



Barnabas Makokha Indimuli t/a The Quill Company Limited v National Bank of Kenya Limited (Civil Suit 3 of 2022) [2023] KEHC 25723 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL SUIT 3 OF 2022
WM MUSYOKA, J
NOVEMBER 27, 2023**

BETWEEN

BARNABAS MAKOKHA INDIMULI T/A THE QUILL COMPANY LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. I am called upon to determine a Motion, dated 23rd May 2023. It seeks stay of sale of Bukhayo/ Bugengi/6443 and 11355; orders directing the plaintiff to repay the outstanding amounts of money in instalments; and leave to amend the plaint. The plaintiff acknowledges the debt, but alleges that the full amount applied for was not disbursed, and that Covid-19 made it impossible for him to service the loan. He blames the prevailing economic situation for the failure to service the loan.
2. The response is by the 1st defendant, through an affidavit of its manager. He avers that the plaintiff had filed another suit, at the Chief Magistrate's Court, where he had obtained orders favourable to him. He notes that the debt is acknowledged, and asserts that the 1st defendant had disbursed the amount in full. He avers that a valuation of the property had been done.
3. I have misgivings about this matter. For one, it seeks to restrain sale of a charged property. Charges are created under the [Land Registration Act](#), No. 3 of 2012, and the [Land Act](#), No. 6 of 2012. Foreclosure, in the event of default, with respect to the secured loans, is equally governed by the same statutes. Those 2 statutes have provisions, which state categorically that the "court" for their purposes is the Environment and Land Court. See section 2, in both the [Land Registration Act](#) and the [Land Act](#). Section 101 of the [Land Registration Act](#) states that any disputes, actions and proceedings relating to any of the processes under the Act, shall be handled by the Environment and Land Court. Similarly, section 150 of the [Land Act](#) states that the Environment and Land Court, and the empowered



- subordinate courts, shall handle any disputes, actions and proceedings relating to any of the processes under the said Act.
4. For avoidance of doubt, section 101 of the [Land Registration Act](#), states that “The Environment and Land Court established by the [Environment and Land Court Act](#), 2011 (No. 19 of 2011) and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.” Section 2 of the said Act defines “court,” for the purposes of the Act, to mean “... the Environment and Land Court established by the [Environment and Land Court Act](#), 2011 (No. 19 of 2011), and other courts having jurisdiction on matters relating to land.” On the other hand, section 150 of the [Land Act](#) states the jurisdiction of the court with respect to proceedings relating to matters governed by that Act, and states “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.” Section 2 of the [Land Act](#) defines “court,” for the purposes of the said Act, to mean: “... the Environment and Land Court established under the [Environment and Land Court Act](#), 2011 (No. 19 of 2011).”
 5. The [Land Registration Act](#) provides for charges under Part V of the Act, running from section 56 to section 59 of the Act. The [Land Act](#) provides for it in Part VII of the Act, running from section 78 to section 106 of the Act. None of the sections in Part V of the [Land Registration Act](#) refer to or mention “court.” However, sections 90(2)(e), 90(4)(b), 91(2), 92(7), 94(8)(c), 95(2)(a), 95(3)(a), 97(1), 97(3)(b), 98(9)(10), 100(1)(2), 103(1)(2)(3)(4), 104, 105 and 106 in Part VII of the [Land Act](#) refer to or mention “court,” and it would follow, going by section 2 of the [Land Act](#), that that reference to or mention of “court” would mean “... the Environment and Land Court established under the [Environment and Land Court Act](#), 2011 (No. 19 of 2011),” and, when read together with section 150 of the [Land Act](#), it would include the empowered subordinate courts; and any disputes, actions and proceedings, relating to matters the subject matter of these provisions, would be outside the jurisdiction of the High Court.
 6. Sections 2 and 101 of the [Land Registration Act](#) and sections 2 and 150 of the [Land Act](#) should be read together. The net effect of these provisions is that any disputes, actions and proceedings, arising out of the provisions of these 2 statutes, are to be handled exclusively by the Environment and Land Court and such subordinate courts as empowered or enabled by any written law. It would mean that reference to “court,” with respect to the provisions in the [Land Registration Act](#) and the [Land Act](#), relating to charges and mortgages, would be the courts defined in sections 2 and 101 of the [Land Registration Act](#) and sections 2 and 150 of the [Land Act](#). Given the provisions in sections 2 and 101 of the [Land Registration Act](#) and sections 2 and 150 of the [Land Act](#), there would be no jurisdiction in the High Court to entertain the suit herein and the Motion, dated 23rd May 2023. Jurisdiction is granted by [the Constitution](#) and statute, and it is not to be conferred or vested by judicial craft. As courts we are duty bound to apply the law, and the law to be applied is that handed down to the courts by Parliament.
 7. The court, in [Cooperative Bank of Kenya Limited v Fredrick Kang’ethe Njuguna & 5 others](#) [2017] eKLR (Visram, Karanja & Koome, JJA), did not define or interpret sections 2 and 101 of the [Land Registration Act](#) and sections 2 and 150 of the [Land Act](#). These provisions are plain on which courts have jurisdiction on creation of charges, and with respect to which courts should exercise jurisdiction on reliefs around the subject. The courts identified by those provisions do not include the High Court, in fact they exclude the High Court, and, therefore, the High Court has no jurisdiction with respect to those matters and processes provided for and governed by those statutes. Part of the argument, in [Cooperative Bank of Kenya Limited v Fredrick Kang’ethe Njuguna & 5 others](#) [2017] eKLR (Visram, Karanja & Koome, JJA), was that Article 165(3)(a) of [the Constitution](#) vests the High



