



Equity Bank Ltd v Stephen Githii Ndegwa t/a Beamso Enterprises & 2 others (Environment and Land Appeal E030 of 2021) [2023] KEELC 376 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL E030 OF 2021
YM ANGIMA, J
JANUARY 26, 2023**

BETWEEN

EQUITY BANK LTD APPELLANT

AND

STEPHEN GITHII NDEGWA T/A BEAMSO ENTERPRISES . 1ST RESPONDENT

ROBERT WAWERU T/A ANTIQUE AUCTIONEERS LTD ... 2ND RESPONDENT

BLUE BELL INVESTMENTS LTD 3RD RESPONDENT

RULING

A. Introduction

1. By a notice of motion dated March 23, 2022 grounded upon Sections 3 & 13(1) (7)(a), Order 42 rule 6 and Order 51 Rule (1) of the *Civil Procedure Rules 2010*, Sections 1A & 1B, 3A of the *Civil Procedure Act*, Article 159, sub-article (2)(d) & (e) of the *Constitution* of Kenya and all other enabling provisions of the law the Appellant sought a stay of further proceedings in Nyahururu CMCC No 278 of 2019 (formerly Nyahururu ELC No 200 of 2018) pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by Isaac K Ikunda, the Appellant’s Credit Manager on March 23, 2022 and the exhibits thereto. The Appellant contended that it was improperly and unfairly prevented from presenting its documentary evidence by the trial court on the basis that the documents were marked “without prejudice”. It was contended that the Appellant shall suffer great injustice if the stay sought was not granted since the outcome of the pending appeal may be rendered nugatory.

B. The Respondents’ Response and Preliminary Objection

3. The 1st Respondent filed a replying affidavit sworn on June 14, 2022 in opposition to the application for various reasons. First, it was contended that the application was incompetent, defective and bad in



law. Second, that the appeal had been filed out of time without leave of the court. Third, that this court had no jurisdiction to entertain the appeal since the dispute before the trial court was of a commercial nature. Fourth, that it was the Appellant which had in the first place sought to have the suit before the trial court dismissed on the basis that it was a commercial dispute and not a land matter in consequence whereof the trial court found and held that it was not a land dispute and had it registered as a Civil Suit at the Chief Magistrate's Registry. Fifth, that the suit had been pending in court for a long time and that the Appellant was taking deliberate steps to delay the conclusion of the suit.

4. The 1st Defendant also filed a notice of preliminary objection dated June 14, 2022 challenging the appeal and application on the following grounds:
 - a. That this Honourable Court does not have the jurisdiction to hear and determine this appeal as the same is civil in nature.
 - b. That the appeal is incompetent, bad in law, fatally defective, totally misconceived and an abuse of the process of this Honourable Court.
 - c. That the said application and appeal is in contravention of the mandatory provisions of *Civil Procedure Act* of the Laws of Kenya.

C. The Appellant's Rejoinder

5. The Appellant filed a further affidavit sworn by Isaac K Ikunda on June 22, 2022 in reply to the 1st Respondent's replying affidavit. It was contended that the memorandum of appeal was filed within the stipulated time hence there was no need to seek leave of court. It was further contended that the preliminary objection was founded on contested factual matters hence it cannot properly be determined as a preliminary objection. The Appellant further contended that this court had jurisdiction to entertain the appeal under Article 162(2)(b) of the *Constitution* of Kenya, 2010 and Section 13 of the Environment & Land Court Act (the ELC Act).
6. The Appellant further contended that the trial court's determination that the dispute before it was not a land case but a commercial dispute was not binding upon this court. It was denied that the Appellant was out to delay the conclusion of the suit before the trial court and the court was urged to overrule the preliminary objection and allow the application for stay of proceedings.

D. Directions on Submissions

7. When the matter was listed for directions it was directed that both the Appellant's application and the 1st Defendant's notice of preliminary objection shall be heard together. It was further directed that the same shall be canvassed through written submissions and the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on August 03, 2022 whereas the 1st Respondent's submissions were filed on September 30, 2022.

E. The Issues for determination

8. The court has considered the Appellant's notice of motion dated March 23, 2022, the replying affidavit in opposition thereto, the Appellant's further affidavit as well as the material on record. The court is of the opinion that the following key issues arise for determination herein:
 - a. Whether the court has jurisdiction to entertain the appeal.
 - b. Whether the appeal is incompetent, defective and an abuse of the court process.



- c. Whether the Appellant has made out a case for grant of stay pending appeal.
- d. Who shall bear costs of the application and the preliminary objection.

