



REPUBLIC OF KENYA

IN THE HIGH ENVIRONMENT & LAND COURT

AT NAIROBI

ELC NO. 88 OF 2018

MICHAEL MWANGI WANJOHI..... PLAINTIFF

VERSUS

PATRICK KANGETHE NJUGUNA.....1ST DEFENDANT

EDWARD NJUGUNA KANGETHE.....2ND DEFENDANT

GEORGE JAMES KANGETHE.....3RD DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....4TH DEFENDANT

RULING

The Plaintiff brought this suit on 2nd March, 2018 seeking the following reliefs against the defendants jointly and severally:

1. A permanent injunction restraining the 4th defendant from commencing realization of security, exercising power of sale, advertising for sale, selling, disposing, alienating, transferring and/or in any other manner interfering with the quiet possession, occupation and enjoyment of all that piece of land known as Land Reference Number 209/2489/22 (“the suit property”) owned by Wardpa Holdings Limited (“the Company”).
2. A declaration that the 1st and 3rd defendants willfully and recklessly abused their trust and obligations as well as duty owed to the company.
3. An order that the 1st and 3rd defendants do indemnify the plaintiff as well as the company against all and any liability including all and any liability for interest and cost arising on the part of the company from this action and all any costs incurred by or on behalf of the plaintiff and the company in prosecuting the action.
4. An order that the defendants do disclose and account for all the details relating to the loan facility or any other so obtained facility and payment of all sums found due to the company on taking the account above.
5. Costs of the suit.
6. Such other or further order as this court may deem fit to grant.

In his plaint dated 2nd March, 2018 the Plaintiff averred that he jointly with the 1st to 3rd defendants were shareholders and directors of Wardpa Holdings Limited (“the Company”) in which each of them held one (1) share each. The Plaintiff averred that the company was at all material times registered as the owner of L.R No. 209/2489/22 (“the property”). The plaintiff averred that sometimes on 5th January, 2018, he learnt that the suit property had been advertised for sale by the 4th defendant through its auctioneers in the Daily Nation Newspaper which advertisement also appeared in the said Newspaper on 9th January, 2018. The Plaintiff averred that he was a stranger to the loan facility that the 1st to 3rd defendants had obtained from the 4th defendant and that the said loan was obtained by the 1st to 3rd defendants in their personal capacities using the property owned by the Company as security. The plaintiff averred that as a shareholder and a director of the Company he had no knowledge of the said borrowing and was not given notice by the 4th defendant or its agents before advertising the property for sale.

The plaintiff averred that the loan facility from the 4th defendant was applied for by the 2nd and 3rd defendants who proceeded to commit the

property which belongs to the company as a security in the year 2010 and that as at the time of that application, the company had passed a resolution to the effect that all matters affecting the company had to be approved and ratified by three (3) of the four (4) members of the company.

The plaintiff averred that as directors of the company, the 1st to 3rd defendants owed the company and the plaintiff a duty to among others:

- (i) *act bonafides in the interest of the company;*
- (ii) *act for the proper purposes of the company in relation to its affairs; and*
- (iii) *protect at all times all the company property including the property herein.*

The Plaintiff averred further that the 1st to 3rd defendants as directors of the company were trustees of the assets of the company and/or owed obligations as trustees in respect of the assets of the company. The plaintiff averred that in charging the suit property in favour of the 4th defendant to secure private loans for themselves without a company resolution to that effect, the 1st to 3rd defendants acted in bad faith against the interest of the company and/or for improper purposes in relation to the affairs of the company and/or in breach of trust and/or in breach of their obligations as trustees in respect of the assets of the company.

The Plaintiff averred that by reason of the matters aforesaid, the plaintiff and the company stood to suffer irreparable loss unless the court intervened urgently to protect the company's property.

Together with the plaint, the plaintiff brought an application seeking among others leave to continue the suit as a derivative claim on behalf of the company. That application is still pending. On 8th March 2018, the 4th defendant filed a Notice of Preliminary Objection in which it contended among others that this court has no jurisdiction to hear and determine the plaintiff's suit by virtue of Sections 3, 239(1) and 240(1) of the Companies Act No. 17 of 2015.

Following that objection, the plaintiff filed an application dated 16th April, 2018 seeking an order to transfer this suit to the Commercial and Admiralty Division of the High Court for hearing and final determination. This is the application which is the subject of this ruling. The application was brought on the grounds that the prayers sought by the plaintiff in the plaint relates to the management of the Company and as such raises issues under Company law which are more aligned to the Commercial Division of the High Court. The application was opposed by the 4th defendant through grounds of opposition dated 13th September, 2018. The 4th defendant contended that since the plaintiff had not denied the jurisdiction of the court, his application to have the suit transferred to the High Court amounted to forum shopping. The 4th defendant contended further that if this court has no jurisdiction to hear and determine the plaintiff's suit then similarly it has no jurisdiction to transfer the suit to the High Court. The 4th Defendant contended that in that case, the only jurisdiction the court has is to strike out the suit for want of jurisdiction. The 4th defendants contended that the plaintiff's application amounted to an abuse of the process of the court.

