



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO 433 OF 2017

PRIVATE DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

REBECCA NGONYO.....1ST DEFENDANT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT

AND

JACKSON NJENGA NJOROGE.....INTERESTED PARTY

RULING

(Application seeking orders that this court has no jurisdiction and for orders to re-open proceedings conducted in the absence of the applicant; applicant arguing that the matter arises from a mortgage or charge thus ELC has no jurisdiction; not the position that the ELC would not have jurisdiction in matters of charge or mortgage; dispute in any event not being one over a charge or mortgage; court having jurisdiction in the matter; no reason to set aside the proceedings as applicant chose to absent herself on the date of hearing; application dismissed)

1. The application before me is that dated 29 November 2018 filed by Private Development Company Limited the 1st plaintiff in this matter. The application seeks the following orders :-

(i) Spent (certification of urgency).

(ii) Spent (dispensation of service in the first instance).

(iii) That this case be transferred to the High Court for directions as the Environment and Land Court has no jurisdiction to hear and determine the matters related to mortgages, charges, and collection of dues and rents which fall within the exclusive jurisdiction of the High Court.

(iv) That the 1st plaintiff be allowed to call his witnesses and the defendants and interested parties' witnesses be recalled for cross-examination by the 1st plaintiff's counsel and the defendants and interested parties be granted a right to re-examine the witnesses after cross-examination.

(v) That to facilitate the cross-examination, the 1st plaintiff's counsel be availed the typed proceedings containing the testimony of the witnesses.

(vi) That the 1st plaintiff be granted leave to file a list and bundle of document and witness statements and that the list and bundle of documents and witness statements filed herein together with this application be admitted on record and deemed to have been properly filed upon payment of the requisite filing fees within 7 days of the ruling.

(vii) That the costs of this application be in the cause.

There are several grounds upon which the application is based and the application is opposed. Before I go to the gist of these, I feel it necessary to give a background of this suit and the matters that arose before the filing of this application.

2. The dispute herein relates to the ownership of the title and right to possession of the land parcel Nakuru Municipality Block 4/46 which

land was owned by one Lucy Mwihaki Macharia (Ms. Mwihaki) . She charged this land to Royal Credit Limited who then wished to exercise their statutory power of sale when there was default. Ms. Mwihaki then filed the case Nairobi HCCC No. 3443 of 1992 hoping to obtain orders to prevent Royal Credit Limited from auctioning the suit property. There was an injunction issued but which lapsed, and through a public auction, Royal Credit sold the suit property to Jackson Njenga Njoroge in the month of November 1998. Through the case Nairobi HCCC No. 694 of 2005, Ms. Mwihaki again sued Royal Credit seeking orders to stop Royal credit from selling the suit land or rectifying the register by discharging the charge, and also asked that the charge be cancelled. In the same year, Private Development Company (the applicant) filed the case Nakuru CMCC No. 2125 of 2005 against one Rebecca Ngunyo and Samuel Kamau Macharia, to prevent the two from interfering with her possession of the suit property. This latter case was withdrawn shortly thereafter, but a new similar case was filed in the High Court, being Nairobi HCCC No. 1082 of 2006. In the case, the applicant in addition to seeking restraining orders, also asked for damages for the loss that they have incurred owing to interference by the two defendants. Having purchased the suit property, Jackson Njenga Njoroge filed the suit Nakuru CMCC No. 2019 of 2006 seeking orders of vacant possession against the applicant.

3. All these suits were consolidated through an order issued on 12 February 2013. It is however noteworthy to recall that the suit Nakuru CMCC No. 2125 of 2006 had been withdrawn on 14 August 2006. This aside, the case Nairobi HCCC No. 3443 of 1992 was dismissed for want of prosecution on 20 June 2001, thus leaving in existence the suits Nairobi HCCC No. 1082 of 2006, Nakuru CMCC No. 2019 of 2006, and Nairobi HCCC No. 694 of 2005. The suit Nairobi HCCC No. 694 of 2005 was dismissed on 3 May 2017, leaving only two suits, that is the original Nairobi HCCC No. 1082 of 2006 and Nakuru CMCC No. 2019 of 2006.

4. In the case Nairobi HCCC No. 1082 of 2006, the following prayers were sought by the applicant as plaintiff :-

(a) A sum of Kshs. 720,000/= (being some special damages)

(b) A declaration that the defendants or either of them are not entitled to enter or use or take benefit or receive income for the said buildings, workshops and stalls and or claim ownership and/or at all of the (suit property).

(c) An injunction order to restrain the defendants by themselves, agents, nieces, uncles or servants or otherwise from entering, remaining on or continuing in occupation, or using or taking rent, income or any benefit from premises aforesaid and/or in the alternative a mandatory injunction order be given ordering the defendants by themselves, servants, agents or employees to cease and stop forthwith and do deliver up or give up the wrongfully assumed control and management of the (suit premises).

(d) Aggravated and general damages and/or mesne profits taken wrongly at the rate of Kshs. 240,000/= per month from November 2005 until income and possession is delivered up.

(e) Costs and interest on (a) and on costs.

