to say: -

"Jurisdiction is determined on the basis of the pleadings,^[5]... and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by... {another court}, the High Court would lack jurisdiction..."

18. Article 165(1) of the Constitution vests vast powers in the High Court including the power to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. However, the limitation of the vast powers conferred upon the High court under Article 165 is found in Article 165 (5). This provision states in mandatory terms that the High Court **shall not** have jurisdiction in respect of matters: - (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).

19. The question which arises is, what are the matters contemplated in Article 165 (b)? The Constitution does not define the matters, but it provides a road map to locate the prohibited matters. Pursuant to Article 162 (3), Parliament enacted the Environment and Court Act.^[6] The preamble to the said act states that it was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. Section 13 of the Act provides that: -

(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.

(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 jurisdiction of the Environment and Land Court is limited to the disputes contemplated under **Article 162(2) (b)** of the Constitution and **Section 13** of the Act. The intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this court has no jurisdiction. The core dispute disclosed in this case involves cancellation of a title to land. To make such a determination, the court will be compelled to ascertain how the transfer was done, and in the process it will determine land rights. That invitation goes beyond mere execution of a judgment. It falls squarely within the matters contemplated under section **13** of the Act.

21. A High court may not determine matters falling squarely under the jurisdiction of the ‘*status courts*’ namely the Employment and Labour Relations Court and the Land and Environment Court. Even with that clear-cut jurisdictional demarcation, on numerous occasions, matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of this case. It falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. I decline the invitation to venture into this forbidden sphere. On this ground, the application fails.

22. Flowing from my analysis of the issues discussed above the conclusions arrived at, I find and hold that the applicant’s application dated **23rd** December 2020 is fit for dismissal. Accordingly, I dismiss the said application with no orders as to costs.

Orders accordingly

Signed and Dated at **Nairobi** this **7th** day of **April** 2021

John M. Mativo

Judge

Delivered electronically via e-mail

[1] {2014} e KLR.

[2] John Beecroft, Words and Phrases Legally Defined, Volume 3:1-N, at Page 113.

[3] The Supreme Court in the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported).

[4] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[5] *Fraser vS ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[6] Act No. 19 of 2011.