



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 34 OF 2014

ALICE CHELANGAT NGENY.....PLAINTIFF

-VERSUS-

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

1. This ruling is on a Preliminary Objection intimated to be raised vide a notice dated 19/9/2019 filed on the same date. The objections is to the effect that the court lacks jurisdiction to determine the suit as the cause of action is in the nature of a commercial transaction, typically taking the form of a charge, thus making it fall outside the jurisdiction of the court as provided for under Article 162 of the Constitution and Section 13 of the Environment and Land Court Act.

2. As the objection relates to the nature of the suit, it is only fair to have a good appreciation of what the suit is all about. The Plaintiff- **ALICE CHELANGAT NGENY** – is contesting intended sale of land parcel No. **KERICHO/CHESOEN/561** which her late husband – **WILLIAM KIPSANG NGENY** – had charged to the Defendant – **NATIONAL BANK OF KENYA LTD** – for a loan of 30,000/=. That happened over two decades ago as the husband is shown to have died in 1997.

3. The Plaintiff pleaded that she was not served with the statutory notice of sale; that the sale is in any case barred by the statute of limitation; and that the principal sum is in her opinion paid and the accrued interest therefore seem to form the basis of the intended sale. She therefore wants a declaration by the court that the defendant’s statutory power of sale has been extinguished by the statute of limitation or, as alternative, taking of accounts to ascertain the amount already paid and/or the principal amount owing in order to mitigate the interest payable.

4. The Defendant filed a defence on 27/4/2015 and denied the core aspect of the Plaintiff’s claim. In particular, the Defendant denied that the statutory notice of sale is not served; that the notice is barred by statute of limitation; and/or that the loan amount is paid.

5. It is clear from all this that the Plaintiff’s main predisposing concern is how to forestall or defeat the intended sale. The Defendant on the other hand is determined that the sale should proceed. The Plaintiff is said to be hugely in arrears of payment. Any other issues that may arise in the suit – including the issue of taking accounts – can only be secondary and/or merely germane to the issue of sale.

6. The objection was canvassed by way of written submissions. The defendant’s submissions were filed on 14/10/2019. In the submissions, the defendant appreciates well the centrality of the issue of sale and submits, *inter alia*, that such sale would be irregular for want of issuance of the requisite notice. The applicable law is then highlighted, with **MUKISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD**[1969] EA 696 being cited to shed light on the meaning and nature of a preliminary objection while **GODFREY KINUU MAINGI & 4 OTHERS –VS- NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY**[2014]eKLR is meant to persuade the court to consider the pleadings as contained in both the plaint and the defence.

7. The Defendant then takes the position that the “*prayers in the suit have nothing to do with the environment and the use and occupation of, and title to land whose disputes are reserved for the court under Article 162(2) of the Constitution.*” Having taken this position, the decided case of **CO-OPERATIVE BANK VS PATRICK KANGETHE NJUGUNA & 5 OTHERS**[2017]eKLR was cited and quoted to justify the proposition that this court has no jurisdiction. The court is then asked to down its tools in light of the *Locus classicus* case on jurisdiction: Owners of the **MOTOR VESSEL M.V LILLIAN S VS CALTEX OIL(K) LIMITED**[1989]EKLR.

8. The Plaintiff’s submissions were filed on 20/11/2019. The Plaintiff submitted, *inter alia*, that sale involves change of title. This being the case, this court has jurisdiction as it is mandated by law to deal with matter involving title. Further, the governing law relating to charges – the Land Act and Land Registration Act – was said to envisage this court as the one to handle matters relating to charges and/or mortgages.