5. In the case originally filed as Nakuru CMCC No. 2019 of 2006, where Jackson Njenga Njoroge is plaintiff and Private Development Company the defendant, the prayers sought are as follows :-

(a) A perpetual injunction restraining the defendant by itself and/or its agents, servants, assigns or those claiming under its title from entering, occupying demanding or collecting rent or in any other manner howsoever interfering with the management and control of the (suit property).

(b) Costs of this suit.

6. I have taken the trouble of laying down the prayers sought in the above suits for they are critical in the determination of whether this court has jurisdiction, and I will come back to this at a later stage of this ruling.

7. On 18 September 2018, the matter came up for pre-trial directions and Mrs. Mukira, then counsel on record for the applicant, stated that she is ready for trial and that she has complied with all pre-trial issues. I then gave the date of 20 November 2018 for hearing which date was agreed by all parties. On the eve of the hearing day, counsel for Ms. Mwihaki (considered the 2nd plaintiff in the consolidated suits) filed an application to amend the plaint, and I did order the application to be mentioned on the following day for directions. On the said day, Ms. Ngugi was present holding brief for Mrs. Mukira, and so too, Mr. Bizimana counsel for the 2nd plaintiff. I did not see merit in the application for amendment of plaint and I dismissed it; I directed that the case do proceed for hearing. Ms. Ngugi stated that Mrs. Mukira no longer has instructions and will therefore not be proceeding and Mr. Bizimana stated that he has no witness and they only choose to be observers. That being the position, I directed the close of the plaintiffs' case and adjourned briefly to 12.15 pm to proceed with defence hearing. When we resumed, Ms. Ngugi and Mr. Bizimana were nowhere to be seen, and the defendants proceeded to testify and close their case. I gave 18 December 2018 for judgment but I did not sit on 18 December 2018 as I was on leave, and upon resuming, I gave notice that I will deliver judgment on 14 February 2019 (which I later deferred to today 15th February 2019).

8. In the period in between, this application was filed. The grounds upon which the application is premised are inter alia that this court has no jurisdiction, that the previous counsel did not communicate to the directors of the applicant about the hearing of the case, that the applicant only got to know that the case proceeded after being informed by her tenants, and that they have a constitutional right to be heard. The application is supported by the affidavit of James G. Macharia, a director of the applicant company, who has deposed inter alia that he was not informed of the hearing date and that he was surprised that the matter proceeded.

9. The respondents have filed Grounds of Opposition to oppose the motion and an affidavit sworn by Mr. Samuel K. Macharia. Basically, it is their view that the application is an abuse of the process of court; that the proceedings of 20 November 2018 were inter partes; that the suit is over ownership of land hence this court has jurisdiction.

10. I took in oral submission at the hearing of the application where Mr. Mogoi relied on the case of **Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR** to buttress his argument that this court has no jurisdiction. Mr. Bizimana was in support of the submissions of Mr. Mogoi. Both Mr. Karanja Munyori and Mr. Orenge opposed the application on behalf of the respondents. I have taken note of the submissions of counsel before arriving at my decision.

11. There are two issues in this application, the first being whether this court has jurisdiction, and the second whether this court should exercise its discretion to set aside the proceedings of 20 November 2018 and re-open the case.

12. On the first limb, the Environment and Land Court (ELC) has its root in Article 162 of the Constitution which is drawn as follows :-

162. System of courts

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(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).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

13. One will observe that with respect to the ELC, the court is to have jurisdiction to hear matters that generally touch on environment and land, and the Constitution at sub-article 3, left it for Parliament to provide for its jurisdiction and functions, and this certainly was going to be done through legislation. Parliament did proceed to pass the Environment and Land Act, 2011 which statute formally established the ELC and provided for its jurisdiction. The said jurisdiction is contained in Section 13 of the said Act, specifically Section 13 (2) which provides as follows :-

13. (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.

14. The above provision gives the ELC a very wide subject matter jurisdiction, and indeed, it does appear that so long as the dispute is one in which there is an issue over land or the environment, then the ELC would have jurisdiction.

15. The ELC Act is not the only statute that gives the ELC jurisdiction. There are other statutes which provide that for purposes of the matters that they address, it is the ELC which will have jurisdiction. These statutes generally cover subject matter related to land and the environment. Among these statutes are the Land Act, 2012 and the Land Registration Act, 2012. Part of what these statutes address are land transactions and dispositions including charges. Now, there is nowhere in these two statutes where it is provided that in relation to charges, the ELC will not have jurisdiction and that jurisdiction is with the High Court. That is why I do not agree with the submissions of Mr. Mogoi, that the ELC has no jurisdiction in matters relating to mortgages and charges. If mortgages and charges are addressed in the Land Act, and Land Registration Act, and these statutes provide that the Court with jurisdiction is the ELC, how then can it be argued that the ELC has no jurisdiction when it comes to issues mortgages and charges ?

