



**Gestered Professional Services v KCB Kenya Limited & another (Environment & Land Case E014 of 2024) [2025] KEELC 1468 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1468 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E014 OF 2024**

**BN OLAO, J  
MARCH 25, 2025**

**BETWEEN**

**GESTERED PROFESSIONAL SERVICES ..... PLAINTIFF**

**AND**

**KCB KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**REGENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What calls for my determination is the Preliminary Objection dated 2<sup>nd</sup> August 2024 and raised by KEnya Commercial Bank (K) LTD (the 1<sup>st</sup> Defendant) against the claim by Gestered Professional Services LTD (the Plaintiff) challenging this Court’s jurisdiction to determine the suit herein.
2. The following grounds have been set out in the said Preliminary Objection in an attempt to persuade this Court to down it’s tools. These are:
  1. That this Court lacks the jurisdiction to hear and determine this dispute and suit as against the Defendants and together with all consequential orders should be dismissed with costs as the same offends the provisions of Article 162(2) and 165(3) of *the Constitution* of Kenya 2010. Sections 2 and 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act* 2012 as read together with Article 159(2)(c) and 260 of *the Constitution* of Kenya 2010.
  2. That this Honourable Court lacks the jurisdiction to hear this matter and should be dismissed with costs by dint of the law set out in the Court of Appeal decision of Co-operative Bank Of Kenya -v- Patrick Kangethe Njuguna & 5 Others 2017 eKLR where it opined:

“To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or



equitable rights and liabilities. Further the purpose of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder were disputed. The main question to be determined were the tabulation of the sums owing and whether statutory notices had been issued prior to the attempted statutory sale. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the Courts jurisdiction to deal with disputes connected to ‘use’ of land as was discussed herein above. Such contracts in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall under the civil jurisdiction of the High Court ... When the applicant approached the Court for a remedy for temporary injunction he had the burden to proof that the Court had the jurisdiction to entertain the claim. It is clear and well established in law that personal and subject matter jurisdiction cannot be conferred by judicial fiat. I hold the view that jurisdiction is of the heart of any judgment rendered by a Court and that any orders made for want of jurisdiction remain void ab initio.”

3. That the Supreme Court of Kenya in Samuel Kamau Macharia -v- Kenya Commercial Bank & 2 Others 2012 eKLR eloquently stated that:

“ A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”
4. That it is meet and in furtherance of the overriding objective of Article 159(2) of the Constitution and Rules made thereunder for the timely disposal of proceedings that this Court peremptorily strike out the plaint and Notice of Motion dated 8<sup>th</sup> July 2024 as an abuse of the process of the Court with costs to the 1<sup>st</sup> Defendant.
3. In response to the Preliminary Objection, the Plaintiff filed grounds of opposition dated 14<sup>th</sup> January 2025 and pleaded as follows:
  1. That the predominant issue and prayer sought in the suit before this Honourable Court is for a permanent injunction against the alienation, selling or such other interference with the Plaintiff’s occupation and use of L.R No Bukhayo/mundika/2538 and the manner in which the Defendants are to exercise the statutory power of sale which cause of action is the preserve of the Environment and Land Court as opposed to the High Court.
  2. That this Honourable Court has jurisdiction to enforce a charge created vide the Land Act 2012 and the Land Registration Act 2012 as provided for under Section 150 of the Land Act 2012, Section 101 of the Land Registration Act 2012 and Section 13(2)(d) of the Environment and Land Court Act NO 9 of 2011 which expressly grant this Honourable Court the requisite jurisdiction to hear and determine disputes relating to instruments granting any enforceable interest in land.
  3. That the Court with the requisite jurisdiction to handle disputes relating to instruments created under the Land Act 2012 and the Land Registration Act 2012 is the Environment and Land Court as opposed to the High Court as held by the Court in Lydia Nyambura Mbugua



-v- Diamond Trust Bank Kenya Ltd & Another 2018 eKLR and Suzanne Achieng Buttler & 4 Others -v- Redhill Heights Investments Ltd & Another 2016 eKLR.

4. That the Court of Appeal in Co-operative Bank Of Kenya -v- Patrick Kangethe Njuguna & Others 2017 eKLR did not expressly oust the jurisdiction of the Environment and Land Court to handle a dispute based on a charge as held by the Court in Bank Of Africa Kenya Ltd -v- John Ndungu Gachara 2002 eKLR.
5. That Article 165 (5) of *the Constitution* of Kenya expressly ousts the jurisdiction of the High Court to hear and determine any matter which falls under Article 162(2) of *the Constitution* such as the one before this Court.
6. That the predominant issue before this Honourable Court is therefore the manner in which the Defendant is to exercise his statutory power of sale arising from a registered interest in land which action is the preserve of the Environment and Land Court as opposed to the High Court.

When the parties appeared before the Deputy Registrar on 5<sup>th</sup> August 2024, they agreed to canvass the Preliminary Objection first by way of written submissions. The submissions were subsequently filed both by my MR WANGILA instructed by the firm of Wekesa & Simiyu Advocates for the 1<sup>st</sup> Defendant and by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Plaintiff. The 2<sup>nd</sup> Defendant Regent Auctioneers did not file any submission nor participate in the matter.

