



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 474 OF 2017

EUNICE JELAGAT.....1ST PLAINTIFF

GEORGE M. KHANIRI.....2ND PLAINTIFF

VERSUS

MWANANCHI CREDIT LIMITED.....1ST DEFENDANT

MISTAN AUCTIONEERS.....2ND DEFENDANT

RULING

1. On 18th July, 2017, the plaintiffs brought this suit contesting the 1st defendant's right to exercise the chargee's statutory power of sale over Title Number Nairobi/Block 83/7303. The Plaintiffs simultaneously brought a Notice of Motion dated 18th July, 2017 seeking an interim order restraining the defendants against auctioning the suit property. The court directed the Plaintiffs to serve the application and set it down for hearing interpartes on 21st July, 2017. The defendants, though served, did not attend the interpartes hearing on 21st July, 2017. They did not file any response to the application. Consequently, the application was heard ex-parte, and in a ruling rendered on the same day, the court granted the plaintiffs an interim restraining order pending the hearing and determination of the suit.

2. Subsequently, the 1st defendant brought Defence, Counterclaim and Notice of Motion dated 9th August, 2017 seeking among other prayers, an order entering judgment for the undisputed debt of Kshs.7,700,000/=. In the alternative, the 1st Defendant sought a review of the orders of 21st July, 2017. The court subsequently rendered a ruling in which it issued the following orders:

a. Judgment is hereby entered in favour of the 1st defendant against the 2nd plaintiff for the admitted principal sum of Kshs.7,000,000/=

b. The said sum shall be paid within 60 days and in default the 1st defendant shall be at liberty to execute

c. The order issued on 21st July, 2017 in relation to the suit property shall remain in place

d. The rest of the parties' respective claims shall proceed for hearing and determination

e. Costs of the application shall be in the cause

3. In default of settlement of the partial decree, the defendant proceeded to initiate execution proceedings. Upon receipt of a proclamation notice in execution of the partial decree, the plaintiffs brought a Notice of Motion dated 11th July, 2018 challenging the proclamation notice, contending, firstly, that the proclamation notice did not take into account the monies already paid, and secondly, that the 1st defendant ought to have realized the security/charge instead of proclaiming the plaintiffs' goods. While the application was still pending, the auctioneer, Mr Timothy Otieno Awour, brought a Notice of Motion dated 18th July 2018, seeking an order authorizing the Police Officer Commanding Langata Police Station to provide security and maintain law and order during the attachment of the proclaimed goods. Both applications were slated for hearing on 27th August 2018.

4. When the two applications came up for hearing on 27/8/2018, the court drew the attention of the parties to the Court of Appeal decision made on 12th October, 2017, on the jurisdiction of this Court in relation to charges and mortgages in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others (2017) eKLR (the Kangethe case)**. The court invited the parties to submit on the issue. In his brief submissions, Mr. Njenga, counsel for the plaintiffs submitted that the plaintiff had since confirmed that indeed a charge was executed and existed against the suit property. He further submitted that the Court of Appeal decision in the Kangethe case had ousted the jurisdiction of this Court in disputes relating to charges and mortgages. He urged the court to transfer the file to the High Court. In response, Mr.

Ogunde who held brief for Mr. Kuloba submitted that this case is at the tail-end as there exists a partial decree and what is pending is the enforcement of the partial decree. He urged the court not to transfer the case. Mr. Otieno, the auctioneer, supported the position taken by the defendants.

5. I have considered the tenor and import of the Court of Appeal decision in the Kangethe case. I have also considered the rival submissions of the parties on the issue of jurisdiction. It is settled law that in court proceedings, jurisdiction goes to the root of a case. Where the jurisdiction of the court is doubted, that doubt must be erased before further proceedings are taken. Secondly, to proceed with a matter in instances where jurisdiction has been ousted is an exercise in futility.

6. The Court of Appeal made the following pronouncement at paragraph 41 of its judgment in the Kangethe case:

Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to "use" of land as discussed herein above. Such contracts, in our view, ought to be incidental to the "use" of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

7. In light of the above unequivocal pronouncement of the Court of Appeal made during the subsistence of the present suit, it has become necessary that this Court downs its tools and transfers this suit to the relevant civil division of the High Court. It was contended that what is pending is only the enforcement of the partial decree. While I agree that there is a partial decree pending execution, I do not agree that the suit has been fully disposed. To the contrary, there are issues pending trial and determination. The partial decree relates to the admitted debt. The rest of the issues are pending hearing and determination.

8. Consequently, I hereby order transfer of this suit to the Commercial and Admiralty Division of the High Court of Kenya at Milimani.

Dated, Signed and Delivered at Nairobi on this 31st day of August 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Oloo holding brief for Mr Njenga counsel for the Applicant

Mr Rabut holding brief for Mr Kuloba counsel for the Defendant

Mr Otieno the auctioneer

Ms Halima Abdi – Court clerk