16. Mr. Mogoi of course relied on the Court of Appeal decision in the case of **Cooperative Bank vs Patrick Kangethe** which I have carefully read and re-read. The facts of the case are that the respondents filed suit before the High Court seeking to stop the appellant from exercising its statutory power of sale. An issue of jurisdiction was raised, the appellant arguing that it is the ELC which ought to have jurisdiction. The High Court held that it had jurisdiction. On appeal to the Court of Appeal, the Court of Appeal upheld the decision of the High Court. I gave my own view of my understanding of what the Court of Appeal decided in my ruling in the case of **Lydia Nyambura Mbugua vs Diamond Trust Bank & Another (2018) eKLR**, and I have not been persuaded to depart from my reasoning in that case. In my decision, I principally held that the Court of Appeal did not say in their decision that when the ELC sees the word “charge” or “mortgage” in the pleadings, then it must down its tools. I was of the view that the Court of Appeal held that the High Court had jurisdiction in the case, because the Court of Appeal saw the dispute as one relating to accounts, for which the High Court would have jurisdiction. I also held in the case that even if one of the issues to be decided in the dispute is accounts relating to the mortgage or charge, but such issue is intertwined with other issues over the charge for which the ELC is the court with jurisdiction as prescribed by the Land Act and Land Registration Act, such as the validity of

the charge or the manner in which the chargee exercises her statutory power of sale, the ELC would still have jurisdiction. I still stand by that decision.

17. Having said that, the issue before me does not even touch on a mortgage or charge, such that even if my reasoning above is all wrong, this court would still have jurisdiction to deal with this matter. I already set down the dispute that is before me by laying down the prayers in the two pending suits. Nowhere in those two complaints is there an issue relating to mortgages or charges. In the case where the applicant is plaintiff, the applicant has sought special damages of KShs. 720,000/=, a declaration that the respondents are not entitled to receive any income from the buildings on the said land; a permanent injunction to restrain the respondents from the suit land; and mesne profits. In the suit where the applicant is defendant, that suit seeks orders of vacant possession. These to me are matters relating to occupation, possession and ownership of land of which it is only the ELC which will have jurisdiction and not the High Court. There is nothing here that relates to mortgages or charges or to accounts paid or payable under a loan. I do not therefore see how the decision in the case of **Cooperative Bank vs Kangethe** can be said to be applicable in this suit.

18. My answer to the first limb of the application is that this court has jurisdiction to handle this suit and given the provisions of Article 165 (5) of the Constitution the High Court has no jurisdiction to handle this matter and it would be an exercise in futility to transfer the case to the High Court.

19. Turning to the second limb of the application, the applicant basically wishes to set aside the proceedings of 22 November 2018 and for the matter to be re-opened so that the applicant may be allowed to adduce evidence and also cross-examine the witnesses of the respondents. I have already set out what transpired in court on the day and it cannot be said that the proceedings were ex-parte. Both counsel for the applicant and the 2nd plaintiff were present in court but their clients were nowhere to be seen and not available to present any evidence. It has been deposed that the applicant was not informed of the hearing of the case by her erstwhile counsel. I do not buy this argument. Private Development Company is a limited liability company, and that being the case, if its directors were aware of the case then it follows that it must be deemed that the company was aware of the case. In the course of these proceedings, an application dated 7 November 2017, was filed by the respondents arguing that Private Development Company does not exist. In the course of hearing that application, the Registrar of Companies sent an official who confirmed that the applicant is a duly registered limited liability company and that its directors are Lucy Mwihaki Macharia and James Gachiengo Macharia. It therefore follows that so long as one of its directors were aware of the hearing of the case, the company could not feign ignorance of the hearing date. Assuming that James Macharia was not aware of the hearing date as he has claimed, Ms. Mwihaki, the other director certainly was aware of the date. This is brought out in the application dated 12 November 2018 that was filed on 16 November 2018 before the hearing date.

20. The supporting affidavit to that application was sworn by Lucy Mwihaki and she deposed inter alia at paragraph 22 of the supporting affidavit, that she has been informed that the matter is set for hearing on 20 November 2018. It therefore means that a director of the applicant was aware of the hearing date and if she was so aware, I am not persuaded for one moment that she and James Macharia never at one point in time shared on this date. The fact that she knew of the date also means that the applicant company is deemed to have known of the date for hearing. I am thus not convinced that the applicant was not aware of the hearing date of 20 November 2018.

21. That being the case, the applicant and Lucy Mwihaki cannot argue that they have been deprived of their right to be heard. They were given an opportunity of being heard when a date for the hearing of the suits was given and all that they needed to do was to present themselves and their evidence on the said date. They opted not to show up and they therefore have to live with the consequences. In fact the impression that I got was that the applicant and Lucy Mwihaki were hell bent on raising all manner of issues to ensure that the matter did not proceed but their gamble did not work. The long and short of it is that I am not persuaded to re-open the proceedings.

22. For the above reasons, it is clear that I do not see any merit in this application and I proceed to dismiss the same with costs.

23. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 15th day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Bizimana Alex present for the 2nd plaintiff and holding brief for M/s Nyongesa Makhanu & Co. for the 1st plaintiff.

Mr. Karanja Munyori present for the 2nd defendant and holding brief for Mr. Orenge for 1st interested party

Rebecca Ngonyo - 1st defendant acting in person- Absent

James Gicharu Gichuru -2nd interested party- present

Court Assistant: Lotkomoi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU