REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 345 OF 2014

JOHN KIMANI NJENGA…….....…..……..PLAINTIFF

VERSUS

MARGARET WANJIRU KANYIRI …….....….1ST DEFENDANT

OBADIA MUCHIRI MUNGAI …….....2ND DEFENDANT

NATIONAL BANK OF KENYA LTD .....3RD DEFENDANT

RULING

(Preliminary objection on jurisdiction of ELC and veracity of a claim by co-defendant; plaintiff being husband to 1st defendant; 1st defendant having sold land to 2nd defendant and 2nd defendant charging it to 3rd defendant; argument that dispute is matrimonial or commercial and that ELC has no jurisdiction; held suit was squarely on title and ELC has jurisdiction; claim by co-defendant for indemnity proper; preliminary objection dismissed).

1. This ruling is in respect of a preliminary objection. In a nutshell, the objection is that this court, the Environment and Land Court, has no jurisdiction to try this matter, and that certain proceedings against co-defendant are invalid.

2. Given the nature of the objection, it is prudent that I provide at the outset, the nature of dispute before this court.

3. This suit was commenced by way of plaint filed on 17 December 2014. The case of the plaintiff as pleaded, is that he is husband to the 1st defendant, having gotten married on 6 May 2001. It is pleaded that in April 2006, the plaintiff and 1st defendant jointly purchased the property Nakuru Municipality/ Block 25/295 at the sum of Kshs. 520,000/=. It is pleaded that upon purchase, the plaintiff applied for change of its user, and a loan of Kshs. 200,000/= from a bank to develop it. It is averred that together with the 1st defendant, they jointly put up a storey building costing about Kshs. 8,000,000/= comprising of 12 family units. It is pleaded that the units had tenants and the rent was being shared at the ratio of 5:7. The two had differences which led to the 1st defendant filing a childrens' maintenance suit being Nakuru CM Children's Case NO. 128 of 2010. It is pleaded that the plaintiff was then ordered to maintain the children from the rental income of the suit property. Around the month of October 2014, the plaintiff discovered that the 1st defendant had behind his back, and without his consent, sold the property to the 2nd defendant

who in turn proceeded to charge it to the 3rd defendant. It is his case that he is the co-owner of the property; that the property comprises of matrimonial property; and that the sale to the 2nd defendant and the subsequent charge to the 3rd defendant are fraudulent and null and void, and should be set aside. In the plaint, the plaintiff has sought the following orders :-

> *(a) An order to set aside the sale of the suit property to the 2nd defendant and discharge of the charge in favour of the 3rd defendant and revocation of the certificate of lease issued to the 2nd defendant.*
>
> *(b) An injunction to restrain the defendants from trespassing into the suit land or interfering with the tenants therein.*
>
> *(c) In the alternative, an order for the 1st defendant to render an account of the sale proceeds.*
>
> *(d) Costs of the suit.*

4. All parties entered appearance and filed defences through separate counsels. The gist of the 1st defendant's defence is that although the property was purchased in their joint names, she is the one who provided finances for its development, and has denied any contribution from the plaintiff towards the purchase or development of the property. She has admitted filing the childrens' maintenance suit, and division of the rental proceeds on a temporary basis, but has denied that the Children's Case apportioned the property. She is of the view that the sale of the property was done legally and with the full knowledge of the plaintiff. She has averred that she has expended all the money realized from the sale of the suit property to maintain herself and her children. She has also averred that she developed another property, a plot No. 70, which is in the name of the plaintiff. It is her view that the case herein is strictly a matrimonial dispute which belongs to the High Court.

5. The 2nd defendant's defence is that he is a bona fide purchaser for value whereas the 3rd defendant's defence is that the property was charged to it by the 2nd defendant and due diligence was undertaken. They have both denied being any party to any fraud.