The plaintiff's application was argued before me on 24th September, 2018. In his submissions, the advocate for the plaintiff argued that the plaintiff has sought in his plaint reliefs that can be granted by the High Court and the Environment and Land Court. The Counsel argued that the main issue in dispute in the suit is the charge that was created by the 1st and 3rd defendants in favour of the 4th Defendant. He argued that under Section 13 (2) (d) of the Environment and Land Court Act 2011, the court has jurisdiction to hear and determine disputes relating to contracts, choses in action or other instruments granting any enforceable interests in land. Counsel submitted that a charge is an instrument conferring interest in land and as such a dispute over the same can be heard and determined by this court. Counsel argued that this court applies the Civil Procedure Act which empowers the High Court to transfer suits from one court to the other. Counsel argued that since the court has the status of the High Court it similarly has the power to transfer cases before it. Counsel urged the court to allow the application.

In his submissions in response, the advocate for the 4th defendant argued that the court has no jurisdiction to hear and determine the plaintiff's suit and as such it similarly has no jurisdiction to transfer the suit to the High Court. The 4th defendant's advocate's argument was that when a suit is filed in a court that has no jurisdiction, the suit is a non starter and is not capable of being transferred and that it is a candidate for striking out. In support of his submissions, the 4th defendant's advocate relied on the cases of **Kenya Ports Authority V. Modern Holdings (E.A) Limited (2017) eKLR** and **Cordisons International (K) Limited V. National Land Commission and 4 Others (2017) eKLR**.

I have considered the Plaintiff's application together with the supporting affidavit. I have also considered the grounds of opposition filed by the 4th defendant in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the parties and the authorities that were cited.

The court derives its jurisdiction from Article 162(2) (b) of the Constitution and Section 13 of the Environment and land Court Act, 2011. The court has jurisdiction to determine all disputes relating to the environment and the use and occupation of and title to land. What constitutes a dispute relating to environment use, occupation and title to land is expounded in Section 13 of the Environment and Land Court Act, 2011. I have at the beginning of this ruling set out in detail the plaintiff's case against the defendants. There is no doubt that the plaintiff's case is concerned with the internal management of the company. The plaintiff has accused the 1st to 3rd defendants of breach of their fiduciary duties to the company and to the plaintiff as a co-director and shareholder of the company. The plaintiff's claim has nothing to do with a dispute over the use, occupation and title to land.

I am fully in agreement with the 4th defendant that this court has no jurisdiction to hear and determine the plaintiff's suit which should have been filed in the High Court. The only issue that has posed some difficulty for me is what to do with the pleadings that have been filed before this court. The plaintiff has urged me to transfer the suit to the right court for hearing and final determination on merit. The 4th

defendant on the other hand has urged me to strike out the suit “**and let the plaintiff file a proper suit in the court with jurisdiction.**” What I need to determine is what order would be just in the circumstances. I am in agreement with the 4th defendant that where a suit is filed in a court without jurisdiction, that court has power to strike it out. I am of the view however that the power is discretionary and like all discretionary powers the same must be exercised judiciously taking into account the circumstances of each case. Where for example it is established that a party filed a suit in a court without jurisdiction to achieve a collateral advantage like obtaining *ex parte* orders which he could not get in a court with jurisdiction and then seeks to transfer the suit having obtained such orders, such application cannot be entertained. In the case before me, there is no evidence that the suit was filed before this court in bad faith or that the plaintiff was out to gain some collateral advantage. The plaintiff has also not obtained any order against any of the defendants *ex parte* or otherwise. The plaintiff has spent over Kshs.10,000/= to file the suit. If the suit was to be struck out, the plaintiff would have to start all over again. There is no evidence that the 4th defendant would suffer any prejudice or injustice of any nature if the suit is transferred to the High Court rather than being struck out. I am of the view that striking out of the suit would not do justice to any of the parties as it would subject them to unnecessary expenses. I have looked at the authorities that were cited by the 4th defendant. In the case of **Kenya Ports Authority V. Modern Holdings (E.A) Limited (Supra)**, the court was not dealing with transfer of a case from one court to the other. The court was dealing with the issue of jurisdiction. I wish to point out also that the case of **Adero & Another V. Ulinzi Sacco Society Ltd. (2002) 1 KLR 577** that the court referred to was determined prior to the promulgation of the Constitution of Kenya 2010 and the court did not have the benefit of Article 159(2) (d) of the constitution. With regard to the decision in **Cordisons International (K) Ltd. V. National Land Commission and 4 Others (2017) eKLR**, the same is not binding on this court and I am not in agreement with the same. My position which I have set out clearly above, is that whether or not a court should transfer a case before it in respect of which it has no jurisdiction to a court with jurisdiction is a matter for the discretion of the court. In the case before me, I am inclined for the reasons that I have already given to exercise my discretion in favour of transferring this suit to the High Court for hearing and final determination.

The upshot of the foregoing is that the plaintiff’s Notice of Motion dated 16/4/2018 is allowed in terms of prayer one (1) thereof. This suit is transferred to the Commercial Division of the High Court at Milimani for hearing and final determination. The matter shall be placed before the Presiding Judge of that Division for directions. The costs of the application to be in the cause.

Delivered and Dated at Nairobi this 24th day of September, 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Gachie for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

Catherine Court Assistant