4. I have considered the Preliminary Objection by the 1<sup>st</sup> Defendant, the Plaintiff's grounds of opposition and the submissions by counsel.
5. The 1<sup>st</sup> Defendant's Preliminary Objection is primarily anchored on the decision of the Court of Appeal in the case of Co-operative Bank Of Kenya -v- Patrick Kangethe Njuguna & 5 Others C.a. Civil Appeal NO 83 of 2016 [2017 eKLR]. In that case, the Court while considering whether the ELC has the jurisdiction to determine a dispute involving the taking of accounts arising out of a charge on land said at page 38 that:

“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.” Emphasis mine.

The Court went on to add at paragraph 40 that:

“To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purpose of this suit, the instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable instrument thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.” Emphasis mine.

Counsel for the Plaintiff has however argued that the Court in the case of Co-operative Bank Of Kenya Ltd -v- Patrick Kangethe Njuguna (supra) did not expressly oust the jurisdiction



of this Court to handle a dispute involving a charge. Counsel then goes on to cite the case of Lydia Nyambura Mbugua -v- Diamond Trust Bank Kenya Ltd & Another 2018 eKLR wherein my brother Munyao Sila J rendered himself at paragraph 31 by saying that:

“... just because ‘charge’ has been mentioned in a case does not mean that the ELC has no jurisdiction. On the contrary, where ‘charge’ is being mentioned, the prescription should be that it is the ELC with jurisdiction unless it is discernible that case raises issues that have little or no relation to the charge.”

In his submissions, counsel for the Plaintiff has stated as follows at page 5:

“In dissenting from the Court of Appeal’s decision in Co-operative Bank Of Kenya -v- Patrick Kangethe Njuguna & 5 Others 2017 eKLR, Justice Munyao Sila In Lydia Nyambura Mbugua -v- Diamond Trust Bank Kenya Ltd & Another 2018 eKLR held that it is not automatic that the Environment and Land Court should down it’s tools whenever the dispute before it relates to a charge as this would conflict with the express provisions of Article 162(2)(b) of *the Constitution* of Kenya.”

I don’t think Munyao Sila J was dissenting from the Court of Appeal’s decision in the case of Co-operative Bank Of Kenya -v- Patrick Kangethe Njuguna & 5 Others (supra) as he could not possibly do that. The Judge was only distinguishing it’s facts.

6. To put the above objection in perspective, I have looked at the Plaintiff’s claim and on which the Notice of Motion dated 8<sup>th</sup> July 2024 seeking injunctive reliefs and the Preliminary Objection is premised. The Plaintiff’s suit is based on the following substantive claims:

- “1. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents whether by themselves, their agents, workers and or servants from alienating, selling or in any way interfering with the land parcel number L.R. No. Bukhayo/Mundika/2538.”
2. “An order requiring the 1<sup>st</sup> Defendant to render accounts and avail an updated account statement to the Plaintiff.”

The ownership of the land parcel No Bukhayo/mundika/2538 is not in dispute. It is also not in dispute that in 2022, the 1<sup>st</sup> Defendant advanced the Plaintiff the sum of Kshs.20,000,000 to be repaid in monthly installment of Kshs.482,896 which was secured using the said land as security The thread which runs through the Plaintiff’s case is basically what is the correct sum payable by him to redeem the charged property. In paragraph 12 of the plaint, he has pleaded that he “is willing to pay the loan balance if clearly communicated by the 1<sup>st</sup> Defendant”. In paragraph 13 he pleads that he has never been served with any notice indicating the fact of the default and or redemption notice to make him “aware of the Defendants claim and to give me a chance to redeem my property.” In paragraph 14 he has pleaded thus:

“14: “That I have equally never been informed of the outstanding balance to enable me see if I can clear the loan facility.”

Finally, in paragraph 17 he states:

“That I also pray for an order requiring the 1<sup>st</sup> Defendant to render accounts and avail an updated account statement to the Plaintiff.”



It must be clear that the predominant issue in this dispute is basically the settlement of accounts which the Plaintiff is ready to pay. The prayer for an injunction is simply to give him time to do so. And as is now clear from the Court of Appeal's decision in the case of Co-operative Bank Of Kenya Ltd -v- Patrick Kangethe Njuguna (supra), where the predominant issue is "a question of accounts" and "the tabulation of the sums owing", that becomes a matter for the High Court. It is also worth noting that in the case Lydia Nyambura Mbugua -v- Diamond Trust Bank Kenya Ltd (supra) Munyao Sila J was dealing with an issue where the Plaintiff had sought the following substantive remedies:

1. "A declaration that the purported sale of Njoro Ngata block 1/478 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is and was for all purposes and intent inequitable, illegal, irregular and wrongful and null and void and as a result, the Court cancels the entire sale of 28 March 2002."
2. "A permanent injunction restraining the 2<sup>nd</sup> Defendant by himself, his agents and servants from claiming any ownership on Njoro Ngata Block 1/478 and from evicting the Plaintiff from the said parcel of land."
3. "Costs of the suit."

