



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 102 OF 2015

GITONGA KITHINJI MURIUKI.....PLAINTIFF

VERSUS

ELEONORA COZZI.....1ST DEFENDANT

SUNPALM LIMITED.....2ND DEFENDANT

RULING

1. I have before me a Notice of Motion application dated 2nd December 2016 in which the Plaintiff/Applicant is praying for orders:-

- 1. THAT the 1st and 2nd Defendant/Respondent's Defence be struck out.**
- 2. THAT the Judgment be entered against the Defendants/Respondents jointly and severally for a sum of Kshs 12,800,000/= as prayed in the Pleint.**
- 3. THAT in the alternative and without prejudice to (2) above, Judgment be entered against the Defendants jointly and severally for a sum of Kshs 2,600,000/= with costs as admitted and/or clearly proven by issuance of a cheque dated 20/3/2012.**
- 4. THAT the Plaintiff/Applicant be allowed by order of this Honourable Court to sell the property known as Kilifi/Jimba/670 to recover the decretal sum.**
- 5. THAT the Honourable Court do give any other order as it may deem fit and just to grant.**
- 6. THAT the rest of the claim if any to proceed to full hearing viva voce.**

2. The Application is supported by an Affidavit sworn by the Plaintiff- Gitonga Kithinji Muriuki- on 1st December 2016. The gist of the application is summarized on the grounds thereof as follows:

- i. That the Plaintiff/Applicant's claim is clear and unequivocal having been documented by way of an agreement and a post-dated cheque issued in favour of the Plaintiff.*
- ii. That the Defendants have no tenable defence and have partially admitted the Applicant's claim by way of Defence and Counterclaim.*

iii. That the Defence and counterclaim are both an abuse of the Court process as they are vexatious, scandalous and frivolous.

iv. That unless the Orders sought herein are granted, the Applicant is bound to suffer irreparable loss.

3. In a Replying Affidavit sworn on 7th March 2017, the 1st Defendant Eleonora Cozzi is opposed to the grant of the orders sought. She avers that the grounds relied on in the application and the averments made by the Plaintiff are unfounded to the extent that there was no promise made to the Plaintiff to pay 5% interest per month. She further states that the figures contained in the Plaintiff's Supporting Affidavit at the annexure marked "GKM 3" are totally exaggerated and unfounded as the same is not conclusively accounted for by the Plaintiff. It is her belief on the basis of information obtained from her Advocate that the Defendants have a tenable defence and the same raises weighty and triable issues and hence the suit herein ought to be heard and determined on merit.

4. In addition to the Replying Affidavit, the Defendants have also filed Grounds of Opposition dated 7th March 2017 in which they repeat the same averments seeking to have the Suit herein inclusive of their Counterclaim heard and determined on merit.

5. Further and in addition to the foregoing, by a Notice of Preliminary Objection dated and filed herein on 13th March 2017, the Defendants gave Notice that they will raise a point of Preliminary Objection of law against the Motion before me and the entire Suit on the following grounds:-

1. That the contract between the Plaintiff and the 2nd Defendant dated 29th February 2012 was for loan advancement in which each party is claiming breach of contract by the other and therefore the Honourable Court lacks jurisdiction to entertain the Suit.

2. That the Applications and the Suit by the Plaintiff is an abuse of the Court process.

6. Both the Application and the Notice of Preliminary Objection were argued together and the parties filed written submissions thereon. I have considered the Application, the Affidavit in Reply and the Grounds of Opposition.

7. In **Owners of Motor Vessel Lillian 'S' –vs- Caltex Oil Kenya Ltd (1989) KLR 1**, the Court stated that:-

“Jurisdiction is everything and once a Court has no jurisdiction, it has no power to make the next step. That is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the Court must down its tools.”

8. Even though the Notice of Preliminary Objection herein was not raised at the very earliest opportunity, the issue raised is fundamental and would require determination before this Court can make the next step. According to the Defendants, the contract between the Plaintiff and the 2nd Defendant is for a breach of contract and this Court lacks jurisdiction to entertain the suit. The said contract, dated 29th February 2012 and attached to the Plaintiff's Supporting Affidavit marked "GKM 1" reads in the relevant part as follows:-

LENDING AGREEMENT

.....

WHEREAS the borrower a Limited Liability Company is in need of an urgent financial assistance and has approached one of its lawyers through a mutual friend by accommodation financial of the said facility(sic) and whereas the said lawyers have agreed to advance them the finances upon such terms and conditions as herebelow:-

NOW THIS AGREEMENT WITNESETH AS FOLLOWS

1. The Lender shall lend the borrower a sum of Kshs 2,000,000/= as soft loan payable within 20 days of this agreement.

2. The Commission for the advance of the sum of Kshs 2,000,000/= herein will be Kshs 600,000/= which will be paid together with the Principal sum at the expiry of the 20 days period herein.

3. The Borrower shall provide a post-dated cheque of Kshs 2,600,000/= to Gitonga Muriuki & Co Advocates

4. The Borrower shall also deposit a Title No. 670 Kilifi Jimba for the said hotel to be kept by the Lawyers as an additional security to be kept safe until the full payment of the sum of Kshs 2,600,000/= herein.

5.

9. The said contract is in actual sense the basis of this Suit as the Plaintiff herein contends that the Defendants are in breach of the same. At Paragraphs 10 and 11 of the Plaint, the Plaintiff wraps up his claim against the Defendants as follows:-

“10. The Plaintiff avers that until May 2015 the 1st Defendant has been promising to pay to the Plaintiff the outstanding sum which with interest today stands at Kshs 12,800,000/=

11. The Plaintiff's claim before this Honourable Court is:-

i. Payment of Kshs 12,800,000/=

ii. An order that the security given to secure this loan be sold to repay the outstanding loan of Kshs 12,800,000/ herein

iii. An order that if there is any balance from the sale of the land parcel Kilifi Jimba/670 (the said balance) be paid to the Defendants.”

