



REPUBLIC OF KENYA



**Mwangi & 2 others v Family Bank Limited & another (Environment & Land  
Case 1 of 2023) [2023] KEELC 16603 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16603 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 1 OF 2023**

**YM ANGIMA, J  
MARCH 28, 2023**

**BETWEEN**

**CHARLES MUTAHI MWANGI ..... 1<sup>ST</sup> PLAINTIFF  
SOLOMON MWANGI MUTAHI ..... 2<sup>ND</sup> PLAINTIFF  
LEAH MUTHONI MUTAHI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**FAMILY BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
REGENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. By a plaint dated December 30, 2022 the Plaintiffs' sued the Defendants seeking the following reliefs against them:
  - a. An order that the Defendants' act of advertising for sale and the intended sale of the suit property is wrongful and unlawful.
  - b. A permanent injunction restraining the Defendant whether by himself, its servants and/or agents or otherwise whomsoever from selling, advertising for sale, transferring or in any way disposing or interfering with the Plaintiffs' interest, occupation and ownership of the suit property pending the hearing and determination of this suit.
  - c. Damages.
  - d. Costs and interest.



2. The Plaintiffs pleaded that they were registered owners of Title Nos. Nyandarua/Tulaga/1732, Nyandarua/Kijabe/185, Nyandarua/Muruaki/1255 and Nyandarua/Muruaki/1401 (the suit properties) which they had charged to the 1<sup>st</sup> Defendant to secure the payment of a loan Kshs 5,000,000/= only which the Defendant had advanced to New Generation Self-Service Stores Ltd (the principal debtor).
3. The Plaintiffs further pleaded that by a letter dated October 24, 2022 the 1<sup>st</sup> Defendant had appointed Regent Auctioneers (the Auctioneers) to sell the suit properties to recover a loan of Kshs 622,778,644.99 allegedly owing by the principal debtor. The Plaintiffs stated that they had not been served with any statutory notices for realization of the securities hence they contended that the Defendants' statutory power of sale had not accrued.
4. The Plaintiffs further contended that the 1<sup>st</sup> Defendant was obliged to pursue the principal debtor for recovery of any outstanding loan in the first instance and that it should only resort to them as guarantors as a matter of last resort.
5. Simultaneously with the filing of the suit the Plaintiffs filed a notice of motion dated December 30, 2022 seeking an interim injunction to restrain the Defendant from selling the suit properties. The said application was based upon the grounds set out in the plaint and the same was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff, Charles Mutahi Mwangi on December 30, 2022.

#### **B. The court's concern on jurisdiction**

6. When the said application for interim orders was listed for inter partes hearing on February 7, 2023 the court of its own motion raised a concern on its jurisdiction to entertain the suit and application for interim orders. The advocates for the Plaintiffs as well as the 1<sup>st</sup> Defendant's Advocates contended that the Environment and Land Court (ELC) was the right forum for adjudication of the dispute. The court, however, invited the parties to address it on the issue in view of the Court of Appeal decision in the case of the *Co-operative Bank of Kenya Ltd v Patrick Kangethe & 5 Others* [2017] eKLR. The matter was consequently stood over to March 14, 2022 for submissions on jurisdiction.

#### **C. The plaintiffs' submissions**

7. The Plaintiffs' advocate opted to submit orally on March 14, 2022. It was submitted that this court had jurisdiction to entertain the suit and application since there were contradictory decisions from other ELC courts on the issue. It was submitted that whereas some courts had assumed jurisdiction and entertained similar suits, others had declined to handle them. The Plaintiffs' advocate further submitted that in case the court finds that it has no jurisdiction then it should transfer the suit to the High Court for trial and disposal. The Plaintiffs' advocate did not, however, comment on the Co-operative Bank of Kenya Case despite being requested by the court to do so.

#### **D. The defendants' submissions**

8. The 1<sup>st</sup> Defendant submitted that the court had no jurisdiction to entertain the suit because its jurisdiction was circumscribed by Article 162(2) (b) of the *Constitution of Kenya, 2010* and Section 13 of the *ELC Act* to handle only disputes relating to the use, occupation and title to land. It was submitted that its jurisdiction did not extend to disputes on charges and enforcement of guarantees for repayment of money. The 1<sup>st</sup> Defendant relied on the Co-operative Bank of Kenya Case and the recent Court of Appeal decision of *Diamond Trust Bank Kenya Ltd v FHH* Civil Appeal No 18 of 2020) [2022] KECA 769 KLR in support of its submission on jurisdiction.



## E. The issues for determination

9. The court has considered the material and submissions on record. The court is of the opinion that the following issues fall for determination herein:
  - a. Whether the court has jurisdiction to entertain the suit.
  - b. If the answer to (a) is in the negative, whether the court should transfer the suit to the High Court for trial.

