Muturi v Equity Bank Limited (Environment & Land Case 10 of 2024) [2024] KEELC 1316 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1316 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 10 OF 2024

FO NYAGAKA, J

MARCH 7, 2024

BETWEEN

PAUL MWANGI MUTURI ..... PLAINTIFF

AND

EQUITY BANK LIMITED ..... DEFENDANT

RULING

(On the Defendant's Preliminary Objection on the Jurisdiction of Court)

1. This matter came up on 06/03/2024 for directions on an Application dated 01/03/2024. The Application was brought under certificate of urgency on the same date. Basically, the Applicant sought for an order of injunction against the Defendant from selling his parcels of land, namely, Waitaluk/Kapkoi Block 6/Ketikoi/20 and Kitale Municipality Block 15/Koitogos/4081. The Court directed that before it could grant any orders, the Plaintiff serves the Application so that it be heard inter partes hence the mention of 06/03/2024 for directions.

2. However, before the directions could be taken the Defendant entered appearance and filed a preliminary objection dated 06/03/2024. By it he took issue with the jurisdiction of this Court to hear and determine the suit. Thus, at the time of taking directions, learned counsel for the defendant opposed the grant of interim orders. He instead insisted that this Court determines whether or not it had jurisdiction.

3. Regarding the opposition to the grant of interim orders and the lack of jurisdiction he argued that the dispute herein was purely a commercial one since it was about a loan facility granted to the Plaintiff, which he admittedly defaulted in paying hence the Defendant was only exercising its statutory power of sale as provided by the law. Further, he argued that, the Plaintiff was only concerned with the valuation of the property for purposed of the auction and that could not be the basis of an injunction for an issue such as the one in the circumstances of this case. He relied on Section 99 (4) of the *Land Act*, No. 6 of 2012 to buttress his argument.

4. About the Court's lack of jurisdiction specifically, he submitted that this being a purely commercial dispute it could only lie in the High Court and not this Court. He cited the decision of the Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR, although in the citation learned counsel gave the names of the parties wrongly by stating that the appeal was between Patrick Kangethe Njuguna and (versus) Co-operative Bank of Kenya (sic). His argument was that the suit land was given to the bank and charged only a security hence it was turned into a commodity that would be bought and sold. The issue between the parties was nothing more than an issue of the bank realizing the property and therefore was not a "land use" as contemplated in the Act.

5. Lastly, in regard to the intended sale, which is due this morning, the Defendant argued that under Section 99(4) of the *Land Act*, if the sale took place and, in the process, a wrong was committed the Plaintiff was entitled, under the provision, to sue for damages. He cited the case of Andrew Muriuki Wanjohi v. Equity Building Society & 2 Others [2006] eKLR. Thus, the argument of the Plaintiff that the property was undervalued was neither here nor there hence it could not form the basis of an injunction.

6. On his part, in response, the Plaintiff argued that this Court had jurisdiction to hear the matter for reason that the security in the matter was the suit land; that the Defendant was at fault by undervaluing the property by relying on a valuation which places it at Kenya Shillings Forty Million (Kshs. 40,000,000/=) only instead of the current value of Kenya Shillings Seventy-Six Million Three Hundred Thousand (Kshs. 76,300,000/=) only. He argued that for the Court to permit the auction to proceed would greatly harm the Plaintiff and that a claim for damages by a chargor against the bank is only available when the charge carries out an illegal sale of a security. He admitted though that indeed he charged the property for securing a loan in the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/=). And that as at the time of suit he had paid much of it but remained with balance of Kenya Shillings Four Million (Kshs. 4,000,000/=) only. He attempted to argue that the land was matrimonial property but his argument could not see the light of day since he was the one who actually charged the property and at the same time the issue had not been raised by the Defendant in its submissions.

Issue, Analysis and Determination

7. I have considered the preliminary objection and the prayer for grant of a temporary injunction in the meantime pending the inter partes hearing of the instant application. I have also given due consideration of both the law and the rival submissions by the parties herein. I am of the view that three issues commend themselves for me for determination. They are whether this Court has jurisdiction to hear and determine this matter, whether the prayer for a temporary grant of injunction pending the hearing of the application is merited, and who to bear the costs of either the Preliminary Objection or the suit or both.