6. On 4 February 2015, the 2nd defendant filed a notice of claim against co-defendant pursuant to Order 1 Rule 24. The 2nd defendant has sought the following :-

> *(a) Indemnity against the plaintiff's claim herein in case the same succeeds.*
>
> *(b) Refund of all the sums paid being the purchase price, all the sums used towards acquisition of the property including charges related to the creation of the charge in favour of the 3rd defendant.*
>
> *(c) Indemnity and payment of any sums as may be claimed by the 3rd defendant including but not limited to the principal amount, interest, penalties, and other charges connected with and/or in relation to the charge created over the subject property and the loan advanced in respect thereof.*

7. Various grounds for the notice were set out, but in a nutshell, the 2nd defendant was stating that in the event that the transaction is reversed, then the 2nd defendant needs to be indemnified by the 1st defendant.

8. The matter was fixed for hearing but at the hearing date, Ms. Magana for the 1st defendant, raised the subject preliminary objection. The objection is as follows :-

i. *That this court has no jurisdiction to determine the 2nd defendant's claim over the 1st defendant, nor the plaintiff's claim against the 1st defendant.*
ii. *No directions have been taken or sought regarding the propriety of the 2nd defendant's*

notice/claim against the 1st defendant, or the manner of hearing/trial thereof. In the premises the matter is premature for hearing.

iii. *The 2nd defendant's notice/claim against the 1st defendant is bad in law, fatally incompetent, and unsustainable. The said claim is illusory and speculative, and is inadequately pleaded, and lacks the necessary particulars of claim necessary to warrant or enable a substantive response thereto.*

9. The 1st defendant asked that the 2nd defendant's notice against co-defendant and the plaintiff's claim in the plaint against her, to be struck out or be dismissed with costs.

10. In her submissions in support of the preliminary objection, counsel for the 1st defendant inter alia submitted that the case herein does not fall within the jurisdiction of this court because it is a matrimonial dispute. She also contended that the alternative prayer is a money claim, and that this court has no jurisdiction to entertain a money claim, because it does not relate to the use, occupation and title to land. She further argued that the prayer for discharge of charge is a commercial matter for which this court has no jurisdiction. On the claim of the 2nd defendant, she submitted that this is premature as directions first have to be taken. It was her view that the procedure is the same as a that of a third party claim. She also submitted that since the claim is also for refund, this is a money claim for which this court has no jurisdiction or a commercial issue.

11. Mr. Morintat for the 2nd defendant supported the preliminary objection in so far as it seeks to dismiss the plaint but did not support the striking out of the claim against co-defendant.

12. Mr. Kiburi for the 3rd defendant was of the view that part of the suit discloses a matrimonial dispute which is therefore not a land dispute.

13. Mr. Waiganjo for the plaintiff opposed the preliminary objection and inter alia argued that the dispute is over the ownership of land for which this is the only court with mandate to adjudicate. He submitted that it is only this court with jurisdiction to go into the propriety of the sale and if convinced revoke the title. He pointed out that the suit involves several parties which dispute cannot be severed.

14. I have considered the matter. There are two limbs to the preliminary objection. The first is whether this court has jurisdiction to try the matter, and the second is on the veracity of the claim against co-defendant.

15. On the first issue, it is argued that this court has no jurisdiction for the reasons that this suit is a matrimonial dispute, or commercial, or that it is a money claim for which this court has no jurisdiction.

16. The Environment and Land Court (ELC) is anchored in the Constitution. Article 162 provides for the creation of the ELC as one of the Superior Courts in Kenya. That provision is drawn as follows :-

> ***162.*** *(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).*
>
> *(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.*
>
> *(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*
>
> *(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

17. It will be seen from Article 162(2)(b) that the Constitution mandated Parliament to create a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Parliament did create the ELC through the Environment and Land Court Act, Act No. 19 of 2011 and did elaborate the jurisdiction provided by the Constitution at Section 13 of the Act. The said provision is drawn as follows :-

