



**Campus Hostels Limited v Housing Finance Company Limited & another
(Civil Case 4 of 2016) [2023] KEHC 739 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 4 OF 2016
OA SEWE, J
JANUARY 30, 2023**

BETWEEN

CAMPUS HOSTELS LIMITED APPELLANT

AND

HOUSING FINANCE COMPANY LIMITED 1ST RESPONDENT

TAIFA AUCTIONEERS 2ND RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated September 13, 2022. The application was filed by the plaintiff, Campus Hostels Limited, under article 159 of the Constitution of Kenya and sections 1A, 1B, 3 and 3A of the Civil Procedure Act, chapter 21 of the Laws of Kenya for the following orders:
 - (a) Spent
 - (b) That the court be pleased to order the Registrar of Titles, Mombasa, to cancel the transfer of the parcel of land known as Mombasa/Block XVII/1585 (the suit property) made in favour of the 1st defendant herein and reinstate the plaintiff as the lawful registered owner of the property.
 - (c) That the court be pleased to order the Registrar of Titles, Mombasa, to cancel the certificate of lease issued to the 1st defendant and issue a fresh certificate of lease in favour of the plaintiff.
 - (d) That the costs of the application be provided for.
2. The application was based on the grounds that the 1st defendant unlawfully conducted a public auction on July 18, 2019 against the express orders of hon Lady Justice Chepkwony issued on July 17, 2019 for the maintenance of the status quo; and that, although the 1st defendant was not a bidder and did not place a bid at the public auction, it illegally and fraudulently assumed the position of a bidder and declared itself as the successful bidder. It thereafter transferred the suit property to itself in blatant breach of the law. The plaintiff further averred that the 1st defendant thereafter instituted a fresh suit,



being Mombasa ELC Civil Case No E073 of 2022: *HFC Limited v Campus Hostels Ltd & Another*, seeking eviction orders against the plaintiff.

3. In support of the application, the plaintiff annexed a copy of an affidavit sworn by one Naftali Mwaura who attended the public auction on July 18, 2019 as his (plaintiff's) representative as well as copies of the Transfer, certificate of lease for Mombasa/Block XVII/1585. At paragraph 11 of the supporting affidavit, the plaintiff averred that the transfer was not only illegal but also fraudulent, in so far as the 1st defendant did not obtain leave of the court to purchase the suit property in terms of the provisions of section 100 of the *Land Act*, 2012.
4. The 1st defendant opposed the application. It relied on its grounds of opposition dated September 23, 2022. The 1st defendant also filed a notice of preliminary objection dated September 23, 2022 contending that the court lacks jurisdiction to entertain the application.
5. The application was urged by way of written submissions, and on behalf of the defendant, written submissions were filed herein on September 28, 2022 by Mr Kongere, Advocate. He proposed only one issue for consideration, namely, whether the court has the jurisdiction to entertain the application. He submitted that, since what is now sought by the plaintiff is the reversal of the sale on the grounds that it was fraudulent and in violation of section 100 of the *Land Act*, the plaintiff ought to have filed a fresh suit before the ELC. He relied on *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] eKLR, *Republic v Inspector General of National Police Service & 2 Others, Ex Parte NCBA Bank Kenya PLC*, Mombasa High Court Judicial Review Application No E048 of 2021 and *Salim Hamisi Kisokoni v Dismas Makokha Mangoli & Another* [2019] eKLR to support his submission that a transfer by a charge pursuant to a sale by public auction is by itself a transfer of an interest in land; and therefore can only be challenged before the ELC pursuant to section 13(e) of the *Environment and Land Act*.
6. Mr Kongere also challenged the court's jurisdiction on the ground that the original pleadings filed herein questioned the intended exercise of the 1st defendant's statutory power of sale. He posited that, once that power was exercised, a new set of circumstances were created for which the original pleadings did not cater; and therefore that it was necessary for the plaintiff to amend its pleadings to challenge the sale. He relied on *Lukas Njuguna S Karobia v Consolidated Bank (K) Limited* [2005] eKLR in which the plaintiff had asked for a temporary injunction to restrain a transfer by the chargee to the auction purchaser without amending his plaint to challenge the auction sale complained of. It was held that the plaintiff could not be granted interlocutory orders which were at variance with the permanent orders sought in his plaint. Thus, Mr Kongere urged for the dismissal of the application dated September 13, 2022 with costs.
7. Mr Gathu, learned counsel for the plaintiff relied on his written submissions filed on November 15, 2022. He reiterated the plaintiff's stance that the 1st defendant unlawfully conducted the public auction on July 18, 2019 against the express orders of hon Lady Justice Chepkwony issued on July 17, 2019 for the maintenance of the status quo. He further faulted the 1st defendant for fraudulently assuming the position of the highest bidder at the auction that it staged as the chargee. On that account counsel urged the court to find that the subsequent transfer and lease were all tainted with fraud and illegality for having been undertaken in contravention of section 100 of the *Land Act*.
8. In response to the 1st defendant's written submissions, Mr Gathu argued that the invocation of article 165(5) of the *Constitution* by the 1st defendant is misconceived. He submitted that nowhere in that article is it provided that the court's jurisdiction to entertain an application challenging title to land is curtailed. He maintained the posturing that the dispute arises out of a commercial transaction wherein the 1st defendant as chargee in exercise of its statutory power of sale arranged for a public auction and