8. As I begin the analysis, I note with consternation that after the parties concluded their arguments and the Court retired to the chamber and for the evening to consider the issues, learned counsel for the sent via Email two authorities, being, Margaret Muthoni Njoroge v Housing Finance Company Limited & Another [2020] eKLR and Charles Murugu Mukindia & 2 Others v Consolidated Bank of Kenya Ltd & Another [2022] eKLR for the Court to consider. I am not sure whether or not he sent them to learned counsel for the adverse party. Be that as it may, the fact of learned counsel or indeed any other party sending materials or authorities to the Court way after arguments or any other issue the judge or judicial officer is to determine have been made and concluded, unless it was directed or indicated to him/her by the Court at the time of hearing, and in the presence of the adverse party,

is not only unprofessional but an act of pulling a fast one or stealing a match over the adverse party. It is akin to laying an ambush to the other side because it will not have opportunity, to distinguish the authorities which is an important aspect of submission, or give their views over the material. This the Court, and indeed any other one, should not allow it. For a court to take into consideration such documents it would portray a wrong perception of the Court, for instance, a special treatment of a party and partiality. To do so even if justice is done, it will lack an important inseparable aspect: it will not be seen to be done, and therefore it will be an injustice. It should be greatly discouraged. For those reasons, I do not hesitate to find that I am not going to consider the authorities here.

9. I now start by underscoring the meaning of a preliminary objection. It is a point of law which goes to the root of any issue or dispute. It is never based on facts or evidence hence the Court must satisfy itself as to that important aspect. In the case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, Sir Charles Newbold defined a Preliminary objection as follows;

> " A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

10. In Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, the same Court held that;

> " We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush."

11. Also, in Susan Wairimu Ndiangui V Pauline W. Thuo & Another [2005] eKLR, Musinga J as he then was held as follows:-

> " a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect."

12. The meaning of a preliminary objection being clear, the issues at hand are simple. The first one is whether or not this Court has jurisdiction to hear and determine this suit. It is important to determine this issue first because jurisdiction is everything when it comes to determination of disputes. Absence of a court's jurisdiction is dry bare solid, actually molten rock, on which nothing can flourish, leave alone attempting to germinate. As was stated by Nyarangi JA in the case in the case of Owners of the

Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 without jurisdiction the court can do nothing. He stated as follows:-

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

13. By jurisdiction is meant the power of the court to handle a dispute. John Beecroft Saunders, in his treatise, Words and Phrases Legally defined - Volume 3: I - N, p. 113 defined jurisdiction as follows:-

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

14. This now sets stage for determining whether this Court has jurisdiction. The jurisdiction of this Court stems from the provisions of *the Constitution*. Article 162(2) (b) of *the Constitution* provides as follows;-

(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).

15. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* Section 13 of the said Act which provides as follows:

(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 written law 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 relating to environment and land, including disputes-

a) Relating to environmental planning and protection, trade, 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) -

(4) -

(5) -

(6) -

7) - In exercising 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;

d) Compensation;

e) Specific performance;

f) Restitution;

g) Declaration; or

h) costs.

15. Similarly, Section 150 of the *Land Act*, 2012 [Rev. 2019] of the laws of Kenya and section 101 of the *Land Registration Act*, 2012 [Rev. 2020] respectively provide that the ELC is the court that shall have jurisdiction to deal with land. Section 150 of the *Land Act* stipulates that

> " The Environment and Land Court established in the *Environment and Land Court Act* and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act." Section 101 of the *Land Registration Act* provides that, "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."

16. On their part learned counsel argued that the Cooperative Bank of Kenya v. Patrick Kangethe (supra) clarified the issue of jurisdiction of this Court in relation to the issue of charges and mortgages. While I agree that it did, in my view the decision was in relation to the taking of accounts where a matter involved the charging or mortgaging of a property. It is all about confirming whether the amounts in issue were properly computed. It has nothing to do with the sale of land. Besides, the statutes provisions on the jurisdiction of the court were made after the decision.

17. When the above view is compared with the instant case, herein, the issue is the sale of land and the aspect of valuation. The Court is being asked, ultimately to consider, whether the valuation used to base the auction is in compliance with the requirements of the law, being the *Land Act*, as amended. In those circumstances I am convinced beyond peradventure that that this Court has jurisdiction over the subject herein.