The 1<sup>st</sup> Defendant had in that case denied that the said sale was illegal wrongful, null and void while the 2<sup>nd</sup> Defendant pleaded that he had purchased the land from a third party. All those are the preserves of the ELC. And as pointed out by the Judge in paragraph 30 of his ruling, the issue of accounts did not rise at all and even if it had risen, his Court would not be divested of jurisdiction. On my part however, notwithstanding what I may think about the decisions of the Court of Appeal in the case of Co-operative Bank Of Kenya Ltd -v- Patrick Kangethe Njuguna & 5 Others (supra) it is binding on me being a decision of a Superior Court. I can only distinguish it as against another decision of the same Court. I have not been referred to any such decision. Instead, what I am aware is that the same Superior Court, differently constituted, had the following to say in the case of Joel Kyatha Mbaluka T/a Mbaluka Associates Advocates -v- Daniel Ochieng Ogola T/a Ogola Okello & Co Advocates C.a. Civil Appeal No 250 of 2017 [2019 eKLR] at paragraph 12:

"We reiterate the position taken in co-operative bank of kenya ltd -v- patrick kangethe njuguna (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to land."

In his case, whereas this Court has the jurisdiction to grant the order of permanent injunction, the other remedy which is the rendering of accounts and updated statement of accounts is, by virtue of the precedents above, the preserve of the High Court for which I must down my tools. That is the route which I recently took in the case of Gilbert Anyango Oduory & Rester Nafula Oduory -v- Ncba Bank Kenya Ltd & Auckland Agencies Auctioneers Busia ELC Case No E030 of 2024. Rendering of accounts and up-dated statement of accounts is, by a reading of the above precedents of the Superior Court, the preserve of the High Court. I must therefore down my tools and allow the High Court to determine the predominant dispute in this case which is an issue of accounts. I have no doubt in my mind that once the issue of accounts is settled, the other remedy sought by the Plaintiff and being an order of permanent injunction will fall be the side as a matter of course.

7. Counsel for the 1<sup>st</sup> Defendant has urged this Court to strike out the plaint herein after finding that I have no jurisdiction. I am not persuaded to do so in the circumstances of this case. I am of course aware that Superior Courts have also held that a case filed in a Court without jurisdiction is a nullity



and cannot be transferred to a Court with the requisite jurisdiction. In the case of Equity Bank Ltd - v- Bruce Mutie Mutuku T/a Diani Tour & Travel 2016 eKLR, the Court of Appeal said:

“In numerous decided cases, Courts including this Court have held that it would be illegal for the High Court in exercise of its powers vide Section 18 of the *Civil Procedure Act* to transfer a suit filed in a Court lacking jurisdiction to a Court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a Court to transfer an incompetent suit for want of jurisdiction to a competent Court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent, confer jurisdiction on a Court where no such jurisdiction exists.”

That may be so and again, this Court is bound by the above decision. However, it cannot be said, *stricto sensu*, that this suit has been filed in a Court without jurisdiction to warrant the drastic order of striking it out with costs out as suggested by counsel for the 1<sup>st</sup> Defendant. The fact is that this Court has the jurisdiction to grant the prayer for injunction but not the prayer for taking of accounts. This suit cannot therefore be equated to a suit where all the remedies sought by the parties are not within the jurisdiction of the Court in which the suit was filed. Rather, this is a case where two Courts have concurrent jurisdiction but what I have determined to be the predominant issue is within the jurisdiction of the High Court. The interests of justice will best be served by transferring this suit to that Court. In doing so, I am persuaded by the decision of F. GIKONYO J in the case of *Dominic & 3 Others -v- County Government Of Narok & Another Peition No E002 of 2023* [2023 KEHC 17908 KLR] where at paragraph 30, the Judge rendered himself as follows:

“It should, therefore, be observed that where Courts have concurrent jurisdiction, it may be prudent to borrow from the use of Force Cases model, that, the inherent powers of the Court include that of not exercising a jurisdiction that it has in order to protect the integrity of the judicial processes, in this case ordained in *the Constitution* and defer to the jurisdiction of the Court with jurisdiction on the primary subject matter as well as the purpose of the Court subject matter in the litigation. This is not purely a matter of preferred choice but exercise of discretion depending on the circumstances of each case.” Emphasis mine.

Having taken the view that the primary or predominant issue in this case is the issue of accounts and statements, I find it prudent to transfer this case to the High Court rather than striking it out altogether. I therefore make the following orders in disposal of the 1<sup>st</sup> Defendant’s Preliminary Objection.

1. This suit be and is hereby transferred to the High Court for further directions as to hearing.
2. Mention before Musyoka J on 14<sup>th</sup> May 2025 for those directions.
3. There shall be no orders as to costs.

**BOAZ N. OLAO**

**JUDGE**

**25<sup>TH</sup> MARCH 2025**

**RULING DATED, SIGNED AND DELIVERED ON THIS 25<sup>TH</sup> DAY OF MARCH 2025 BY WAY OF ELECTRONIC MAIL ON THIS.**

**BOAZ N. OLAO**

**JUDGE**



25<sup>TH</sup> MARCH 2025