> *13. (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes?*

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

> *(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*
>
> *(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*
>
> *(5) (Deleted by 12 of 2012, Sch.).*
>
> *(6) (Deleted by 12 of 2012, Sch.).*

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

(c) award of damages;

(f) compensation;

(g) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

18.The general jurisdiction is set out in Section 13 (1) which emphasizes that the ELC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution, relating to environment and land. Section 13 (2) clarifies the general jurisdiction in Section 13 (1), probably to elaborate more, as to what a matter touching on land and environment is. It sets out matters touching on environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. Section 13 (2) (e) in very broad terms, states that the court has jurisdiction to hear any other dispute relating to environment and land.

19. It will be seen from Section 13 (2) (d) and (e) that the ELC has jurisdiction to hear a matter *relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.*

20. It will be appreciated that the jurisdiction of the ELC in so far as a dispute involves land or the environment is very wide indeed. In fact, the boundaries are almost limitless. As to the remedies that the ELC can grant, it will be observed that this includes an award of damages.

21. The dispute before this court relates to the ownership of the land parcel Nakuru Municipality/ Block 25/295. It cannot be argued that the dispute is not over land. It is over land. It was argued by counsels for the defendants that the dispute is matrimonial and should be heard by the High Court. I do not agree. The dispute is over who between the plaintiff and 1st and 2nd defendants should own the suit property. It is not a dispute over the sharing of matrimonial property. The land has indeed already moved from the 1st defendant to the 2nd defendant and it cannot currently be shared as matrimonial property. The issue before this court is whether the title of the 2nd defendant ought to be upheld, or whether it ought to be cancelled. In fact one of the prayers is for the cancellation of the title of the 2nd defendant. That is squarely an issue touching on title to land and it is unsound to argue that this court has no jurisdiction in a matter such as this. It is clear beyond peradventure that the Constitution does give this court the jurisdiction to hear a suit relating to title to land , and this is one such suit.

22. The dispute is not matrimonial in my view, but even assuming that it is, that bit of the dispute cannot be separated from the clearly non-matrimonial dispute that calls for cancellation of the title of the 2nd defendant, and discharge of the charge, created in favour of the 3rd defendant. In other words, the dispute is not severable, and since there is a claim touching on cancellation of title, this court has jurisdiction to entertain the dispute.

23. It was contended that this court cannot hear a money claim. As noted at Section 13 (7) (c) and (d) some of the remedies that this court can give is an award of damages or compensation. What is an award of damages? Is it not money? An award of compensation can also be in form of money. How can it then be said that the court cannot hear a money claim? The ELC can, and will hear, a claim for money, so long as that claim has relation to land, whether it be title to land, use of land or occupation of land, or other relationship with certain land.

24. It was further argued that this is a commercial claim in so far as it relates to discharging the charge in issue. Again, I am afraid I do not agree. I am not sure what parameter counsel for the 1st defendant meant by this term "commercial" for even a sale of land is a commercial transaction. If she meant a transaction that does not involve land, such as the buying and selling of goods or services, then she is absolutely wrong in so far as charges are concerned. A charge is not just a commercial transaction, in the manner of not being a dealing in land. It is a dealing in land. What is "commercial", in the sense of not being "land" is probably only the money tendered. The charge is a disposition relating to land. So too a discharge. Indeed, charges are covered, not by commercial laws, but by land and conveyancing laws. The current law on charges is in Part V of the Land Registration Act, and Part VII of the Land Act. A reading of Section 101 of the Land Registration Act and Section 150 of the Land Act, will inform one that jurisdiction is with the ELC. Section 101 of the Land Registration Act provides as follows :-

> ***101.*** *The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings*

concerning land under this Act;

25. Section 150 of the Land Act provides as follows :-

150. *The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.*

26. A reading of the above two provisions will bring one to the conclusion that where the issue relates to whether a charge should be registered or deregistered, that dispute can be determined by the ELC, for it is a disposition relating to land.