The case of **LYDIAH NYAMBURA MBUGUA –VS- DIAMOND TRUST BANK LIMITED AND ANOTHER**[2018]eKLR was cited to buttress this position. The submissions conclude by making the observation that “the circumstances in this suit are such that the Plaintiff seeks to have sale barred by dint of Limitation of Actions Act and alternatively have the amounts payable ascertained. These are all activities collateral to the process of sale and ought to be heard and determined by the ELC court”

9. I have had a look into the pleadings. I have considered the rival submissions and the law sought to be relied on. In my view, the Defendant approach to the whole issue is wanting. It is also difficult to agree with the Defendant on the issue of pleadings. The approach is wrong because the law and practice enjoin that if you want to raise a Preliminary Objection that may pre-determine the suit, you need first to raise issue in the defence and express your intention to raise the objection. That is how it is done; that is the practice.

10. That is also the law. And I realize here that I need to explain. In **ACHOLA & ANOTHER VS HONGO & ANOTHER**[2004]1KLR 462, the appellants had filed a case against the respondents alleging, *inter alia*, the tort of fraudulent misrepresentation. The second respondent, the Municipal Council of Kisumu, which was second defendant in the High Court, raised a Preliminary Objection that the suit against it was time-barred since the said tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A defence that had been previously filed by the second respondent neither pleaded the defence of limitation nor specifically pleaded that the claim was time-barred under the Public Authorities Limitation Act. The High Court nevertheless allowed the issue of limitation, upheld the Preliminary Objection, thereby terminating the appellants claim. The appellants appealed. The Court of Appeal held, *inter alia*, that as the second respondent had failed to plead limitation in its defence, it was not entitled to rely on that issue and base a Preliminary Objection on it. It observed further that the second respondent was not even entitled to rely on the issue during trial unless it amended its defence.

11. I think I have now made myself clear regarding the law and the practice. In the matter at hand, the Defendant filed its defence on 27/4/2015. At the last paragraph of that defence, the jurisdiction of the court is expressly admitted. Yet without amending the defence, the defendant raised this Preliminary Objection which is essentially a negation of that admission.

As things stand now, it is clear that on the issue of jurisdiction, the Defendant espouses two contradictory positions. This is what one would call double-speak and it comes from the mouths of those who have little regard for truth and/or honesty.

12. But this is not to say that the Defendant is dishonest or untruthful. All evidence is not in and it would be wrong and premature to treat the defendant as dishonest. What has happened is that by adopting an approach that seems contradictory, the Defendant inadvertently creates a situation that lends itself possible for such interpretation. I think it is now clear as to what I mean by saying that the Defendant approach is wanting.

13. I have also said that it is difficult to agree with the Defendant regarding the position taken on the issue of pleadings. And I need to explain: At paragraph 2 of the Defendant’s submissions, the Defendant makes the following pertinent remarks:

“..... it is not in dispute that the suit property was charged to the Defendant and the cause of action arises from the Defendant’s intention to exercise its statutory power of sale as a result of non-payment of the loan which facts are confirmed at paragraph 3 – 8 of the Plaint. According to the Plaint, the Plaintiff confirms that the loan repayment schedule was affected by her late husband’s poor health and that the intention to sell the property is irregular for want of issue of the proper statutory notices by the Defendant”

14. These observations are correct and, as can be seen, the intended sale by the Defendant is right at the centre of the dispute. But the paragraph that follows (paragraph 3) seems rather incongruous with the preceding paragraph when it observes thus:

“As a result of the foregoing, the Defendant contends through its Preliminary Objection that the suit does not fall within the jurisdiction of the honourable court for the reason that the dispute is commercial in nature”

It is not logically possible, whether by inductive or deductive reasoning, to draw such conclusion or observation from the preceding paragraph. There is an obvious mis-match here.

Question is: Does the dispute become commercial merely because sale is prima facie a commercial activity? Isn’t the Defendant not being a bit superficial by not appreciating fully what sale of land entails? Is it not clear that the intended sale will obviously involve transfer or change of title?

Anybody properly addressing his mind to these questions will obviously come to the conclusion that the Defendant’s objection is not based on sound or well thought – through premise.

