



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 779 OF 2009

MULTI TRACK

KENYA PLANTERS COOPERATIVE UNION LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

HARVEN GADHOKE.....2ND DEFENDANT

DANIEL MUTISYA NDONYE.....3RD DEFENDANT

ROBERT KINUTHIA MUNGAI

T/A KAHONOKI ESTATE.....4TH DEFENDANT

FIKAH ACRES LIMITED.....INTERESTED PARTY

AND

DAVID NJEHIA NGUGI

& 7 OTHERS.....APPLICANTS/INTENDED INTERESTED PARTIES

RULING

1. The subject of this suit is a charge that was created into between the Plaintiff and the 1st Defendant herein for the advancement of financial facilities to the plaintiff. Following the default in the repayment of the said facility, the 1st Defendant Bank in the exercise of its statutory powers appointed a receiver of the property of the Plaintiff herein and that is how the 2nd and 3rd Defendants became parties to this suit. Part of the charged property, however at one point belonged to the 4th Defendant herein. The interested party herein, Fikah Acres Limited on its part claims interests in some of the charged property as a purchaser from the plaintiff.

2. At one point during the pendency of these proceedings, the plaintiff compromised its suit and withdrew the same. What has however sustained these proceedings is an alleged counterclaim filed by the 4th Defendant.

3. When the 4th Defendant herein sought orders against the said interested party seeking inter alia that the Plaintiff/Respondent, the Proposed Interested party, their servants and/or agents or otherwise howsoever be restrained from trespassing, entering upon, transferring or dealing any further in any way with all that piece of property commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 (“the suit property”), the entry of a caveat thereon and rectification of the said titles, this Court on 1st February, 2016, found that the 4th Defendant having disposed of some of the properties pursuant to an agreement that enabled the plaintiff to dispose of the said properties to the interested party, could not turn round to seek the aforesaid reliefs. The 4th Defendant was advised, if so minded to institute proceedings for fraud and join the registrar in the same.

4. The applicants in this ruling have now moved the Court seeking the following orders:

1. THAT the application filed herewith be certified urgent and heard ex parte in the first instance and service thereof be dispensed with.

2. THAT the Intended interested parties be joined parties to this case.

3. THAT this honourable court do stay the orders issued vide the ruling dated 1st February 2016 pending hearing and determination of this application.

4. THAT the Interested Party Fikah Acres Limited/Respondent by themselves, agents, employees, and or servants be restrained by a temporary injunction from entering into, wasting, damaging, alienation, sale, removal or disposal or in any other manner dealing with the property known as L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33 pending hearing and determination of this application.

5. THAT the Interested Party Fikah Acres Limited/Respondent by themselves, agents, employees, and or servants be restrained by a temporary injunction from entering into, wasting, damaging, alienation, sale, removal or disposal or in any other manner dealing with the property known as L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33 pending determination of the counter claim by the 4th Defendant/Respondent against the plaintiff and HCC 542 OF 1991; NAIROBI; ROBERT KINUTHIA MUNGAI –VS- KENYA PLANTERS CO-OPERATIVE UNION LIMITED .

6. THAT leave be granted to the applicants to file their substantive claim of interest to the respective land parcels that the applicants have purchased from the 4th Defendant/Respondent the subject of the case before this court.

7. THAT the pending counter claim by the 4th defendant/Respondent against the plaintiff/Respondent be transferred for hearing and determination before the Land and Environment Court which has jurisdiction to hear and determine a claim to title to land and any dispute relating to land before which court the applicants intend to lodge their substantive claim to title to land that they have acquired pursuant to sale agreements entered into between them and the 4th Defendant/ Respondent; and further that this honourable court do vacate the proceedings held before this court over the counter-claim by the 4th Defendant against the plaintiff relating to the mortgage on the land belonging to the 4th Defendant comprising of the titles L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14; L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/23; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 & L.R. No. 1363/33; resultant subdivisions of L.R. 1363/2.

8. THAT costs of this application be provided for.

5. According to the applicants, they and the 4th Defendant entered into respective sale agreements for the 4th Defendant to sell the intended interested parties parts of the suit property namely L.R. No. 1363/10; L.R. No. 1363/11; L.R. No. 1363/12; L.R. No. 1363/13; L.R. No. 1363/14, L.R. No. 1363/15; L.R. No. 1363/16; L.R. No. 1363/22; L.R. No. 1363/24; L.R. No. 1363/25; L.R. No. 1363/26; L.R. No. 1363/27; L.R. No. 1363/28 and that they have come to learn of the pendency of these proceedings. They also disclosed the existence of another case being HCC 542/1991 NAIROBI; ROBERT KINUTHIA MUNGAI –VS- KENYA PLANTERS CO-OP. UNION LIMITED over the mortgage issue between the plaintiff and the 4th Defendant in which an order was issued on 28th February 1991 restraining the plaintiff from interfering with the land parcel L.R. 1363/2 the mother title to the subject subdivisions.

6. According to the applicants, they came to learn that while the dispute over the mortgage between the plaintiff and the 4th Defendant has been pending determination before court the plaintiff has transferred the dispute property to its name in August 2014 and subsequently transferred it to the interested party in these proceedings. The applicants however contended that pursuant to the said sale agreement, they had taken possession of their respective portions of the sale property in the belief that the 4th Defendant was at all material times the registered owner of the property. It was however contended by the said applicants that the dispute herein between the plaintiff and the 4th Defendant being a dispute over title to land, it is the Land and Environment Court that has jurisdiction to hear and determine any disputes over the suit property herein hence this Court lacks jurisdiction to entertain such claims.

7. These proceedings, according to the said applicants came to their knowledge sometime about July 2016 when one of the applicants the intended 6th interested party was found in her land by strangers who claimed to be on a mission on behalf of the plaintiff and the interested party to scout for buyers of the property occupied by the intended interested parties. It was their case that neither of the parties to the suit involved them in the proceedings before this court and the failure to enjoin them and procuring orders adverse to their interest was material non- disclosure and fraudulent misrepresentation of facts intended to mislead the court and deprive the intended interested parties of their right to be heard and a fair determination of their interests in the suit property.

8. The applicants averred that the 4th Defendant is and has always been willing to redeem the mortgage owed the plaintiff the subject of the dispute between the parties and deprivation of the 4th Defendant of his land by the plaintiff and the interested party without a hearing and determination of the pending claim over the mortgage in the pending cases between the 4th Defendant and the plaintiff; and in turn depriving the intended interested parties of their legitimate expectation of their interest in the land purchased from the 4th Defendant is unjust and unconstitutional.

9. It was on this basis that the applicant sought orders for joinder in these proceedings and for the transfer of these proceedings to the Environment and Land Court.

10. The application was opposed. According to the interested party, it is the registered and beneficial owner of parcels of land more particularly described as L.R Numbers 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28 and 1363/33, (the suit properties) located in the Gatanga area of the Muranga County within the Republic of Kenya, having purchased the same for valuable consideration from the plaintiff in this matter, Kenya Planters Co-operative Union Limited after undertaking due diligence. It was its case that upon an agreement for the sale and purchase of the suit properties, it paid unto the plaintiff the entire consideration agreed for the purchase and whereupon, the plaintiff executed conveyances in its favour transferring the titles thereto to it which conveyances were registered in its favour on the 21st August 2014 and thereby constituting the interested party as the registered proprietor thereof.

11. It was the interested party's case that to the extent that the proposed interested party' claim is based on an agreement of sale for properties which this court has already found were not owned by the 4th

defendant, the present application is seeking a determination of issues which were similar to and/or were substantially in issue in the ruling made by this court on the 2nd August 2016 and therefore *res judicata* hence the present application is an abuse of process and warrants striking out *in limine*.

12. To the interested party, the applicants do not have any actionable interest in the suit properties as the 4th defendant with whom they contracted, did relinquish such interest thereon which he could pass to them, or at all and the agreements of sale exhibited in this application are incapable of conferring any proprietary interest in the suit property to them. It was accordingly contended that from the material before this court, it is clear that the applicants were defrauded by the 4th defendant and who misrepresented and masqueraded himself as the owner of the suit properties and accordingly, they should pursue their claim against him separately and apart from this suit where all the issues arising have already been settled. Their joinder to this suit would therefore be untenable and this Court was urged to disallow the application for the same since their claim against the 4th respondent is a distinct and separate issue from the gist and thrust of this suit as presented to court which is a suit on realisation of a security by a borrower.

13. It was the interested party's case that this application does not disclose any cause of action by the applicants as against the Interested Party and the Plaintiff in this suit and there would be no basis for joining them to this cause.

Determination

14. I have considered the issues raised in the instant application. As stated hereinabove, the original suit filed by the Plaintiff against the Defendant no longer exist the same having been withdrawn. It was that suit that properly speaking was seeking orders in the nature of commercial reliefs. As I have stated hereinabove, these proceedings have been kept alive purportedly due to the existence of a counterclaim by the 4th Defendant. The validity of the said counterclaim is itself in issue. However a cursory perusal of the same clearly shows that the issues to be determined therein, assuming it is valid, cannot be purely commercial issues since they touch on the 4th Defendant's interest in the subject land.

15. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

.....

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

16. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration

of justice.

17. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

18. It is now trite that the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

19. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which fall within the jurisdiction of the courts contemplated in Article 162(2) aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact **The Environment and Land Court Act, 2011** which Act commenced on 30th August 2011. Section 13 of the said Act provides 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 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, 69 and 70 of the Constitution.

(4) In addition to the 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 by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(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—

(a) interim or permanent preservation orders including injunctions;

- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (g) restitution;
- (h) declaration; or
- (i) costs.

20. In my view the plaintiff having withdrawn its suit, the pith of the commercial dispute was drained and the commercial branch of this dispute has dried away. The branch of the remaining tree if any is purely related to land. The applicants' interests in this saga is similarly purely in the nature of a land dispute.

21. In my view this Court sitting as a commercial court is no longer seized of the jurisdiction to deal with all the issues in this case. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA expressed himself as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction". [Emphasis mine]

22. As was held by Ochieng, J in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003**, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1**. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. It is my understanding that scenario herein falls within the second context. In other words, whereas the Court had jurisdiction to entertain the original cause of action which was merely the relationship between the partes resulting from financial accommodation with the land being just a collateral issue, the issues herein have since mutated beyond the mere commercial issues and have taken a life of their own in the form of disputes relating to interests to land, whether justifiably or not.

23. To compound the problem, there is now pending before the ELC a dispute revolving around the

original parcel of land before its subdivision. There is clearly a danger that the Commercial Division of this Court may arrive at diametrically opposed findings to those of the ELC. It is therefore my view that to forestall such eventuality, further proceedings in this case including whether the applicants herein ought to be joined to these proceedings ought to proceed before the ELC.

24. I therefore have to down my tools at this stage.

25. Accordingly, it I hereby direct that this suit be heard and determined by the ELC. The same is accordingly transferred to the said Court forthwith.

26. It is so ordered.

Dated at Nairobi this 12th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Chege for the 2nd to 9th interested parties

Mr Chege for Mr Njenga for the 1st interested party

CA Mwangi