E. Analysis and Determination

a. Whether the court has jurisdiction to entertain the appeal

9. The court has considered the material and submissions on record on this issue. This issue was raised by the 1st Respondent in his notice of preliminary objection dated June 14, 2022. The 1st Respondent contended that the dispute before the trial court was of a civil nature and not a land dispute hence any appeal against the decision of the trial court would lie to the High Court and not the Environment & Land Court (ELC). The 1st Respondent submitted that it was the Appellant who first raised this issue before the trial court where it contended that the trial court sitting as a land court had no jurisdiction to entertain the suit since the dispute was of a civil or commercial nature. It was further submitted that vide a ruling dated December 17, 2019 the trial court held that the dispute among the parties was commercial in nature hence the case file was returned to the registry to be registered as a civil suit and assigned Nyahururu CM Civil Suit No 200 of 2018. It was therefore contended that the Appellant could not approbate and reprobate by shifting goal posts at the appellate stage.
10. The Appellant, on the other hand, submitted that this court has both original and appellate jurisdiction to entertain the matter both under Article 162 (2)(b) of the *Constitution* of Kenya and Section 13 of the ELC Act. The Appellant relied upon the case of *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Ltd & Another* [2018] eKLR and the case of *Alphonse Yankuliye vs One Twiga Road Limited* [2019] eKLR in support of its submissions on this issue. The Appellant was further of the view that the ruling of the trial court on the nature of the dispute before it was immaterial.
11. The court is of the opinion that the jurisdiction of the ELC both under Article 261(2)(b) of the *Constitution* and Section 13 of the ELC Act was authoritatively interpreted by the Court of Appeal in *Co-operative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR. The Court of Appeal also authoritatively interpreted the meaning of terms such as use, occupation and title to land. Anything else falling outside the definition of those terms would usually fall outside the provisions of the ELC Act.
12. In the Co-operative Bank of Kenya Ltd Case, the Court of Appeal summarized the Respondents' grievances as follows:

“As stated earlier, the mainstay of the Kangethes' application was that the statutory sale was unlawful for having been commenced prior to the issuance of the mandatory 90 day statutory notices as by law required. Consequently, that the instruction of auctioneers was reckless and unlawful as not only was the rightful procedure ignored, but that the sum claim was in excess of what was owed.....”

Those grievances are quite similar to the 1st Respondent's grievances before the trial court.
13. In rejecting the Appellant's submissions that charging of land constituted use of land within the meaning of Article 162 2(b) of the *Constitution* and Section 13 of the ELC Act, the Court of Appeal held as follows:

“36. By definition, a charge is an interest in land securing the payment of money's worth or the fulfilment of any condition (see Section 2 of the *Land Act*). As such, it gives rise



to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.”

14. It is evident from the material on record that the 1st Respondent's claim was not a dispute about the use, occupation or title to land. The predominant issue was whether the Appellant was entitled to exercise its statutory power of sale under a charge and whether the same was lawfully executed. All the Respondent's grievances essentially flowed from that issue. The court is thus of the opinion that the trial court was right in holding that the dispute before it was not a land case but a commercial dispute to be tried by the magistrate's court sitting as a civil court. It is interesting that it was the Appellant who raised that issue before the trial court and upon hearing the parties the court agreed with the Appellant and consequently directed that the suit be registered as a civil suit. Thereafter, the suit proceeded to hearing as a civil suit.
15. The court is of the opinion that although the magistrate's courts which are designated and gazetted for the purpose of handling claims specified in Article 162(2) can lawfully handle them as subordinate courts, any appeal arising therefrom should be filed before the appropriate superior courts. For instance, an appeal against a decision of the subordinate court sitting as a civil court should be handled by the High Court, an appeal against the decision of a subordinate court sitting as an employment court should be handled by the Employment and Labour Relations Court whereas an appeal against the decision of a subordinate court sitting as an Environment and Land Court should be handled by the ELC.
16. It would be absurd and irregular if the ELC were to handle an appeal against the decision of a subordinate court sitting as an employment court or for the Employment and Labour Relations Court to handle an appeal against the decree of a subordinate court sitting as an environment and land court. It would be equally irregular and unlawful for the ELC to handle an appeal from decision of the subordinate court sitting as a civil court for that would constitute usurpation of jurisdiction. The court is thus of the opinion that the impugned decision of the subordinate court sitting as a civil court in Nyahururu CMCC No.278 of 2019 can only lie to the High Court. Accordingly, ELC has no jurisdiction to entertain the instant appeal. To that extent, the 1st Respondent's preliminary objection on the issue of jurisdiction is hereby upheld.

b. Whether the appeal is incompetent, defective and an abuse of the court process

17. The court has already found and held that it has no jurisdiction to entertain the appeal. It has been held that jurisdiction is everything and that a court of law should down tools the moment it forms the opinion that it has no jurisdiction to entertain a matter. See Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1 where it was held, *inter alia*, that:

“...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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter the moment it holds the opinion that it is without jurisdiction...”
18. The court is thus of the opinion that being without jurisdiction, there is no need to consider the rest of the listed issues for determination such as (b) and (c). However, the court shall make a determination on the issue of costs as mandated under Section 27 of the Civil Procedure Act (Cap 21).



c. Who shall bear costs of the application and the preliminary objection

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). Accordingly, the successful party should ordinarily be awarded costs of the action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons vs Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful party should be deprived of costs of the appeal, the application for stay and the preliminary objection. Accordingly, the 1st Respondent shall be awarded costs of the proceedings.

E. Conclusion and Disposal Order

20. The upshot of the foregoing is that the court finds and holds that it has no jurisdiction to entertain the appeal and the application for stay of proceedings. In the premises, the court makes the following orders for disposal of the matter and the preliminary objection:

- a. The 1st Respondent’s preliminary objection to the jurisdiction of the court is hereby upheld.
- b. The Appellant’s appeal and the notice of motion dated March 23, 2022 are hereby struck out since the court has no jurisdiction to entertain the same.
- c. The 1st Respondent is hereby awarded costs of the appeal and the preliminary objection.
- d. For the avoidance of doubt, any interim orders in place are hereby vacated.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 26TH DAY OF JANUARY, 2023.

In the presence of:

Ms Cheruiyot for the Appellant

Ms Njoki Mureithi for the 1st Respondent

N/A for the 2nd Respondent

Mr Maina for the 3rd Respondent

C/A - Carol

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JUDGE