18. On the issue as to whether the prayer for a temporary grant of injunction is merited, I have carefully looked at the facts of the instant application. I noted that from the Supporting Affidavit, particularly at paragraphs 5 and 6 of the Affidavit sworn by Paul Mwangi Muturi, the Applicant was served with what he calls a "redemption notice" which he annexed and marked as PMM-1 and a notification of sale of the same date, which he marked as PMM-2 to which the value of the property was attached. That was done on 20/12/2023.

19. The purpose of the forty-five (45) statutory notice provided for by the law where a mortgagee is to realize the security of a loan is not to be gainsaid. It is to give the chargor a chance to not only redeem his property or make good the default but also to move the court for appropriate remedies, if the notice or other step is defective or unlawful. It was not designed to encourage indolence and abuse of the process of the court by a party rushing to the court on the eve of the auction, and while he pants he pleads with the Court to stop the auction. Such has been the practice of dirty frustrating games by many a chargor.

20. In the instant case, the Plaintiff resolved to move this Court only five days before the auction. He has not explained why, if in his opinion the property was undervalued, he did not move the Court immediately for the Court to intervene. He come from nowhere to claim on the 01/03/2024 that the property was undervalued. Even then my reading of the notice is that the value of Kshs. 40,000,000/ = is only stated as the market value. In relation to the duty of a charge in exercise of a statutory power of sale, Section 97(2) of the *Land Act*, provides:-

> "(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."

21. There must be and are consequences for a chargee who fails to comply with the provision. Certainly, it is not the option of stopping an auction unless the chargor demonstrates that the value is so greatly divergent and unreasonable from the market value that there would be nothing but unconscionability in permitting the auction to take place. Even then, the court ought to be moved at the earliest instance. In the instance case, this is too late in the day for the applicant to move this court. Equity aids the vigilant and not the indolent or deliberately slow mover.

22. I sympathize with the Applicant given that he greatly expected this Court to issue an order of injunction. As a matter of fact, yesterday when both learned counsel submitted before me from 12:59 PM over the two issues I have dealt with, his learned counsel pleaded with this Court to deliver the Ruling later in the day since the auction was scheduled to take place this morning. The learned counsel even explained that his appointment came about yesterday in the morning because the one previously on record has his offices situate in Kitale which lies within the Kitale LSK Branch jurisdiction which Branch members were on a boycott of courts since 05/03/2024 over issues to do with one specific Court in the Station. Counsel wished that this Court stretches beyond limit or leaves all other matters it had for yesterday, prepare and deliver this Ruling, due to that urgency. But this Court had very many other matters scheduled for the day. That is why I have to deliver the Ruling at 9:00 AM.

23. The desperate plea of the Applicant for the court to act quickly is simply a reminder that no one should squander their time allotted to do something and expect magic or miracles to be worked. Also, it reminds the parties herein and the whole world to, as Jesus said, "Watch therefore: for ye know not what hour your Lord doth come" (Mathew 24:42). No one, including the Applicant, expected that a boycott could be called on the eve of the mention of this Certificate of Urgency for directions, yet he (applicant) waited and slept on his rights all along since 20/12/2023. The lesson is: let all litigants learn to be vigilant.

24. That said, I have carefully analyzed the PMM1 and PMM 2. They indicate that there is a forced value. As to whether the amount was or was not arrived at by a valuer is a matter that will arise at the hearing, and if the provision is not complied with, it can give to a claim for damages. It means the bank proceeds to sell the property without valuation at its own risk as to a suit for damages. In the circumstances I decline to grant an order of a temporary injunction pending the hearing of the instant application inter partes. I also dismiss the preliminary objection dated 06/03/2024.

25. I issue the following further directions: the Respondent is given ten (10) days to file a response and serve, the Applicant is to file written submissions and serve within seven (7) days of service of the Response or lapse of the ten (10) days whichever is earlier, the Respondent is to file its written submissions within seven (7) days of service by the Applicant or the lapse thereof whichever is earlier. The parties' submissions should strictly not exceed five pages of New Times Roman, Font 12 of 1.5 spacing, otherwise the Court will not refer to the extra pages. The application shall be heard on 11/04/2024.

26. Each party shall bear own costs.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KITALE VIA THE TEAMS PLATFORM ON THIS 7TH DAY OF MARCH, 2024 FROM 9:00 AM.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

In the Presence of:

1. Mitei for the Plaintiff

2. Langat for Defendant