15. But the Defendant appreciation of the law relating to Preliminary Objection also seems to be problematic. The Defendant quotes the Mukisa Biscuits case(*Supra*). He cites the pronouncement of Law J.A(as he then was) that terms a Preliminary Objection as a point of law that has been pleaded – it bears pointing out that the Defendant’s objection is not pleaded – or which arises by clear implication out of pleadings – again here, no such implication can arise in the matter at hand as jurisdiction is expressly admitted – and then purports to create the impression that his objection is properly raised. The fact of the matter is that the Defendant’s objection is a point of law that is improperly raised.

16. The Defendant’s problem however does not end there, he also quotes Sir Charles Newbold P in the same case in a further bid to reinforce the purported correctness of the objection. But Sir Charles Newbold is shown saying that “A Preliminary Objection is in the nature of what used to be a demurrer.....” If the Defendant appreciated what a demurrer is, then it should have been obvious that there was no point raising the objection. A demurrer entails acceptance of the facts pleaded by the other side as correct or leaving them uncontested.

When a position like that obtains, one can properly raise a Preliminary Objection. If you demur, you object to the legal sufficiency of a claim while admitting or not contesting the truth of the facts pleaded.

This is not what the Defendant has done here. Every material aspect of the Plaintiff's claim is denied in the Defendant's defence. There are facts to be ascertained during trial and the Defendant is therefore wrong to raise the objection. But I still need to say more on the issue of jurisdiction.

17. The conflicting legal positions on the issue of jurisdiction relating to the objection herein are largely based on judicial pronouncements found in two cases viz:

CO-OPERATIVE BANK OF KENYA LTD –VS- KANGETHE NJUGUNA & 5 OTHERS[2017]eKLR (the bank's case) and **LYDIAH NYAMBURA MBUGUA -VS- DIAMOND TRUST BANK LIMITED** [2018] eKLR(Lydia's case)

The Defendant seeks support in the bank's case. The Plaintiff is relying on Lydia's case.

18. Both of these cases addressed the issue of jurisdiction of the Environment and Land Court. The jurisdiction of the court requires to be understood in light of both Constitutional and Statutory Provisions. And as courts have occasionally pronounced themselves on it, decided cases are also come in handy.

19. Article 162(2) and (3) of the Constitution of Kenya, 2010, provides as follows

1.
2. Parliament shall establish courts with the statue 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
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2.

20. It is clear from these Constitutional provisions that parliament is mandated to enact legislation to define and/or delineate the jurisdiction of Environment and Land Court. Such mandate however should confine itself only to the areas mentioned in Article 162(2) (b). Under Article 165(5) (b) the High Court is expressly divested of jurisdiction to handle matters spelt out for Environment and Land Court under Article 162(2).

21. Pursuant to the mandate given by Article 162(2) parliament enacted the Environment and Land Court Act, No. 19 of 2011. The jurisdiction of the court is then more elaborately set out at Section 13 of the Act. The section provides as follows:

Section 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 the 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, chores in action or other instruments granting enforceable interests in land; and
 - e. any other dispute relating to environment and land.
3. Nothing in the 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 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)

6.(deleted)

7. In exercise of its jurisdiction under the 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

f. Restitution

g. Declaration; or

h. Costs.

22. Further, the revised and consolidated Land Law regime as enacted by parliament clearly had the Environment and Land Court exclusively as the forum for resolution of Land and Environment disputes. The two most important enactments in this regard are the Land Act, 2012 and the Land Registration Act, 2012. The Land Act, 2012 defines the word court as follows:

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011;

In like manner, the Land Registration Act defines the word court thus:

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011.

As both these statutes make reference to the court established under the Environment and Land Court Act, 2011, it is useful to add that it is Section 4 of that Act that establishes the court.

That Section spells it out as follows

4. Establishment of the court

1. There is established the Environment and Land Court.
2. The court shall be a superior court of record with the statue of the High Court.
3. The court shall have and exercise jurisdiction throughout Kenya.