## F. Analysis and determination

### Whether the court has jurisdiction to entertain the suit

10. It is evident from the plaint and other material on record that the Plaintiffs were merely guarantors to a loan facility advanced by the 1<sup>st</sup> Defendant to the principal debtor. They charged the suit properties to secure the payment of the loan owing to the Defendant by the principal debtor.
11. It is also evident from the material on record that the Plaintiffs were seeking to stop the Defendant from exercising its statutory power of sale on two main grounds. First, it was contended that the Defendant had not issued or served the requisite statutory notices prior to the advertisement of the suit properties for sale. Second, it was contended that the Plaintiffs were merely guarantors of the loan facility and that their liability to pay any outstanding debt could not arise unless and until the Defendant had exhausted all available recovery mechanisms against the principal debtor.
12. The court is of the opinion that the issues raised by the Plaintiffs have nothing to do with the use, occupation or title to land as contemplated under Article 162 (2) (b) of the [Constitution of Kenya](#) and as interpreted by the Court of Appeal in the [Co-operative Bank of Kenya Limited](#) Case and the [Diamond Trust Bank Kenya Limited](#) case. In the former case the court considered the jurisdiction of this court and held, *inter alia*, that:
  35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognized charging land as connoting land use.
  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.
  37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a



tenancy agreement constitutes land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.”
13. In the Diamond Trust Bank Limited Case the Court of Appeal held as follows:
- “28. In Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above) it had been contended that the High Court lacked jurisdiction to entertain a matter where the Plaintiffs therein had sought to restrain a bank therein from taking steps to sell charged property in exercise of statutory power of sale and that the jurisdiction over the matter lay with the ELC. It was contended in that case that charging the suit land constituted use of land within Article 162(2)(b) of the Constitution. In rejecting that contention, this Court stated:
36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfilment of any the 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 of 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 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 of a charger.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use.
29. The Court went on to say that in addition, the cause of action herein was not the validity of the charge, but a question of accounts. The other contention on jurisdiction in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above) that was rejected by this Court was the contention that the dispute fell under ELC on account of Section 13(2)(d) of the Environment and Land Court Act which provides that the ELC has power to hear and determine disputes relating to land and contracts, choses in action or other instruments granting any enforceable interests in land?. In that regard, the Court expressed that the jurisdiction of the ELC to deal with disputes relating to contracts should be understood within the context of the court's jurisdiction to deal with disputes connected to the use of land; that such contracts ought to be incidental to the use of land and do not include {mortgages, charges, collection of dues and rents which fall within the civiljurisdiction of the High Court.
30. The holding by the learned Judge in the present case that a charge is an instrument granting and enforceable interest in land meaning therefore that this court has jurisdiction to hear disputes relating to charges therefore flies in the face of the decision of this Court in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above). Recently, this Court in PJ Dave Flowers Limited v Limuru Hills Limited, Malindi Civil Appeal No 123 of 2019 in affirming that the ELC had, in the circumstances of that case, jurisdiction to entertain the dispute noted that the appellant therein clearly had an interest in the suit premises as a purchaser and had



therefore acquired interest that conferred jurisdiction on the ELC to hear and determine the matter.

31. In the present case, although the respondent is not privy to the instrument of legal charge, there is no doubt that what the respondent is seeking before the ELC, is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (above), is a commercial matter for adjudication before the High Court. In our view therefore, the Judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.

#### **If the answer to (a) is in the negative, whether the court should transfer the suit to the High Court**

14. The court has considered the material and submissions on record on this issue. Whereas the Plaintiffs submitted that the court should transfer the suit to the High Court for trial and disposal should it find that it has no jurisdiction, the Defendant contended otherwise. The Defendant was of the view that a court of law has no jurisdiction transfer a suit where it finds that it has no jurisdiction to entertain it in the first place. The Defendant relied upon the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 Others* [2019] eKLR in support of its submissions.
15. In the *Albert Chaurembo Mumba Case* the Supreme Court of Kenya held, *inter alia*, that:
  - (153) In that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of the *Constitution* leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.
  - (154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”
16. The court is persuaded by the said authority that it has no jurisdiction to transfer the suit to the High Court for trial since it was filed in a court without jurisdiction. The said authority is directly on point and is binding upon this court by virtue of the hierarchy of our court system. Accordingly, the court is not inclined to transfer the suit to the High Court or any other court for trial.

#### **G. Conclusion and disposal order**

17. The upshot of the foregoing is that the court finds and holds that it has no jurisdiction to entertain the suit. The court also finds and holds that it has no jurisdiction to transfer the suit to the High Court. Accordingly, the court makes the following orders:
  - a. The Plaintiffs’ suit is hereby struck out for want of jurisdiction.
  - b. The Defendant is hereby awarded costs of the suit.

Orders accordingly.



**RULING DATED AND SIGNED AT NYAHURURU THIS 28<sup>TH</sup> DAY OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Otieno Obwanda for the Plaintiffs

Ms. Kimathi holding brief for Ms. Ngui for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

