



**Mmari (Suing as the legal representative of David Wangonya Kuria)  
v Mlyn Credit Limited & 3 others (Commercial Suit E071 of 2021)  
[2024] KEHC 16813 (KLR) (Commercial and Tax) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16813 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT E071 OF 2021  
BM MUSYOKI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**JANETH STEPHEN MMARI (SUING AS THE LEGAL REPRESENTATIVE OF  
DAVID WANGONYA KURIA) ..... PLAINTIFF**

**AND**

**MOLYN CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT  
ERIC TIMOTHY BALONGO ..... 2<sup>ND</sup> DEFENDANT  
REGENT AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit was initially filed in the Environment and Land Court as ELC suit number 544 of 2016. After going through pretrials including some applications, the same was eventually set for hearing before Honourable Justice M.D. Mwangi on 3-11-2021 on which date, the Honourable Judge found that the same was best suited in the High Court Commercial division and made an order that it be transferred to this division. After the transfer, the suit went through further pretrial motions including attempted mediation which was reported as having failed.
2. After the said motions, the matter was listed for hearing on 25-07-2024 but two days before, the 2<sup>nd</sup> defendant brought an application vide notice of motion dated 22-07-2024 seeking for the following orders;
  1. The application be certified as urgent and be heard on a priority basis.



2. The entire suit herein be struck out with costs.
3. Costs of the application be provided for.
3. The application was based on 11 grounds which can be collapsed into one which is that, the suit is a nullity for having been filed in a court which had no jurisdiction. According to the applicants, the suit was nullity ab initio and there was nothing capable of being transferred to this court as the same had been filed in a court which lacked jurisdiction.
4. As indicated above, the matter came for hearing before Justice Mwangi on 3-11-2021 who confirmed the same for hearing at 10.00 am. Later at 10.00 am, the Honourable Judge told the parties that it was of the view that the jurisdiction over the matter lied with the commercial division of the High Court. All the advocates for the parties were agreeable that the matter could be transferred to the commercial division of the High Court at Milimani. The Honourable Judge then adjourned for his directions at 2.00 pm on the same date and when he resumed at 2.35 pm, he made the following directions;

‘After a close scrutiny of the pleadings in this matter, this court makes the following observations;

1. The plaintiff’s cause of action in this matter arises from the sale of the suit property- title number Dagoretti/Thogoto/T.373 by the 1<sup>st</sup> defendant (a micro credit institution) in exercise of a chargee’s power of sale upon default by the chargor (the plaintiff). From the amended plaint, the plaintiff borrowed a sum of Kshs 2,000,000.00 from the 1<sup>st</sup> defendant and secured the loan using the suit property. Apparently, upon default (which is in contention), the 1<sup>st</sup> defendant commenced the process of sale of the suit property by public auction to recover its monies. The entire suit revolves around the legality or otherwise of the contract between the plaintiff and the 1<sup>st</sup> defendant and the process of sale.
2. Guided by the Court of Appeal decision in Cooperative Bank Limited vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR, the appropriate court to handle and determine this matter is the commercial and tax division of the High Court.
5. Accordingly, I direct that this matter be and is hereby referred to the presiding Judge of the Commercial and Tax Division of the High Court Milimani Law Courts for further directions.’
6. The next proceedings in the matter were taken before the Deputy Registrar of this court on 17-02-2022 and after several mentions before different Deputy Registrars, the file was placed before the Presiding Judge of the division, Honourable Justice A. Mabeya on 19-05-2023 when it was allocated to Honourable Justice Prof (Dr) Sifuna for hearing and disposal. All this while, the parties were represented by their advocates and none of them raised the issue of jurisdiction or nullity of the suit.
7. In my mind, the directions of Honourable Justice M.D. Mwangi above were in whatever description, an order of the court. I do agree with the submissions by the 2<sup>nd</sup> defendant that jurisdiction can only be conferred by statute and *the Constitution* and that a court cannot arrogate jurisdiction to itself even with consent of the parties. However, since the order for transfer was made by the court, one should ask whether this court is the proper forum to address that issue at this stage? There is no dispute that this court has jurisdiction and competence to hear and determine this matter. The only contention by the defendants is that the court from which the suit was transferred did not possess the requisite



jurisdiction and, in the circumstances, it did not have powers to transfer the suit to this court as there was no competent suit capable of being transferred.

8. Article 162(2)(b) of *the Constitution* provides that;

‘Parliament shall establish courts with status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.’

9. In order to operationalise the Article, Parliament enacted the *Environment and Land Court Act* Chapter 8D of the Laws of Kenya which established the Environment and Land Court. It follows therefore that the court which made the order for transfer had concurrent status with this court in the hierarchy of our courts and as such I have no jurisdiction to sit on an application which if granted will have the effect of overturning the decision of the said court.

10. Section 16 of the *Environment and Land Court Act* as read together with Article 164(3)(b) of *the Constitution* confers appellate jurisdiction from decisions of the Environment and Land Court on the Court of Appeal and not this court. The defendants should seek intervention of the Court of Appeal which they seem not to have been keen in doing for the last three years.

11. I therefore find that the 2<sup>nd</sup> defendant’s application dated 22-07-2024 is lacking in merits and an afterthought and it is hereby dismissed with costs to the plaintiff.

12. Since this matter had been reallocated to Honourable Justice Prof (Dr) Sifuna for hearing and determination and I am exiting my duty in this division, the same shall be mentioned before his Lordship on a date to be fixed after this ruling.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Wambui Ngugi for the plaintiff and

Mr. Wamiti Njagi for the 2<sup>nd</sup> defendant and in absence of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

