



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO.72 OF 2018

SAID MOHAMED ABDALLA.....PLAINTIFF

VERSUS

1. BANK OF AFRICA (K)LTD

2. WATTS AUCTIONEERS.....DEFENDANTS

RULING

1. This ruling is in respect of the preliminary objection dated 25th may 2018 by the 1st defendant that this court lacks jurisdiction to hear and determine this matter on the following grounds:

a) **That the suit raised entire commercial disputes which falls outside the purview of the Environment and Land Court. Consequently, the court is divested of jurisdiction within the meaning of Article 162 (2) of the Constitution of Kenya as well as the Environment and Land Court Act.**

b) **That the dispute herein being resulting from mortgaging/charging issuing a property as security is a financial/commercial dispute. The jurisdiction of this Honourable court as per Section 13 of the Environment and Land Court Act as well as Section 150 of the Land Act is restricted and does not extend to handling such disputes.**

2. In the plaint dated 4th April 2017, the Plaintiff pleaded that he was granted a loan of Kshs.24,000,000/= by the (1st defendant) which was consolidated with an earlier loan of Kshs.3,376, 204.48. The Plaintiff averred that after the consolidation and upon adding other charges the loan facility was for Kshs.28,376,204.48 and that as security, a charge was created over two properties, namely, **MAINLAND NORTH/SECTION II/10336** and **PLOT NO.11046/II/MN** in favour of the 1st defendant.

3. It is the plaintiff's contention that on or about 10th August 2016, with the defendants consent, he entered into an agreement to sell the property known as **MAINLAND NORTH/SECTION II/10336** at Kshs.30,000,000/= with the monies going towards redeeming the said properties. The plaintiff averred that on or about April 2017, the defendant sent him a letter demanding from him Kshs.24,473,043.40 being outstanding loan arrears to be cleared in order to redeem the remaining security being **PLOT NO.11046/II/MN**. The plaintiff further averred that the defendant maintain a very dubious system of levying interest on non-performing loan arrears ballooning exorbitantly on a monthly basis. The Plaintiff further averred that the 1st defendant had received in excess of Kshs.35,000,000/= in repayment of an initial loan of Kshs.28,376,204.48 and redemption of the charged properties and now threatens to sell the security **PLOT NO.11046/II/MN**.

4. The plaintiff's claim against the defendants is for a declaration that the loan arrears together with the system of levying interest is unlawful and consequently an order directed to the defendants restraining them from transferring or dealing with the suit property in any manner on the basis of the unlawful loan balance plus cost of the suit.

5. I have considered the preliminary objection and the rival submissions made. The main issue is whether the court has jurisdiction to try the matter. It is argued that this court has no jurisdiction for the reasons that this suit is a commercial dispute.

6. The issues raised in this suit do not specifically seek to establish the use and occupation of and title to land but rather it is over the interest charged on the loan arrears. The plaintiff faults the system of levying interest on loan arrears.

7. In the case of **Cooperative bank of Kenya –v- Patrick Kangethi Njuguna & 5 Others (2017)eKLR** the Court of Appeal held as follows:

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the cujus doctrine nor

Article 260 whether expressly or by implication recognizes charging land as connoting land use. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with disposition of land....

Consequently, the assertion that a charge constitutes use of the land within the meaning of Section 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts."

8. Going by the above decision of the Court of Appeal and considering the cause of action in this suit in my view this court is barred from determining the issues herein. The same can best be canvassed in the High Court Commercial Division.

9. Having found that this court has no jurisdiction in this matter in as far as the same raises commercial or financial issue, I have no otherwise but to down my tools(see owners of the motor vessel Lillian 'S' -v- Caltex Oil (Kenya) Ltd (1989)KLR 1).

10. The preliminary objection dated 25th May 2018 is upheld and the application and the suit struck out with costs to the defendants.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

No appearance for Plaintiff

No appearance for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE

17/1/19