



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 1 OF 2017

CELINA WAMBUI KIGWE.....PLAINTIFF/APPLICANT

VERSUS

URITHI HOUSING

COOPERATIVE SOCIETY LIMITED.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant has moved the court by way of a chamber application dated the 4th January, 2017 seeking the following orders;

- (1) That this application be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.
- (2) That the Honourable court be pleased to grant an interim injunction restraining the Defendant/Respondent by themselves, their agents, employees or any persons claiming through them from disposing of, leasing, charging, entering, subdividing or in any way dealing with land parcel Land Reference Number 10823/422 pending the hearing and determination of this Application.
- (3) That the Honourable Court be pleased to grant interim injunction restraining the Defendant/Respondent by themselves, their agents, employees or any person claiming through them from disposing of, leasing, charging, entering, subdividing or in any way dealing with land parcel Land Reference Number 10823/422 pending the hearing and determination of this Suit.
- (4) That the cost of this Application be borne by the Defendant/Respondent.

The application is supported by the affidavit of Celine Wambui Kigwe sworn on the 4th day of January, 2017. The facts in support of the application are that vide an agreement dated the 4th day of June, 2015, the applicant agreed to sell land parcel number 10823/422 to the respondent.

That the respondent breached the initial agreement and they entered into a fresh agreement dated the 4th day of March, 2016 which effectively terminated the first agreement. Pursuant to the said agreement, the respondent paid a sum of Ksh. 13,250,000/= leaving a balance of 6,750,000/= which according to the agreement was supposed to be paid within 60 days from the date of the agreement.

The respondent failed to pay the balance as agreed and a notice to pay was issued to it on the 9th May, 2016. It failed to heed to the notice and the agreement was terminated in accordance with clause 8.2.

That notwithstanding, the respondent deposited the balance of the purchase price in the applicant's account on the 12th November, 2016 and effected the transfer of the land into its name since the title documents had been given to it.

The respondent has since subdivided the said land and it is in the process of selling portions of it to third parties. The respondent has also started wasting the land in dispute by digging trenches. That the sale agreement has an arbitration clause that requires the dispute to be resolved through arbitration.

The respondent has opposed the application vide notice of preliminary objection filed on the 16th January, 2017 on the following grounds:-

(1) The plaintiff's/applicant's applications is devoid of jurisdiction as the court empowered to hear and determine the issues before this Honorable Court is the Environment and Land Court(ELC) established under Article 162 (2) (b) of the constitution as read together with the Environment and Land Act (No 19 of 2011)

(2) By reason of the Arbitration clause in the sale agreement dated the 4th March, 2016 between the plaintiff and the defendant which forms the subject of the dispute between the parties the High Court lacks the requisite jurisdiction to entertain the plaintiff's application.

Parties orally submitted in court. Counsel for the defendant/respondent submitted that there is an arbitration clause between the plaintiff and the defendant and hence the High Court lacks jurisdiction to entertain the matter. According to the respondent, the requisite court is the Environment and Land Court and it's the only court that can stay the matter and refer the same to arbitration.

On his part, counsel for the applicant submitted that there is an arbitration clause in the agreement and the matter should proceed for arbitration but the reason for filing the matter at the High Court is because section 7 of the Arbitration Act requires that any party seeking interim orders should apply to the High Court. According to him both the High Court and ELC have jurisdiction to entertain the matter herein. He averred that the respondent is seeking interim orders so as to preserve the property pending the arbitral process which takes time because even an arbitrator has not been agreed upon.

The preliminary objection herein, relates to the jurisdiction of this Honourable Court. In the famous case of Owners of the motor vessel "Lillian S. Vs. Caltex Oil (Kenya) Ltd Civil appeal No. 50/1989, the court held that a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court".

The essence of a preliminary objection was given by JA old sir Charles Hewbold P. in Mukhisa Biscuits manufacturing Co. Ltd Vs. West End Distributors (1969) E. A 696 at page 700 law J.A. stated that

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Hewbold P added as follows page 701:-

"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 facts are to be ascertained or if what is sought is the exercise of judicial discretion".

The court has considered the submissions made by the counsels for the respective parties in support of and against the preliminary objection. The defendant has averred that the court empowered to hear and determine the issues before the court is the Environment and land court (ELC) established under Article

162 (2) (b) of the constitution as read with the Environment and Land Act.

The ELC is established under Article 162 (2) (b) of the constitution which provides:-

(2) Parliament shall establish courts with status of the High Court to hear and determine disputes relating to:-

(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).

Pursuant to the clause (3) above, parliament enacted Environment and Land court Act. No. 19 of 2011. Section 13(2) of the said Act, sets out the jurisdiction of the ELC and it provides as follows:-

(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (d) 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 interest in land; and

(e) Any other dispute relating to environment and land.

Under part 1- (preliminary to the Act), court is defined to mean the Environment and Land Court established under section 4 pursuant to Article 162 (2) (b) of the constitution.

As I write this ruling, I am aware that many Hon. Judges have expressed different opinions when it comes to the interpretation of Article 162 (2) (d) of the constitution with regard to the jurisdiction of the High Court Vis-a Vis that of the ELC Court. My interpretation based on the above analysis is that the High Court does not have jurisdiction to hear Environment and land court matters.

This is informed by the provisions of Article 162(2) (d) of the constitution and section 13(2) of the ELC Act which sets out the jurisdiction of ELC court.

In the premises aforesaid and being of that view, this being a land matter, I hold that the preliminary objection has merits and the same is hereby allowed. The plaintiff’s suit is hereby struck out with costs to the defendant.

Dated, signed and delivered at Nairobi this 16th day of February, 2017.

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L NJUGUNA

JUDGE

In The Presence of

.....***For The Plaintiff/Applicant***

..... ***For The Defendant/Respondent***