



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 65 OF 2016

TACHASIS WHOLESALERS CO. LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

The application before court is dated 8.2.2017. It seeks orders that the civil suit Eldoret E & L Case No. 65 and Eldoret CMCC No. 904 both of 2016 be consolidated and thereafter be heard as one action and that this case be selected as a test suit and that the court to give further direction. The application is based on grounds that similar issues of law and fact are involved in the above-mentioned suits which are both pending in the Environmental and Land Court at Eldoret and Chief Magistrate's Court respectively. That at all material time of institution of the suit E & L Case No. 65 of 2016 (*Tachasis Wholesalers Vs National Bank of Kenya*), the respondent herein was aware that he had filed a similar suit in the lower court being Eldoret CMCC No. 904 of 2012. That the parties in both matters are the same and that the plaintiff/respondent has filed the suits involving the same cause of action. That the plaintiff herein filed suit Eldoret CMCC No. 904 of 2012 on 7.11.2012 whereas Eldoret E & L No. 65 of 2016 was filed on 22.3.2016. That in both suits, the prayers being sought are the same. That both matters have partially proceeded and are both pending before the Environment and Land Court and the Chief Magistrate's Court respectively.

According to the applicant, consolidation of the above noted suits is necessary to avoid duplication of proceedings and multiplicity of suits. It would therefore be just, convenient and expedient for all the parties involved in the above noted suits herein consolidated and heard as one. That the plaintiff/respondent will not suffer any prejudice if the same is allowed.

In the supporting affidavit, Everlyne N. Masinde states that the plaintiff herein has filed two suits Eldoret E & L No. 65 of 2016 and Eldoret CMCC No. 904 of 2012 where the cause of the action if the same. That the defendant/applicant herein filed defences in both suits. That he is aware that the plaintiff herein owes the defendant a sum of Kshs. 40,829,246.85. That Eldoret CMCC No. 904 of 2012 has partly proceeded.

That in both suits, the plaintiff's claim against the defendant is an order directing the defendant to release to the plaintiff the loan application letters, approval letters of the loans, copies of the letter of offer and acceptance and statement of account.

That consolidation of these suits is necessary to avoid duplication of proceedings and multiplicity of suits.

That it would be just, convenient and expedient for all the parties involved in these matters consolidated and heard as one. That the plaintiff would not be prejudiced in any way if the orders sought in this application are granted. That this application has been brought in good faith and without undue delay.

The application is opposed vide affidavit of Jassan K. Kosgei who argues that the application is frivolous and res-judicial and that the applicants should appeal or apply for review.

I have considered the application, supporting affidavit and replying affidavit, rival submissions on record and do find that the suits herein revolves on a loan of Kshs.42,826,897. The suit property is alleged to be the collateral securities thus Eldoret Municipality Block 5/46/1, Eldoret Municipality Block 9/1727 and Eldoret Municipality Block 20/38.

Amongst the prayers sought by the plaintiff is an order that the particulars of the loan be supplied including all payments made and an accounting to be done. I do find that the suit revolves on a charge and the taking of accounts.

In law jurisdiction is everything, without which the court can do nothing else and must down its tools as held in the case of **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1.**

In the case of **Court of Appeal No. 83 of 2016, Co-operative Bank of Kenya Ltd Vs Patrick Kangethe & Others**, it was held:

“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.

37. 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 dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

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

The import of the above decision is that matters of charges and mortgages especially where the dispute revolves on the realization of security due to default in payment, the High court has the prerequisite jurisdiction to hear the dispute.

From the foregoing, this court is bound by the decision of the Court of Appeal aforesaid. I do find that the jurisdiction in this matter lies with the High Court as the dispute herein revolves on accounts and the process of realization of security after default. I do hereby transfer the matter to the High Court. Orders accordingly.

Dated and delivered at Eldoret this 24th day of October, 2018.

A. OMBWAYO

JUDGE