27. From the foregoing, I find no merit in the argument that this court has no jurisdiction to try this case.

28. The second limb is on the claim of the 2nd defendant against the 1st defendant. That claim was filed pursuant to the provisions of Order 1 Rule 24 which provides as follows :-

Defendant claiming against a co-defendant [Order 1, rule 24.]

1. *Where a defendant desires to claim against another person who is already a party*

   to the suit—

   (a) that he is entitled to contribution or indemnity; or

   (c) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or

   (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.

   (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.

   (3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.

29. It was argued by counsel for the 1st defendant that this claim cannot stand. Frankly, I do not understand the basis of that argument, for the 2nd defendant is co-defendant of the 1st defendant and Order 1 rule 24, does allow for a claim against a co-defendant. In fact, there is no other way that the 2nd defendant can seek remedy from the 1st defendant, other than filing a claim against co-defendant, which is precisely what was done in this case. The claim that the 2nd defendant has against the 1st defendant is squarely related to the claim of the plaintiff. If the plaintiff succeeds, then the 2nd defendant loses the property, and the 2nd defendant is therefore perfectly entitled to seek indemnity from the 1st defendant. I have no doubt in my mind that the claim by the 2nd defendant against the 1st defendant is properly pleaded and properly on record.

30. The other matter was that this suit is premature for hearing because directions have not been given. The argument tabled was that third party procedure needs to be followed. It will be seen from Rule 24(2) that the procedure for hearing a claim by a co-defendant is similar to that of hearing third party claims.

But not all procedures for Third party claims can be adopted for hearing a claim against co-defendant. For example, in Third Party claims, one has to file an application for leave to commence a third party action. No such leave is required to commence an action against co-defendant. Counsel mentioned that directions needed to be taken as in third party claims. On that aspect I agree, but again this cannot be said to be mandatory. The provision on Third party directions is Order 1 Rule 22 which provides as follows :-

22. Appearance of third party and directions [Order 1, rule 22.]

> *If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.*

31. It will be seen from the above that the word used, in so far as directions are concerned, is "may" not "shall". It is therefore not mandatory that third party directions be given before a matter can proceed. It is of course good and wise to issue directions so that a path can be charted on how to hear the claims in the matter. But a hearing will not be said to be null and void just because third party directions have not been given. There is indeed no magic in giving directions, which in my view can even be done orally in court. Insisting that there is a flaw in a case that has proceeded without third party directions will be stretching a technicality too far contrary to the provisions of Article 159 (2) (d) of the Constitution which oblige the court not to be overly concerned with technicalities of procedure. It is the same situation with directions in a suit where there is a notice given by a co-defendant. A party may ask for directions, but it cannot be said that a hearing cannot commence just because directions have not been given. If it is felt that directions are necessary, they can be sought at the hearing of the matter, before the matter commences, or at any time of the proceedings. I do not therefore agree that the hearing of this matter was fixed prematurely. In any event the date for hearing was taken by consent, with the presence of counsel for the 1st defendant, and this was after the notice by co-defendant was filed. If counsel thought that directions were necessary, that was the day for asking for the same, but there was no such request. I find it curious that it is now claimed that the hearing of the matter is premature for want of directions.

32. However, if it is thought that directions are critical, then I do give directions that the claim of the 2nd defendant against the 1st defendant, be heard concurrently with the claim of the plaintiff against the 1st and other defendants.

33. The upshot of the above is that I find no merit in the preliminary objection. It is hereby dismissed with costs to the plaintiff. The costs thereof will be full day's attendance costs when the preliminary objection was heard, equivalent to the costs of full day's attendance for a hearing, and attendance costs for delivery of this ruling.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 14th day of May 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr Waiganjo for plaintiff.

Ms Magana for 1st defendant.

Mr Cheruiyot for 2nd defendant.

Mr Geoffrey Otieno holding brief for Mr Kiburi for 3rd defendant.

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU