



**Republic OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 147 OF 2013 (FORMERLY HCC. 9 OF 2003.**

**JOHN HEZRA ONYANGO WAFULA..... PLAINTIFF.**

**VERSUS**

**NATIONAL BANK OF KENYA & ANOTHER.....DEFENDANTS.**

**R U L I N G.**

**1. JOHN HEZRA ONYANGO WAFULA**, hereinafter referred to as the applicant, filed the notice of motion under certificate of urgency dated 13<sup>th</sup> December, 2012 for five orders as shown below;

‘ 1. THAT, the Application herein be certified urgent and service of the same be dispensed with in the first instance.

2. THAT, a temporary injunction and thereafter a permanent injunction do issue restraining the 1<sup>st</sup> Defendant from selling by way of Public auction through Garama Investments or by any other auctioneers or any other way of selling disposing of and/or in any other way dealing with land parcel No.BUKHAYO/MUNDIKA/1378 pending the hearing and final determination of this suit.

3. THAT, there be stay of execution or attachment and sale of the Applicant’s moveable property pending the hearing and final determination of this Application.

4. THAT, the Applicant’s suit dismissed on 12.10.2011 for want of attendance be reinstated and determined on merit.

5.THAT, the costs of this Application be provided for’.

The first two prayers have already been dealt with and this ruling is in respect of prayers 3 to 5. The application is based on seven grounds set out on the face of the application and supported by the affidavit sworn on 13<sup>th</sup> December, 2012 by **JOHN HEZRA ONYANGO WAFULA**, the Applicant.

Though Mr. Anwar Advocate for the Respondent in his submissions stated he was relying on a replying affidavit sworn on 25<sup>th</sup> November, 2013, there is no such affidavit on record. In any case the court record shows that on 13<sup>th</sup> November, 2014, the Respondents had not filed any replying affidavit and were on that date granted seven days to file and serve their replying papers.

**2.** When the application dated 13<sup>th</sup> December, 2012 was filed, the Deputy Registrar directed on the same date that it be placed before the Judge. The matter was placed before Muchelule, Judge on 14<sup>th</sup> December, 2012 by Gikonyo J,. On the 17<sup>th</sup> December, 2012 the parties counsel appeared before

Gikonyo J, issued the following orders;

**“ This is a land matter that falls within the jurisdiction of the Environment and Land court. Although the matter had been concluded through the dismissal order issued on 12<sup>th</sup> October, 2011, the nature of the orders sought in the instant application are legally and essentially matters the High court cannot issue. Technically an order to set aside the dismissal herein could be issued by the High Court but practically once the matter resumes its original status as a fresh suit, the High court will then find itself without jurisdiction. This kind of approach will not make any practical sense. I therefore direct that the file be transmitted to the Environment and land court, Bungoma for disposal”**

On the same date counsel appeared before the Environment and Land Court and Omolo J, granted temporary injunction against the 1<sup>st</sup> Defendant on condition that the Applicant deposits Kshs.250,000/= within four days. The court directed that should the Applicant fail to comply with the condition, the temporary injunction orders would remain discharged.

3. In the process of preparing this ruling, the court noted that the suit the application seeks to reinstate was commenced through the plaint dated 1<sup>st</sup> April, 2003. It is apparent from the plaint that the dispute emanates from a loan facility the Applicant got from the 1<sup>st</sup> Defendant of Kshs.200,000/= in 1989 on the security of his land parcel Bukahyo/Mundika/1378(See paragraph 4 and 5 of the plaint) The Applicant in the plaint seeks to stop the intended sale of the charged property through temporary and permanent injunctions (See paragraphs 8, 11, 12 and the plaint) This court's jurisdiction is set out in articles 162 (2) (b) of the constitution to hear and determine disputes relating to **“ the environment and the use and occupation of and title to, land”**. The legislature then enacted the Environment and Land Court Act No. 19 of 2011 to operationalize the court and Section 13 of the said Act expanded on the jurisdiction of the court. There is nothing in the pleadings filed in this case that would show that it falls under the matters listed under Section 13 of the Environment and Land Court Act and Article 162 (2) (b) of the Constitution. This court has to be satisfied that it has jurisdiction to deal with the matter before it can proceed to pronounce itself on the issues for determination. Where the court finds it has no jurisdiction, it has to stop dealing with the matter and there would be no need to continue with the proceedings. In the decision on the matter in the Court of Appeal case of **Owners of the Motor Vessel “Lilian”** case –vs- Caltex oil Kenya Ltd (1989)KLR and this court's decision in **Gilbert Wesonga Mugeni & 2 others –vs- Eco bank Kenya Ltd & Another** . Busia ELC. No. 63 of 2014 in which this court held as follows;

**“ The Respondent s charged .....land with the Applicant to secure Kshs.6,000,000/=. This court's jurisdiction is to hear and determine disputes relating to the environment and the use and occupation of the title to land.”**

The pleadings in this case do not disclose any dispute to the use, occupation of , and, or title to any parcel of land. The pleadings raises a dispute over the status of accounts relating to the distributorship financing facility.....under which the Applicant loaned the Respondents Kshs.6000,000/= and the latter offered land ...as security. The Superior Courts have held that where a party has offered a suit property as security for loan facilities that has been availed, the property becomes a commodity that could be sold off in accordance with the law in case of default in payment to recover the money lent and interest thereof....”

As held in the foregoing case, this court is of the considered view that the pleadings herein discloses a dispute based entirely on a commercial transaction under which the Applicant charged his land with the 1<sup>st</sup> Respondent in 1989 for Kshs.200,000/=. There is nothing to do with the **“environment and the use and occupation of and title to, land.”** The court is of the considered view that had all the materials that were presented to this court been brought to the court on the 17<sup>th</sup> December, 2012, the directions given by my brother, Gikonyo J, would have been different.

4. Having formed the opinion that the pleading herein relates to a Commercial transaction rather than an

environment and land dispute, it follows that this court has no jurisdiction to pronounce itself on the application dated 13<sup>th</sup> December, 2012 as it cannot deal with the main suit in the event the application was to be granted. The matter is therefore referred to the High Court to be placed before the Resident Judge for directions.

It is so ordered.

**S. M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 13<sup>TH</sup> DAY OF MAY, 2015.**

**IN THE PRESENCE OF;**

**PLAINTIFF - ABSENT.**

**1<sup>ST</sup> DEFENDANT - ABSENT**

**2<sup>ND</sup> DEFENDANT – ABSENT.**

**JUDGE.**