

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 14 OF 2015

DAVID KOMEN SIRIMU.....PLAINTIFF

VERSUS

PROTUS WANGA T/A TIMELESS DOLPHIN AUCTIONEERS.....1ST DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....2ND DEFENDANT

RULING

David Komen Sirimu has come to court against **Protus Wanga T/A Timeless Dolphin Auctioneers and Consolidated Bank Ltd.** He claims to be the registered owner of the parcel of land known as Eldoret Municipality Block 12/194 and Eldoret Municipality Block 12/195. The properties are charged in favour of the 2nd defendant in order to guarantee an amount of Kshs.18,000,000 advanced to Lomsons Enterprises Limited. The properties have been advertised for sale on Daily Nation of 12.1.2015 by way of public auction. The plaintiff contends that he was not served with any statutory notices or a notification of sale and that the purported charge and intended sale of the suit property by public auction is fraudulent, unlawful, illegal, null and void.

Moreover, that the sum of money sought to be recovered exceeds the amount recoverable in law among other issues.

The plaintiff prays for a declaration that the guarantee to charge and the inflicted exercise by the 2nd defendant of its statutory power of sale is unlawful, illegal, null and void. An order that the guarantee to charge created over land parcel number Eldoret Municipality/Block 12/194 and 195 be discharged and a permanent injunction against sale and transfer of the property.

On the 5.7.2018, the defendants filed a preliminary objection dated 4.7.2018 on the basis that this court lacks the prerequisite jurisdiction to determine this matter pursuant to the Court of Appeal Judgment in Court Appeal No. 83 of 2016. The defendant argues that the court cannot exercise jurisdiction that has not been donated by either the constitution or legislation or both.

I have considered rival submissions and do find that the Environment and Land court is established by Parliament pursuant to powers granted to Parliament by Article 162(2)(b) of the Constitution.

The Court of Appeal in **Civil Appeal No. 83 of 2016, Co-operative Bank of Kenya Vs Patrick Kangethe Njuguna & 5 Others** held that the jurisdiction of the Environment & Land Court to deal with disputes relating to construction under Section 13 of the Environment & Land Court Act ought to be understood in the contest of the court's jurisdiction to deal with disputes connected the use of land. The construction ought to be incidental to the "use" of land. According to the Court of Appeal, they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

The dispute herein is dominantly on whether Lomsons Enterprises Ltd has paid the guaranteed amount of Kshs.18,000,000. The title to the properties are merely collaterals. There is no dispute as to the use, occupation and title to the land. The plaintiff bound himself to the conditions in the charge and agreed that in the event of default, the property could be sold to realize the borrowed sum and therefore, the title

is merely a commodity for sale.

Moreover, the court is bound by the decision of the Court of Appeal through the doctrine of *stare decisis* and *judicial precedent*. The failure to observe the tenets of the said doctrine inevitably leads to decisions lacking in consistency, uniformity and predictability. This places legal practitioners and the clients whom they advise in a serious predicament, thereby undermining not just effective articulation and advice of legal issues to clients, but by extension, also the under-lying business and economic activities in which those clients engage. The perception of judicial arbitrariness and inconsistency thereby created has the undesirable effect of undermining respect for the rule of law and the institutions which serve it

The upshot of the above is that the preliminary objection is upheld. This matter is transferred to the High Court of Kenya for hearing and determination. Orders accordingly.

Dated and delivered at Eldoret this 6th day of December, 2018.

A. OMBWAYO

JUDGE