



**Family Bank Limited v Western Dry Foods Limited (Miscellaneous Civil Case E069 of 2022) [2023] KEHC 22705 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22705 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
MISCELLANEOUS CIVIL CASE E069 OF 2022  
WM MUSYOKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPLICANT**

**AND**

**WESTERN DRY FOODS LIMITED ..... RESPONDENT**

**RULING**

1. What I am tasked with determining is a Motion, dated 1<sup>st</sup> December 2022, which seeks that the court grants to the applicant leave to exercise its right to purchase Bukhayo/Bugengi/2428 and 3421, under section 100 of the *Land Act*, No. 6 of 2012. Detailed grounds, on which the Motion is premised, are set out on the face of the application, and in the supporting affidavit, sworn by Sylvia Wambani, the legal officer for the applicant. She essentially avers that the secured loan was in arrears, and the applicant has been unable to secure a buyer, hence the desire by the applicant to buy the land itself, as allowed by section 100.
2. The response to the Motion is by James Kuria Wairagu, the Managing Director of the respondent. He concedes the indebtedness, and blames it on factors beyond their control, which include inordinate delays by banks to facilitate LPO financing, unnecessary increased costs in interests and penalties, and the onset of Covid-19. He raises issue with the valuations that the applicant was relying on.
3. The matter is fairly straightforward. Loan facilities were given. There was default, which the respondent blames on factors beyond its control. The applicant was unable to get a buyer for the assets offered as security, and it now wants to buy them itself, under section 100 of the *Land Act*. However, I have considerable difficulty in disposing of this matter, as straightforward as it seems. I doubt whether I have the requisite jurisdiction to deal with it.



4. Why do I say so? The power that I am being asked to exercise, under section 100 of the Land Act, is statutory. Let me start with section 100. It provides as follows:

1Purchase by chargee

- (1) Other than in the circumstances provided to in subsection (3), a chargee exercising the power of sale may, with leave of the Court, purchase the property.
- (2) A court shall not grant leave unless the chargee satisfies the court that a sale of the charged land to the chargee is the most advantageous way of selling the land so as to comply with the duty imposed on the chargee by section 97(1).
- (3) ...
- (4) ...”

5. Under section 100, the lender may be granted leave by the court to buy the security, subject to certain conditions. The court envisaged under section 100 of the Land Act, is that defined in section 2 of the same Act, the Environment and Land Court. Section 2 provides that ““Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011).” My understanding of section 100 is that the leave to a lender or chargee, to purchase the charged property, should be granted by the court defined in section 2 of the Land Act. That would be the Environment and Land Court. The High Court has nothing to do with it.

6. Section 2 of the Land Act should be read together with section 150 of the Land Act, which provides that the court with jurisdiction to grant orders with respect to the processes provided for under the Land Act is the Environment and Land Court and the enabled magistrates courts. Section 150 states:

“150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

7. Section 100 of the Land Act is located in the same statute with section 150, and it follows that the discretion to grant leave under section 100 accrues to the Environment and Land Court, and not the High Court.

8. Given the provisions under sections 2 and 150 of the Land Act, there would be no jurisdiction in the High Court to grant the orders sought in the Motion, dated 1<sup>st</sup> December 2022. Jurisdiction is granted by the Constitution and statute. Leave to purchase land is a land issue, and it is an issue around ownership and title. Under Article 162(2) of the Constitution, issues around title to land is vested in the court contemplated under that Article, which was subsequently established by Parliament, through the Environment and Land Court Act, which was enacted in 2011. Under Article 165(5) of the Constitution, it is stated in no uncertain terms that the High Court has no jurisdiction over matters that are set out in Article 162(2) of the Constitution. The Land Act was then enacted in 2012, and it vested jurisdiction in the Environment and Land Court, with respect to matters governed by the Land Act, including those set out in section 100 thereof.

9. For avoidance of doubt, Articles 162(2)(3) and 165(5) of the Constitution of Kenya state as follows:

System of courts



(2)

- (1) ...
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - (a) ...
  - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

“High Court

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) The High Court shall not have jurisdiction in respect of matters—
  - (a) ...
  - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) ...
- (7) ...”

10. The parties did not address me on jurisdiction. However, I am alive to [\*Cooperative Bank of Kenya Limited vs. Fredrick Kang’ethe Njuguna & 5 others\*](#) [2017] eKLR (Visram, Karanja & Koome, JJA), where it was stated that the jurisdiction to deal with disputes on accounting, with respect to mortgages and charges, lay with the High Court, and not the Environment and Land Court. The dispute herein does not relate to accounts or accounting, but on grant of leave, to the chargee or mortgagee, to purchase the charged or mortgaged property. Other than a dispute on accounting, all the other issues fall squarely within the jurisdiction of the Environment and Land Court, including exercise of the discretion under section 100 of the [\*Land Act\*](#), by virtue of sections 2 and 150 of the [\*Land Act\*](#), for the reasons given above.
11. I reiterate that jurisdiction is a constitutional and statutory matter, and where the same has not been vested by statute on a particular court, then that court cannot exercise it. In this case, it is very clear where jurisdiction lies. I do not have the jurisdiction to handle the matter before me, and I consequently lay down my tools with respect to it. The matter should have been filed at the Environment and Land Court. The decisions, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited* [1989] eKLR (Nyarangi, Masime & Kwach, JJA), [\*In the Matter of Interim Independent Electoral Commission\*](#) [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung’u, SCJJ) and [\*Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others\*](#) [2012]



eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ), are on point, so far as jurisdiction is concerned. It is granted by either *the Constitution* or by statute, and where it is not given or conferred, it does not exist. I am not going to exercise a jurisdiction that *the Constitution* and the *Land Act* has not conferred on or vested in the High Court, where I sit.

12. The Motion, dated 1<sup>st</sup> December 2022, is not properly before me, for the reasons given. It is for striking out, and I hereby strike it out, with costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

**Advocates**

Ms. Onsare, instructed by Maina & Onsare Partners Advocates LLP, Advocates for the applicant.

Mr. Onsongo, instructed by Obwoye Onsongo & Company, Advocates for the respondent.