sold the property to itself as the highest successful bidder; and therefore that it was too late in the day for the 1st defendant to raise the issue of jurisdiction.

9. Thus, Mr Gathu concluded his submissions by positing that the averments of the plaintiff in his supporting affidavit sworn on September 14, 2022 are uncontroverted as no replying affidavit was filed by the defendants. He accordingly prayed that the application be allowed with costs.
10. In the foregoing circumstances, it is imperative for the court to consider and determine the issue of jurisdiction before attempting to determine the plaintiff's application on the merits. The rationale for this was underscored by hon Nyarangi, JA, in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR thus:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
11. And, because the issue of jurisdiction is primordial it can never be too late to raise it. Indeed, in *Kenya Ports Authority v Modern Holding [EA] Limited* [2017] eKLR, the Court of Appeal held:

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself provided that where the court raises it *suo motu* parties are to be accorded the opportunity to be heard.”
12. Consequently, the submission by Mr Gathu that it is too late in the day for the 1st defendant to raise the issue of jurisdiction is untenable.
13. In determining whether or not the court has jurisdiction to entertain the application one has to look at the cause of action and the reliefs sought vis-à-vis the relevant constitutional and statutory underpinnings. Accordingly, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme court held that:

“A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



14. Thus, the jurisdiction of the High Court is provided for under article 165(3)(a) of the Constitution which stipulates that:

Subject to clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters;

15. Article 165(5) of the Constitution on the other hand, provides that:

(5) The High Court shall not have jurisdiction in respect of matters: -

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in article 162(2).

16. In the same vein, section 13 of the Environment and Land Court Act, 2011, an Act of Parliament enacted pursuant to Article 162(2) of the Constitution, is explicit that:

(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 law applicable in Kenya 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-

a) relating to environmental planning and protection, 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 interest in land; and

e) any other dispute relating to environment and land.

17. It is plain therefore that issues to do with cancellation of title, which is what the plaintiff now seeks, are matters that fall within the jurisdiction of the Environment and Land Court. I find succour in the decision of hon Musyoka, J in Salim Hamisi Kisokoni v Dismas Makokha Mangoli & Another (supra) that:

“A lease creates an interest in land which enables the lessor to occupy and use the land of the lessee. Any disputes that arise with respect to exercise of that right are disputes that fall within section 13(e) of the Environment and Land Court Act, and, therefore, within the jurisdiction exercisable by the Environment and Land Court.”

18. Likewise, in Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another (supra) hon Munyao, J took the position, with which I entirely agree, that:

“The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC...the sale of a charged property by charge is really no different from a sale by one private individual to another...”



19. A similar approach was taken by hon Mativo, J (as he then was) in *Republic v Inspector General of National Police & 2 Others* (supra) that:

“...a transfer by a chargee pursuant to a sale by a public auction is by itself a transfer of an interest in land. So, the question is whether the dispute before me involves an interest in land. Going by the above definitions, the answer is yes.”

20. It is clear from the foregoing that, any disputes arising after a chargee has completed the process of sale and transferred the charged property to the purchaser, are disputes that fall within the jurisdiction of the Environment and Land Court. That being my view, I must immediately down my tools and refrain from considering the merits of plaintiff’s application dated September 13, 2022. The same is hereby struck out with costs for want of jurisdiction.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JANUARY 2023

OLGA SEWE

JUDGE

