



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 64 OF 2021

ASHA KAMENE SALIM PLAINTIFF/APPLICANT

-VERSUS-

MWANAINCHI CREDIT LIMITED 1ST DEFENDANT/RESPONDENT

MISTAN AUCTIONEERS 2ND DEFENDANT/RESPONDENT

RULING

1. By the Notice of Motion application dated 19th July, 2021, Asha Kamene Salim (*the Plaintiff*) prays for an order that pending the hearing and determination of this suit, this court be pleased to issue an order of injunction restraining the Defendants by themselves, servants or agents from selling, alienating, disposing off or in any other way interfering with all those parcels of land known as Kilifi 9122/401 and Kilifi 9122/402 situated within Kilifi County.

2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds that:

(i) *The Plaintiff is the registered proprietor of the two parcels of land;*

(ii) *By a letter of offer dated 14th January, 2020, Mwanainchi Credit Limited (the 1st Defendant) offered to extend banking facilities to the Plaintiff in the sum of 5,319,788.00;*

(iii) *The said banking facilities were secured by a charge over the two parcels of land;*

(iv) *The Plaintiff has regularly serviced the said advance by making periodic and monthly remittances to the 1st Defendant in strict conformity with the lending contract between the parties and in total adherence to the charge instruments;*

(v) *The 1st and 2nd Defendants are now purporting to exercise a statutory power of sale illegally;*

(vi) *By Notice date 8th April, 20-21, the 1st Defendant through Mistan Auctioneers (the 2nd Defendant) purported to serve the Plaintiff with a 45 days' notice to sell the charge properties pursuant to **rule 15(d) of the Auctioneers Rules**; and*

(vii) *The purported notice was not proceeded by the mandatory 3 months statutory notice prescribed by **Section 90 of the Land Act 2012**.*

3. The application is opposed by the 1st Defendant. By its Grounds of Opposition dated and filed herein on 21st July 2021, the 1st Defendant opposes the application and the entire suit on the grounds:

1. *That the Plaintiff's application is seriously misconceived, frivolous, vexatious and nothing but an utter abuse of the court process and must therefore fail in its entirety.*

2. *That is it trite law that jurisdiction flows from the Constitution or Statute. It is apparent that this court lacks jurisdiction over the dispute by virtue of **Article 162(2)(b)** as read together with **Article 165(b) of the Constitution of Kenya, 2010**. Therefore, it cannot arrogate itself jurisdiction.*

3. *That the Plaintiff has not annexed a single payment towards the liquidation of the 1st Defendant's debt apart from a hollow and*

surreal averment short and/or devoid of evidence.

4. *That the grounds or issues raised in the Plaintiff's application are misguided and predicated on a wrong premise and cannot be given audience by this court.*

5. *That the Plaintiff's application is a waste of the Court's precious time and a perfect candidate for dismissal.*

6. *That the Plaintiff's application and the entire suit herein are fatally defective bad in law and can therefore not stand in law.*

4. In addition to the Grounds of Opposition the 1st Defendant filed on the same day a Notice of Preliminary Objection dated the same 21st July, 2021 stating:

1. *That the Plaintiff's application and the entire suit herein are frivolous, vexatious and an abuse of court process;*

2. *That this Honourable Court lacks jurisdiction over the dispute herein by virtue of **Article 162(2)(b)**, as read together with **Article 165(5)(b) of the Constitution of Kenya, 2010**;*

3. *That this Honourable court lacks jurisdiction over the dispute herein by virtue of **Section 15(c) Explanation 3(i) of the Civil Procedure Act, Cap 21 Laws of Kenya**; and*

4. *That the Plaintiff's application and the entire suit herein are fatally defective, bad in law and can therefore not stand in laws.*

5. I have perused and considered the application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties - Mr. Aduda for the Plaintiff and Mr. Kibara for the Defendant.

6. By their Notice of Preliminary Objection, the 1st Defendant objects to the jurisdiction of this court on the basis of **Section 15(c) Explanation 3(i) of the Civil Procedure Act** as well as **Article 162(2)(b)** as read with **Article 165(5)(b) of the Constitution of Kenya**.

7. **Section 15(c) Explanation 3(i) of the Civil Procedure Act** provides as follows:

“15. Subject to the limitation aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) ...

(b) ...

(c) The cause of action , wholly or in part, arises Explanation (3) – In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely –

(i) The place where the contract was made.”

8. By this objection, I understood the 1st Defendant to be stating that the suit ought to have been filed in a place other than the ELC court at Malindi. It was however not clear to me where the parties had executed the contract for purposes of determining where the suit ought to have been filed. I say so because the 1st Defendant has not filed any pleadings herein save for the Grounds of Opposition and the Notice of Preliminary Objection which is the subject matter herein.

9. As **Newbold P. stated in Mukisa Biscuit Manufacturing Company Limited –vs- West End Distributors Limited (1969) EA 696:**

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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 ...”

10. In the matter before me, neither the Plaintiff nor the Defendant has annexed the lending contract leading to this dispute. All that is clear from the Plaintiff's pleadings is that the suit properties are situated within Kilifi and that they were to be sold by auction along Links Road in Mombasa. Given the physical situation of the properties, I am unable to fault the Plaintiff for filing the suit at Malindi and I find no basis for that objection.

11. The 1st Defendant's second basis for the Preliminary Objection was the contention that the court has no jurisdiction by virtue of **Article 162(2)(b)** as read together with **Article 165(5)(b) of the Constitution of Kenya**. In his oral submissions herein, Mr. Kibara, Learned Counsel for the 1st Defendant told the court that under **Article 162(b) of the Constitution** and **Section 13 of the Environment and Land Court Act**, this court only has jurisdiction over matters to do with land use.

12. Relying on the case of **Co-operative Bank Limited -vs- Patrick Kang'ethe Njuguna and 5 Others (2017) eKLR**, counsel submitted

that this court had no jurisdiction to deal with matters regarding mortgages and charges and hence urged this court to strike out the case.

13. I have read the decision in **Co-operative Bank Limited -vs- Patrick Kang’ethe Njuguna** (*Supra*), I did not however find anywhere where the Court of Appeal stated that this court lacks jurisdiction to deal with matters that are incidental to the “use of land” as defined both in the Constitution and the Environment and Land Court Act.

14. What was clear to me was that a charge such as the one in contention herein is provided for under the Land Act No. 6 of 2012. **Section 2** of the said **Act** which defines a charge also defines the court thereunder to mean “the Environment and Land Court established under the Environment and Land Court Act, No. 19 of 2011.” Accordingly I did not again find any basis for the contention by the 1st Defendant that this court has no jurisdiction to deal with a matter relating to a charge.

15. Turning to the application before me, the Plaintiff accused the 1st Defendant of purporting to exercise its statutory power of sale without giving her the mandatory 3 months statutory notice prescribed under section **90(2) of the Land Act, 2012**. The Plaintiff avers that 1st Defendant only served her with a 45 days notification of sale through the 2nd Defendant Auctioneer.

16. I have looked at the 1st Defendant’s response to the application. They do not deny that they failed to serve the three months notice prescribed under Section 90(2) of the Land Act 2012. As it were, the statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices.

17. That being the case, it was self-evident to this court that having failed to serve the said notice, the acts of the 1st Defendant in seeking to exercise its statutory power of sale was at this point in time unlawful.

18. It follows that I find merit in the Plaintiff’s application and I allow the same in terms of prayer No. 3 thereof with costs.

Ruling dated, signed and delivered virtually at Nyeri this 2nd day of December, 2021 via Microsoft Teams.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court assistant - Wario

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J. O. Olola

JUDGE