23. Besides the above provisions, it is imperative to note that both the Land Act, 2012 and the Land Registration Act, 2012, have other clear provisions mandating the Environment and Land Court Act to handle matters that fall under them.

In this regard, Section 150 of the Land Act, 2012 provides as follows:

150: The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions, and proceedings concerning land under the Act.

On its part, the Land Registration Act, 2012, provides as follows at Section 101:

101: The Environment and Land Court established by the Environment and Land Court Act, 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

24. A pertinent question that arises is this; Where does one find the statutory law relating to charges and mortgages? The truth of the matter is that the law is to be found in these two statutes. In the Land Act, 2012, the law is in part VII, which runs from Section 78 all the way to Section 106. In the Land Registration Act, the law is in Part V, which covers Sections 56 to 59.

The first port of call therefore for anybody seeking resolution of disputes relating to mortgages and charges should be the Environment and Land Court. Yet this is the court which, in the Defendant’s view, does not have jurisdiction. The Defendant should have told us where the High Court is mentioned in the enacted law.

25. So far, I have tried to highlight constitutional and Statutory provisions. There are, however, various judicial pronouncements whose end results have been to clothe other courts with jurisdiction. One such decision has been the bank's case(*supra*).

A reading of the decision in that case shows the Court of Appeal involved in very laboured reasoning where the word "use" in the context of the matter the court was handling was ultimately divorced in its purport and meaning from the word "use" as envisaged in both the Constitution and the enacted land statutes. In the same case, the issue of taking accounts was completely separated from the other issues in the case and treated as the basis of the dispute then under consideration. The logical outcome of that approach was that the High Court was found to have had jurisdiction to handle the matter it had already handled. In my view, the High Court was found to have jurisdiction in the matter through extensive use of legal ingenuity and deployment of the craft of legal interpretation.

26. But there was the Lydiah's case(*Supra*) where the jurisdiction of the Environment and Land Court case was challenged in light of the Court of Appeal's decision in the bank's case. In Lydiah's case however, one notices the ease of reasoning and clarity of thought by Munyao J, who chose not to wander far from the provisions of both the constitution and the statute.

In Lydia's case, Munyao J chose not to treat the issue under consideration as separate from the other issues and avoided being bogged down by interpretation of the word "use" which had pre-occupied the court in the bank's case.

27. As I have already pointed out elsewhere in the ruling, the central issue for consideration in this case is sale and all other issues arising are related to it.

This court is not being invited to interpret the word "use" or to separate issues and treat them as distinct or predominant.

The Defendant in this matter is therefore wrong for trying to find succor in the bank's case. That case does not apply here. The fact of the matter is that the dictates of the law I have so far cited and considered is that this matter squarely falls for determination by this court.

28. All considered therefore, it is clear that the objection herein must fail for the following reasons:

- i. The manner in which the objection is raised is wanting. And it is so wanting both in terms of practice and the Law.
- ii. The objection as raised fails the test of what a proper Preliminary Objection is or should be.
- iii. The matter does not apply to the bank's case that the Defendant seeks to rely upon.
- iv. Even if the merits of the objection are considered, the applicable constitutional and statutory provisions show well that it is this court, not the High Court, that should handle the matter.
- v. The Defendant adopted convoluted and less than clear, reasoning in his submissions apparently in a bid to bring the factual premise of the pleadings and the thrust of his Preliminary Objection within the scope of the bank's case that he sought to rely on. His efforts are unconvincing as there is an obvious disconnect between the reality he seeks to create and the obvious reality that runs through the pleadings.

29. It is plain to me that it was not necessary to raise the objection herein in the first place. This is an old matter and both sides should focus on ensuring that the trial is conducted so that a determination on the merits can be given.

30. The upshot, in light of the foregoing, is that the objection herein is hereby dismissed with costs.

Dated and signed at Kericho this 23rd day of January, 2020

.....

A.K. KANIARU

JUDGE