



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 289 OF 2017**

**SHIDYA MOHAMED MBARAK.....PLAINTIFF**

**VERSUS**

**LETSHEGO KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ROBERT WAWERU T/A ANTIQUE**

**AUCTION AGENCIES.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a preliminary objection dated 4<sup>th</sup> October 2017 by the Defendants that this Honourable court lacks jurisdiction to hear and determine this suit as the claim herein arises from a commercial transaction and an exercise of a statutory power of land premised on a registered charge which is an outflow of a commercial engagement and not ipso facto a contention on any interest in land but for recovery of a loan balance.

2. In the plaint dated 2<sup>nd</sup> August 2017, the plaintiff pleaded that she was advanced a loan of kshs. 1,100,000/= by the 1<sup>st</sup> defendant and the suit property Title Number MOMBASA/BLOCK XLIV/83 belonging to the plaintiff's husband was charged as security. It is the plaintiff's contention that despite having serviced a huge chunk of the advanced loan and having never refused to service the loan, the 1<sup>st</sup> defendant alleges the plaintiff is in arrears of kshs. 834,439.17/= Which balance the plaintiff disputes and despite seeking for explanation on how the arrears was arrived at, the 1<sup>st</sup> defendant has refused and/or ignored to give an explanation and instead has unlawfully instructed the 2<sup>nd</sup> defendant to attach and sale the charged suit property. The plaintiff's claim against the defendants is for an order of an injunction restraining them from attaching and selling the suit property known as Title No. MOMBASA/BLOCK XLIV/83 plus costs and interest.

3. In his submissions in support of the preliminary objection Mr. Wameyo, Counsel for the defendants inter alia submitted that this court lacks jurisdiction to determine the dispute. Citing Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act, Counsel submitted that the jurisdiction of this court is limited to matters of environment, Management and Occupation of land. He submitted that the plaintiff's claim is about actual loan balance that is due and payable and that the plaintiff's motive is to seek re-adjustment of the instalments payable and to secure statements from the 1<sup>st</sup> defendant. Mr. Wameyo acknowledged that Section 13 of the Environment and Land Court Act makes reference to enforceable interests in land but submitted that Section will only apply if the legality of the charge was the issue in dispute, which, according to him is not the case herein. It was Counsel's submission that so long as the issue is about money, the matter ought to go to the Commercial Court.

4. Mr. Kalimbo for the plaintiff opposed the preliminary objection and argued that the preliminary objection is not purely on point of law as paragraph 2 thereof is purely factual, hence untenable. He submitted that the cause of action as disclosed in the plaint relates to land parcel No. MOMBASA/BLOCK XLIV/83 and argued that Article 162 (2) (b) as read with Section 13 of the Environment and Land Court Act equip this court with jurisdiction.

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 or a money claim for which the court has no jurisdiction.

6. The Environment and Land Court is anchored in the Constitution. Article 162 provides for the establishment of the ELC as one of the superior Courts in Kenya. It provides as follows:

**162 (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.**

7. Article 162 (2) (b) of the Constitution mandated parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Parliament did create the ELC through the Environment and Land Court Act, No. 19 of 2011. Section 13 of the ELC Act provides for the jurisdiction of the court and states as follows:

**13 (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 written law relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162 (2)**

**(a) of the Constitution, the court shall have power to hear and determine disputes relating to Environment and Land, including disputes:-**

- b) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- c) Relating to compulsory acquisition of land;**
- d) 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 interest 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 Article 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.**

**(6) Deleted by Act No. 12 of 2012**

**(7) The 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) Specific performance;**
- e) Restitution;**
- f) Declaration; or**
- g) Costs.**

8. As can be noted from Section 13(1) above, the court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution. Section 13(2) in very broad terms states that the court has jurisdiction to hear any other dispute relating to environment and land.

9. It will be seen from Section 13(2) (d) and (e) that the court has jurisdiction to hear a matter relating to public, private and community land contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land. It will therefore be appreciated that the jurisdiction of the court in so far as disputes involving environment or land is very wide and almost limitless. The remedies that the court can grant includes injunctions.

10. The dispute before this court relates to the charge over land parcel Title No. MOMBASA/BLOCK XLIV/83. The plaintiff seeks an injunction to restrain the defendants from attaching and selling the said land. It cannot be argued that the dispute is not over land. It is over land or interest in land. It was argued that this court cannot hear a money or commercial claim. The charge is a disposition relating to land. The current law on charges is in part C of the Land Registration Act and part VII of the Land Act and Section 101 of the Land Registration Act and Section 150 of the Land Act gives this court jurisdiction to hear and determine disputes, actions and proceedings concerning land under the two Acts.

11. From the foregoing, I find no merit in the argument that this court has no jurisdiction to hear and determine this suit. The upshot of the above is that I find no merit in the preliminary objection. It is hereby dismissed. Considering the circumstances of this case, I order that each party to bear own costs.

It is so ordered.

**Dated, signed and delivered at Mombasa this 10th April, 2018**

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**C. YANO**

**JUDGE**