



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 26 OF 2015

ECO BANK KENYA LIMITED.....DECREE HOLDER/PLAINTIFF

- VERSUS -

HARVEY ENGINEERING LIMITED.....1ST DEFENDANT

STANLEY NDUATI MWANGI.....2ND DEFENDANT

JOSEPH MBURU MUIGAI.....3RD DEFENDANT

RULING

1. Before me is the Notice of Motion dated **1st July, 2016** as amended on **29th May, 2018**. That application is filed by **Eco Bank Kenya Limited** (the plaintiff).

BACKGROUND

2. The plaintiff by a plaint dated **26th January, 2015**, sought judgment against **Harvey Engineers Ltd** (1st defendant), **Stanely Nduati Mwangi** (2nd defendant) and **Joseph Mburu Muigai** (3rd defendant) for **Ksh 16, 118,189.51** plus interest at 20% per annum, plus default interest at 5% per annum until payment in full.

3. Although all the defendants were served with the summons and plaint, they did not file an appearance within the prescribed period and indeed upto todate, and judgment was therefore entered in default. The plaintiff obtained default judgement against all the defendants jointly and severally as prayed in the plaint. A decree was drawn and issued on **15th December, 2015**.

4. The recoverable costs were certified on **9th June, 2016** at **ksh 411,668.40**.

THE APPLICATION

5. The plaintiff by the **Notice of Motion** application brought under **Order 22 Rule 48 (1) of the Civil Procedure Rules**, seeks the following prayers:

(1) **“That pending hearing and determination of this application the Honourable Court be pleased to issue an order prohibiting the 3rd Judgment Debtor/his servants and or agents from transferring or charging the property known as NAIROBI/BLOCK 106/155.**

(2) **That this Honourable Court be pleased to issue an order that the property known as NAIROBI/BLOCK 106/155 be attached and sold by public auction in execution of the decree herein.**

(3) **That the Honourable Court be pleased to settle the terms of sale and issue such further orders as it may deem fit.”**

6. Those prayers are supported by the affidavit of **Elizabeth Hinga** an employee of the plaintiff. It is deponed that the 3rd defendant owns the property **Nairobi/Block 106/55** (the subject property). That the plaintiff intends to sell that property to recover the amount of the decree herein.

7. The plaintiff by its written submissions stated that the 2nd and 3rd defendants guaranteed a loan facility advanced to the 1st defendant by

the plaintiff. By that guarantee, the 2nd and 3rd defendant undertook to pay the plaintiff on demand of all money owed by the 1st defendant. Further, that the said guarantee was a continuing security. Further that although the 1st defendant's debt was secured by a charge over property **LR 209/9823** Nairobi, that the said property yielded very low price at the public auction, because the land had been invaded by squatters who discouraged prospective buyers. In this regard, reference was made to the letter by **Valley Auctioneers** dated **21st November, 2013**. The said auctioneer in that letter addressed to the plaintiff stated:

“ we refer to the above matter and wish to inform you that we conducted the auction of the debtors property on 20 nov 2013 and the highest bid received was ksh 7 million.

We did not confirm the bid since it was below the reserve price. The problem with this property is that the entire plot has been invaded by squatters and this has discouraged prospective purchasers.

We are of the view that valuation should take this into consideration to reflect the true value of this property. The bidders indicated that one has to obtain court orders to evict the squatters.”

8. The application was opposed by the defendants. The replying affidavit was sworn by the 3rd defendant. In that replying affidavit, the 3rd defendant acknowledged that the 1st defendant company obtained a loan facility from the plaintiff. That, that loan was secured by a legal charge over Property **LR No. 209/9823**, and the guarantee by the 2nd and 3rd defendants.

9. The 3rd defendant further deposed in that affidavit that the charge property at the time when the loan was issued, in 2010, was valued at **ksh 25 million**. That the plaintiff was only entitled to sell the subject property after selling the charged property.

10. By the defendant's written submissions the defendants stated that the subject property was protected under Article 40 of the constitution. They submitted that the subject application should have been filed before the Environment and Land Court as set out under Article 162 (2) of the constitution. It was their submission that the High Court lacked jurisdiction to entertain the application.

ANALYSIS AND DETERMINATION

11. It has often been stated that jurisdiction is everything and that without it the court has no power to make one step. See the case **Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989] KLR**. In the case **John Kipng'eno Koech and 2 others vs Nakuru County Assembly and 5 Others [2013] eKLR** the court had this to say on jurisdiction:

“Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

12. This court will therefore first determine whether it has jurisdiction to hear the application.

13. **Article 162 of the constitution** provides that there shall be established by parliament, a court to determine the environment and use and occupation of, and title to, land. **Article 165 (5) (b)** provides that the High Court does not have jurisdiction to entertain matters falling within the jurisdiction of the court contemplated under Article 162(2). It is because of those provisions that the defendant submitted that this court lacks jurisdiction to hear the present application.

14. One can only determine if the court lacks jurisdiction by looking at the prayers sought in the application. Those prayers were reproduced above. The plaintiff by those prayers seeks a prohibitory order against a property which the 3rd defendant admitted is registered in his name.

15. Does such a prayer touch on environment and use and occupation and title to land? It obviously does not. It relates to prohibition from dealing with the subject property. The order of prohibition being sought is a natural consequence of the judgment entered in favour of the plaintiff. It is a process of execution. In my humble view therefore, this court has jurisdiction to entertain the application. That position is supported by the decision of the Court of Appeal at Mombasa in the case **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR**

“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.”

16. The defendant also submitted that because of Article 40, this court cannot issue orders of prohibition.

17. I beg to differ with the defendant's submissions. Article 40 provides that everyone has a right to own land and that parliament should not enact laws that permit arbitrary deprivation of that right.

18. The application before court can hardly be said to be arbitrary. It is a process whereby the defendant has been given an opportunity and has indeed participated in the hearing of the application. Article 40 is therefore not applicable in this matter.

19. On the whole, there is no basis of denying the plaintiff the prayers it seeks. The prayers are premised on Order 22 rule 48 and rule 68 of the rules which provides as follows:

“ORDER 22 RULE 48 OF THE CIVIL PROCEDURES RULES

(1) Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

(2) A copy of the order shall be affixed on a conspicuous part of the property.

ORDER 22 RULE 68 OF THE CIVIL PROCEDURES RULES

Sale of immovable property in execution of decrees may be ordered by any court.”

20. It is because there is a valid judgment in favour of the plaintiff and the property which is sought to be attached belongs to the 3rd defendant that I acquiescent to the plaintiff’s application.

21. The orders of the court are as follows:

*a. A prohibition order shall hereby issue in respect to property **Nairobi/Block 106/155**.*

*b. The property **Nairobi/Block 106/155** is hereby attached and it shall be sold by public auction in satisfaction of the decree herein.*

*c. The terms of that sale by public auction shall be settled by the deputy registrar of this court and shall be in strict conformity of order 22 rule 57 of the civil procedure rules. At that settlement of terms of sale, the plaintiff shall provide an official search of the property **Nairobi/Block 106/155**.*

*d. The plaintiff is awarded the costs of the **notice of motion** dated **1st July, 2016** and amended on **29th May, 2018**.*

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

.....1st Defendant

.....2nd Defendant

.....3rd Defendant