10. In their Defence and Counterclaim filed herein on 28th July 2015, the Defendants deny the contents of paragraph 10 and 11 of the Plaint and proceed to state at paragraph 11 thereof as follows:-

“11. Further the Defendants state that the value of the suit parcels of land are in excess of fifty million (sic) and the same cannot be realistically sold to off-set any debt, if at all.”

11. In their prayers for the Counter claim, the Defendants state as follows:-

“IN ADDITION, the Defendants counterclaims against the Plaintiff:-

a. A declaration that the Plaintiff was in wrongful possession of the title documents to Kilifi/Jimba/670.

b. A declaration that the Plaintiff does forthwith release to the 2nd Defendant the title documents to Kilifi/Jimba/670.

c. Cost of this Suit.

11. Article 162(2) of the Constitution states inter-alia that:-

“(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

12. The Environment and Land Court is established under the Environment and Land Court Act No 19 of 2011 which provides at Section 13(2) thereof that the Court has jurisdiction to hear and determine disputes relating to land administration and management; public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

13. Clearly in my view while the dispute herein revolves largely around the lending contract as pointed out by the Defendants, the issue of who is entitled to be in possession of title for all that parcel of land known as Kilifi/Jimba/670 is at the centre of the dispute. I think it is now settled that where the matters raised in a suit fall both within the jurisdiction of this Court and outside it, it would be a travesty of justice for the Court to decline jurisdiction as it would mean that a litigant would be forced to institute two sets of legal proceedings.

14. In ***Tasmac Ltd –vs- Roberto Marci & 2 Others (2013) e KLR***, the Honourable Justice Oscar Angote observed and I agree, that:-

“Where a dispute raises matters which fall within the jurisdiction of the High Court and the Environment and Land Court, any of the two Courts should be able to adjudicate upon it and make a determination. The two Courts have concurrent jurisdiction.

A suit cannot be “dismembered” by a party so that one limb is heard by this Court and another limb by the High Court. That would amount to an absurdity and miscarriage of justice which was not what was intended by the Constitution.

It therefore does not matter that there are some aspects of Civil or Commercial issues on the one hand and ownership of land on the other hand in the current suit. The suit can either be heard by this Court or the High Court.”

15. Arising from the foregoing and for the reasons given above, I find and hold that the Notice of Preliminary Objection dated and filed herein on 13th March 2017 lacks merit as this Court has jurisdiction to entertain the Suit herein.

16. Turning back to the application dated 2nd December 2016, the Plaintiff contend that the Defendants have no tenable defence and that in any event they have partially admitted the claim and Judgment should hence forth be entered in the Plaintiff’s favour.

17. The primary applicable law concerning summary Judgment is Article 159 (2) (c) of the Constitution which commands that justice be done without undue delay. In addition, Sections 1A and 1B of the Civil Procedure Act require the Courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

18. In ***Job Kilach –vs- Nation Media Group Ltd & 2 Others (2015) eKRI***, the Court of Appeal observed that:-

“Before the grant of summary Judgement, the Court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgement or in any other manner.”

19. The Plaintiff’s claim against the Defendant is that on or about 29th February 2012, he lent a friendly loan of Kshs 2,000,000/= to the Defendants which sum was to be paid back within 20 days with interest

of Kshs 600,000/=. To secure the said loan, the 1st Defendant offered the Plaintiff two security titles in the name of the 2nd Defendant for land parcel No. Kilifi/Jimba/670 measuring approximately 1.69 ha together with a post-dated cheque of Kshs 2,600,000/=. It is the Plaintiff's case that the 1st Defendant kept on promising to pay back the money with all accruing interest at 5% per month but to-date she has not made good her promise.

20. On their part, the Defendants deny that the amount was advanced and that if indeed it was, then the same was not subject to accruing interest. The 1st Defendant also avers at paragraph 9 and 10 of the Defence and Counterclaim that she did not at any time "seek any further amount from the Plaintiff whatsoever" and further, that she has not at any time made any promises for the stated amount.

21. At paragraph 4 of the Replying Affidavit, the 1st Defendant states as follows:-

"4. That the grounds relied on in the application and the averment in the Supporting Affidavit of Gitonga Kithinji Muriuki are unfounded to the extent that there was no promise made to the Plaintiff to pay five percent (5%) interest per month."

22. I have carefully considered the documents annexed to the Plaintiffs application and the response filed by the Defendants. The Defendants have not denied entering into the Lending Agreement dated 29th February 2012. Nor do they deny issuing the cheque dated 20/3/2012 for Kshs 2,600,000/= which is annexed and marked "GKM2" to the Plaintiff's Affidavit. All that the Defendants state is that they did not promise to pay the Plaintiff interests at 5% per month.

23. In my view, the only conclusion one arrives at after considering the defendants pleadings, is that they admit receiving the loan from the Plaintiff and issuing the cheque for Kshs 2,600,000/=. Anything else is disputed and should proceed to trial.

24. In the circumstances, I will allow the Plaintiff's application dated 2nd December 2012 in the following terms:-

a. Judgment is hereby entered against the Defendants jointly and severally for a sum of Kshs 2,600,000/= with costs.

b. The rest of the Plaintiff's claim to proceed to full hearing in the usual manner

c. The cost of this Application shall be borne by the Defendants/Respondents.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J. O. OLOLA

JUDGE