



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 20 OF 2019

DOMINIC MUREITHI MATHENGE.....1ST PLAINTIFF

PRISCILLA WANGECI NJOROGE.....2ND PLAINTIFF

-VERSUS-

BELLE HOLDINGS LIMITED.....1ST DEFENDANT

WIRELESS CELL CONNECT LIMITED.....2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's Application dated 30.8.19 and the 2nd Defendant's Notice of Preliminary Objection both dated 16.10.19.

2. The Application is brought under Order 51 of the Civil Procedure Rules, **Sections 18(10) (a),(2), and 3 A of the Civil Procedure Act (Cap 21)** , in which Applicant is seeking the orders that;

a. Mombasa HCC 20 of 2019 be and is hereby transferred from the High of Kenya Commercial and Admiralty Court at Mombasa to the Environment and Land Court at Mombasa for hearing and final determination.

b. Cost of this Application be in the cause.

3. The Application is anchored on six (6) grounds on its face and supported by the Affidavit sworn on the 30.8.2019 by **Joram Wairuhi Wang'ombe** who is the plaintiffs advocate and a further Affidavit sworn on the 25.10.2019 by the 2nd Defendant. the Plaintiffs' advocate avers that the present suit should be in the interest of Justice be transferred to the Environment and Land Court for final hearing and determination because it is the Court seized with competent jurisdiction to adjudicate on the matters of that nature.

4. The 2nd Defendant avers that this Court is duty bound and has judicial authority to administer Justice without undue regard to procedural technicalities and that the Defendant would not be prejudiced by the transfer of the suit.

5. The Preliminary Objection is based on three (3) grounds that:

a. That the subject matter of the suit is purchase of Apartment Number C7 erected on plot number 1665 Section I Mainland North.

b. That matters relating to the interests in property fall within the jurisdiction of the Environment and Land Court.

c. That the High Court lacks jurisdiction to hear the Plaintiff's case as filed and that the same ought to be struck out in *limine*

6. The 1st defendant opposed the Application via Grounds of Opposition dated 24.9.2019 on the grounds summarized as follows:

a. That this Court lacks jurisdiction to transfer the instant suit to the Environment and Land Court as Section 18 of the Civil Procedure Act only applies to matters instituted in Court subordinate to the High Court and not to Court of equal status with the High Court

b. That the present Application is an afterthought, bad in law and an abuse of the Court process and should be dismissed with costs.

7. The 2nd Defendant opposed the Application via its Grounds of Opposition dated 16.10.2019. The grounds are summarized as follows:

a. That this Court lacks jurisdiction to transfer the instant suit to the Environment and Land Court.

b. That the Plaintiffs application is a non-starter, bad in law and incurably defective, an abuse of the Court process and ought to be dismissed with costs to the Defendants.

8. On the 28.10.19, this Court directed that the Application and the 2nd Defendant's Notice of preliminary Objection be dispensed with via written submission.

DETERMINATION

9. I have considered the entire application, the preliminary objection together with the Grounds of Opposition and the written submissions in this matter. The issue for determination is whether the orders sought in the application and the Grounds of the preliminary objection are merited. At this stage, I must say that the Application and the preliminary objection being based on the same grounds, I will consider the objection as part of the Application and therefore the determination of the Application shall bind the objection.

10. It is trite law that jurisdiction is everything, without which the court has no power to make one more step, as held in the case of; **Owners of Motor Vehicle Lillian ("S") vs Caltex Oil (K) Limited (1989) 1 KLR**. Indeed where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, the court must determine the issue of jurisdiction at the outset.

11. Looking at the undated Plaint filed on the 1.4.2019, the prayers sought are as follows:

a) Cancellation of the Agreement of Sale dated 31.8.2017

b) Refund of the Purchase Price in the sum of Kenya shillings Thirty Two Million Three Hundred and Eighty Two, Five Hundred and Twenty Five (kshs. 32,382,525/=

c) Interest on commercial rates on the sum due to the Plaintiff from 4.11.2017 until payment in full.

d) Damages for breach of Contract.

e) Costs of the suit

f) Any other relief that the honourable Court deems fit or g) appropriate to grant.

12. Section 13 of the Environment and Land Court Act stipulates as follows:-

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 dispute relating to environment and land.

13. From the plaintiffs' plaint it is clear, that the disputed subject of this suit, is in its entirety, commercial in nature. It is not, as suggested by the parties that a matter that it falls under the jurisdiction of the Environment and Land Court. It is not a land dispute envisaged under Section 13 of the Environment and Land Court Act. Therefore, this is purely a commercial related claim for which this court has jurisdiction to deal with.

14. In the case of Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & Another [2016] eKLR, Joel Ngugi J rendered himself as follows:-

“In my view, therefore, it appears clear that the parties intended that their contract involved two distinct parts – one for the sale of land and, the other, for the construction of townhouses and ancillary infrastructure.It is, finally, my finding that the Land Acquisition Price having been paid (as it is undisputed from the pleadings), and the title to the properties having been registered in the name of the Plaintiffs, there is no dispute as to ownership of land – the only contest being whether there has been a breach of the Construction Contract between the parties, and if so which party is in breach and what the consequences for the breach are. Consequently, it is my finding and holding that the dispute between the Plaintiffs and the Defendants that is presented to court is a dispute that is not primarily about land. I therefore hold that this Court has jurisdiction to hear the suit.”

15. In view of the foregoing, I find that this court is clothed with the jurisdiction to entertain the present suit. The Plaintiffs’ Application and 2nd defendant’s preliminary objection are without substance.

16. The upshot is that, the Application dated 30.8.2019 and preliminary objection dated 16.10. 2019 are without merit and are accordingly dismissed.

Costs shall be in the cause.

Dated, Delivered & Signed at Mombasa this 12th day of February, 2020.

D.O. CHEPKWONY

JUDGE