Court with unlimited original jurisdiction over criminal and civil matters. However, that unlimited original jurisdiction is “limited” by other constitutional provisions, such as Article 162(2) and 165(5). In addition, a plethora of statutes have frittered away aspects of that jurisdiction, and dispersed it to or shared it with other courts, tribunals and entities, and some statutes carry provisions which expressly exclude jurisdiction of the courts, including the High Court. Article 165(3)(a) states a very broad general principle. In any case, the court, in *Cooperative Bank of Kenya Limited v Fredrick Kang’ethe Njuguna & 5 others* [2017] eKLR (Visram, Karanja & Koome, JJA), did not strike down sections 2 and 101 of the *Land Registration Act* and sections 2 and 150 of the *Land Act*, and declare them to be inconsistent with *the Constitution*. The fact that these provisions stand side by side with *Cooperative Bank of Kenya Limited v Fredrick Kang’ethe Njuguna & 5 others* [2017] eKLR (Visram, Karanja & Koome, JJA) creates the untidy situation, where the court says one thing, while the statute says another, with respect to which courts have jurisdiction to handle disputes, actions and proceedings arising from the provisions of the *Land Registration Act* and the *Land Act*. There is still a conflict, and, when confronted with it, I would rather go by the written letter of the statutes, on jurisdiction.

8. 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 decisions, in *Owners of the Motor Vessel “Lillian S” v 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 v 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. The point was also made that jurisdiction is not conferred by judicial craft. I am not going to exercise a jurisdiction that *the Constitution* and the relevant statutes have not expressly conferred on or vested in the High Court, where I sit, but has been conferred expressly in other courts, to the exclusion of the High Court.
9. The Motion, dated 23rd May 2023, is, therefore, not properly before me, for the reasons given.
10. The other concern is with respect to whether the plaintiff herein can maintain the suit herein, without The Quill Company Limited being a substantive party. There is only one plaintiff, Mr. Indimuli, who claims to be trading under The Quill Company Limited. However, from what I can see from the record, The Quill Company Limited is a limited liability company. It is classic company law, that a limited liability company is a separate legal entity from its shareholders. It has a separate legal existence from its own shareholders, and it has a separate legal personality from them. It can sue and be sued. It can own property. It can conduct business. See *Salomon v A. Salomon & Co Limited* (1896) UKHL 1, (1897) AC 32 (Lords Halsbury LC, Herschell & Macnaghten), *Romana Chepkemboi Yego & another v Jane Njuguna & another* [2017] eKLR (Githua, J), *Pacific Frontier Seas Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) (M’Inoti, J Mohammed & Kantai, JJA) and In *re Estates of Gitere Kabura & another* (Both Deceased) [2018] eKLR (Musyoka, J). The Quill Company Limited is not a sole proprietorship or a business name. So, the idea that the plaintiff herein is trading as The Quill Company Limited should not sit well in company law. The plaintiff and The Quill Company Limited are individuals with a separate legal existence, and none can claim to be trading as the other.
11. From what I get from the record, the loan in question was granted to The Quill Company Limited. The Quill Company Limited is the debtor, not the plaintiff. The plaintiff, as the registered proprietor of the 2 parcels of land in question, Bukhayo/Bugengi/6443 and 11355, offered the same as security, to secure the amounts advanced to The Quill Company Limited by the defendant. The person who should be



asking for time to repay the moneys in instalments should be The Quill Company Limited, and not the plaintiff. When I look at the affidavit in support, I feel that there is something fundamentally wrong with the way the whole suit and application are conceived, in terms of the relationship that should be there between the plaintiff and The Quill Company Limited.

12. I have no jurisdiction over the dispute, for the reasons given, and I am persuaded that the entire suit is not properly conceived. I am unable to grant any of the prayers sought for the reasons given above. The order that commends itself to me, to grant, is to strike out the Motion, dated 23rd May 2023, with costs. The interim orders, made on 11th July 2023, are hereby discharged. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 27TH DAY OF NOVEMBER 2023

W.M. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant

Advocates

Mr. Makokha, instructed by JP Makokha & Company, Advocates for the plaintiff.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the defendants.

