



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CIVIL CASE NO 7 OF 2016

1. WOODCREST INVESTMENT CO. LTD
2. MAWA FAMILY LIMITED
3. PATRICK WAWERU MAINA.....PALINTIFFS

VERSUS

1. JAMII BORA BANK LIMITED
2. MURANG'A UNIVERSITY COLLEGE.....DEFENDANTS

RULING

1. The 1st Defendant herein, **Jamii Bora Bank Limited**, advanced certain monies to the 1st Plaintiff upon guarantee provided by the 2nd and 3rd Plaintiff's in the form of legal charges over their respective landed properties. The 1st Defendant subsequently moved to exercise its statutory power of sale over the charged properties. The 2nd and 3rd Plaintiffs have alleged in their plaint that the 1st Defendant's action is in bad faith and unfair, and calculated only to unduly interfere with their equity of redemption.

2. The main relief sought in the plaint is a permanent injunction to restrain the 1st Defendant from, in effect, exercising its statutory power of sale over the 2nd and 3rd Defendant's properties, and also discharge of the charges. Other reliefs are sought in respect to the financing agreement between the 1st Plaintiff and the 1st Defendant, and the 2nd Defendant's alleged obligation to provide student occupancy for the hostels built by the 1st Plaintiff in terms of the agreement between it and the 1st Defendant.

3. Together with the plaint the Plaintiffs applied by notice of motion dated 26/7/2016 for temporary injunction pending disposal of the suit. Interim relief was granted pending disposal of the issue of jurisdiction of this court to hear and determine the suit.

4. The Plaintiffs and the 1st Defendant are in agreement that this court has jurisdiction. The 2nd Defendant however is of the firm persuasion that jurisdiction in this matter lies with the **Environment and Land Court**, not the **High Court**.

5. I have considered the respective submissions of the learned counsels appearing, and I have perused the cases cited.

6. The *Environment and Land Court* was established upon the dictate of **Article 162(2) and (3)** of the *Constitution of Kenya, 2010* which pronounces –

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

(a) Employment and labour relations; and

(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).”

7. Parliament indeed enacted the *Environment and Land Court Act, Cap 12A*, which commenced operation on 30/08/2011. The *Environment and Land Court* was established by section 4 of the Act. Section 13 of the Act provided the jurisdiction of the Court as follows –

“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 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 environment 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 other dispute relating to environment and land

(3) Nothing in this 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, 68 and 70 of the Constitution.

(4) In addition to the matters referred to in subsection (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)

(6)

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including 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;
- (g) restitution;
- (i) declaration; or
- (j) costs

8. Disputes “relating to **private land and contracts**, choses in action **or other instruments granting any enforceable interest in land**” must surely include a legal charge which is an instrument that grants an enforceable interest in land, to wit, the statutory power of sale! It is to be noted that a successful exercise of the statutory power of sale will result in change of ownership and thus affect the title to the land concerned.

9. It is for this reason that I respectfully disagree with the decision of Havelock, J in **Kisimani Holdings Limited & Another-vs- Fidelity Bank Limited [2013] eKLR**. The main cause of action may be the banking transaction between the lender and the borrower which may entail issues regarding whether or not there has been breach, etc. of the terms of the contract. However, the issue of exercise of the statutory power of sale of charged land appears to me to come squarely within the jurisdiction of the **Environment and Land Court**, and not the **High Court**, which is specifically denied jurisdiction by Article 165(5) of the Constitution in matters in which the **Environment and Land Court** has jurisdiction.

10. It is to be noted also that Part VII (sections 78 to 106) of the **Land Act, Cap 280** (which commenced operation on 2nd May 2012) contains general provisions on charges, including the remedies available to the chargee, one of which is the statutory power of sale, and the reliefs available from court by both chargee and chargor. “**Court**” is defined in **section 2** of the Act as the **Environment and Land Court**.

11. Much has been made of the **1997 Practice Directions** by the then Chief Justice upon establishment of the **Commercial Division** of the High Court. Those directions pointed out what matters were suitable for trial by that division of the High Court. They have nothing at all to do with the present controversy as to which court, between the **High Court** and the **Environment and Land Court**, has jurisdiction in issues of a chargee’s exercise of statutory power of sale. By the same token, the issue the court dealt with in the case of **Cannon Assurance Kenya Ltd –vs- Frederick Githithi Kabue [2013] eKLR** was which division of the High Court, as between the Civil and the Commercial Divisions, was better suited to deal with the matter at hand there, not as between the **High Court** and the **Environment and Land Court**. The case is irrelevant here.

12. I therefore hold that the **High Court** had no jurisdiction to hear and determine this case. The case belongs in the **Environment and Land Court**. It is hereby transferred to the **Environment and Land Court, Murang’a** for disposal. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 16TH DAY OF FEBRUARY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURNAG’A THIS 17TH DAY OF FEBRUARY 2017