



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.327 OF 2016
NICHOLAS OWINO RAJULA.....1ST PLAINTIFF
KOGELO HOTEL LTD.....2ND PLAINTIFF
VERSUS
TOURISM FINANCE COOPERATION.....DEFENDANT

RULING

1. **Nicholas Owino Rajula and Kogelo Hotel Ltd**, the Plaintiffs commenced this suit against **Tourism Finance Corporation**, the Defendant, through the plaint dated 5th December 2016 seeking for injunction, taking of accounts, declaration order and costs. That filed contemporaneously with the plaint is the notice of motion of even date seeking for temporary injunction order and costs. The Defendant filed their statement of defence dated 23rd December 2016, grounds of opposition and a notice to raise preliminary objection of even date among other documents. The Plaintiffs filed another notice of motion dated 7th March 2017 seeking for more or less similar orders to those in the earlier notice of motion dated 5th December 2016.
2. The notice of motion dated 5th December 2016 was mentioned on the 13th December 2016 when conditional interim order of injunction was issued pending interparties hearing on the 22nd March 2017. That when the matter came up for hearing on that date, Mr. Mwamu and Gachuba, learned counsel for the Plaintiff and Defendant respectively, represented their clients. That after hearing their submissions, the court directed among others that the preliminary objection by the Defendant be heard and determined first through written submissions.
3. That the counsel for the Defendant and Plaintiffs filed their written submission dated 23rd March 2017 and 19th May 2017 respectively.
4. The following are the issues by the courts determination;
 - a) Whether this court has jurisdiction to hear and determine this suit in view of **Articles 162 (2) (b) and 165 (3) (a) of the Constitution 2010 and Section 13 of The Environment and Land Court Act No. 19 of 2011.**
 - b) Who pays the costs of the preliminary objection.
5. The court has carefully considered the single ground of preliminary objection which is on jurisdiction, the written submissions by both counsel, the pleadings filed and come to the following determination;

a) That the Defendant extended some financial facilities to the Plaintiffs secured with charges over land parcels **North Sakwa/Nyawita/2186 and East Alego/Kogelo Nyangoma/1064** registered in the name of the 1st and 2nd Plaintiffs respectively. That the Defendant advertised for auction of 14th December 2016 for the two parcels of land prompting the Plaintiffs to file this suit and the notice of motion. That the relationship that the Plaintiffs and Defendant have is that of borrowers/chargors and chargee respectively. The preliminary objection raised by the Defendant is specifically that this court do not have jurisdiction to hear and determine the suit as the dispute herein relate to a legal charge over the two parcels of land. That the counsel for the Defendant has submitted that the Plaintiffs had by charging the two parcels converted them into commodities, thereby ceasing to be land “strictu sensu” , and instead became mere collateral to the loan agreement. That this court has no jurisdiction to deal with it at its jurisdiction is “*specifically limited to determine of disputes relating to environmental, planning and protection, climate issues, land use planning, title tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land; land administration and management, public, private and community land contracts, choses in auctions or other instruments granting any enforceable interests in land, and other dispute relating to environment and land.*”

b) The Plaintiffs opposed the preliminary objection and submits through their counsel that the dispute in this matter “revolves on ownership, possession and legal rights of the Plaintiff with registered to his parcels of land.” They further submit that **Section 101 of Land Registration Act and 150 of the Land Act** specifies the court vested with jurisdiction to deal with disputes arising under the Acts to be this court.

c) That having considered the decisions cited by both counsel, that is **Al- Jalal Enterprise’s Limited –V- Gulf African Bank Limited [2014] eKLR, Ester Nyanganyi Onyango –v- Housing Finance Company of Kenya and Another [2016] eKLR , Kisimani Holdings Limited & Another –V Fidelity Bank Limited [2013] eKLR, John Kimani Njenga –V- Margaret Wanjiru Kanyiri & 2 Others [2015] eKLR and Ernest Kevin Luchidio –v- Attorney General & 2 Others [2015] eKLR**, the court agrees with both counsel that the decision on whether or not this court has a jurisdiction to deal with the dispute herein is of paramount importance. This is because if the court is to find that it has no jurisdiction, then it would, as it were, drop its tools immediately [See MV Lilian “S” –V- Caltex Oil Kenya Ltd [1989]KLR at page 14]

d) That the court is aware that some decisions of the superior courts takes the position that disputes over charges on land are commercial transactions and therefore should be filed and heard before the commercial division of the High Court, while other decisions take the position that such disputes have everything to do with the title to the land and therefore this court has jurisdiction. That a clear reading of **Section 13(2) (d) and (e) of the Environment and Land Court Act No.19 of 2011**, shows that among the disputes to be dealt with by this court are matters relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and any other dispute relating to the environment and land. That the charge documents, through which the financial facilities the Defendant gave the Plaintiffs were secured by the legal charges on the two parcels of land are essentially constructs that affects and attaches on the land. That the management of realization of properties used as securities through legal charges, unlike in other contracts under which one party lends money to another, is provided for under **Part V11 of the Land Act No.6 of 2012**. The Act under **Section 150** clearly refers to the court with jurisdiction for the disputes thereof to be this court. That further **Section 101 of the Land Registration Act No.3 of 2012** also provides the court with jurisdiction to be this court.

That the insertion of the two provisions in the two legislations that came after the **Constitution of Kenya 2010** which at **Article 162 (2) (b)** created this court, MUST have been meant to leave no doubt as to the court to deal with the disputes therein. That had the legislators intended to retain the disputes relating to charges over land to the High Court, a specific provision to that effect would have been made.

e) That this suit and the prayers in the notice of motion, being about disputes on the parties rights

and obligations arising out of the legal charges on the two parcels of land are before the court with jurisdiction to hear and determine the issues therein.

6. That in view of the foregoing the Defendant's preliminary objection has no merit and the same is dismissed with costs.

Orders accordingly,

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 15TH DAY OF NOVEMBER 2017

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr. Gachuba for the Defendant

Mr. Kowinoh for Mwamu for the Plaintiffs

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/11/2017

15/11/2017

S.M. Kibunja Judge

Oyugi court assistant

Mr. Gachuba for the Defendant

Mr. Kowinon for Mwamu for the Plaintiffs

Court: Ruling dated and delivered in open court in presence of Mr. Kowinoh for Mwamu for the Plaintiff and Mr. Gachuba or the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/11/2017