



Transnational Bank Ltd v Byegon & 2 others; Were t/a Sila Munyao & Co Advocates (Garnishee); Byegon (Interested Party) (Civil Suit 6 of 2018) [2023] KEHC 25806 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 6 OF 2018
JK SERGON, J
NOVEMBER 23, 2023**

BETWEEN

TRANSNATIONAL BANK LTD PLAINTIFF

AND

ROBERT KIPKEMOI BYEGON 1ST DEFENDANT

DIANA CHEMTAI BYEGON 2ND DEFENDANT

FAITH CHEBET 3RD DEFENDANT

AND

**KENNEDY OCHIENG WERE T/A SILA MUNYAO & CO.
ADVOCATES GARNISHEE**

AND

JOAN CHEROTICH BYEGON INTERESTED PARTY

RULING

1. The genesis of this suit is that the plaintiff filed this suit as an ELC Case No 12 of 2015 seeking to realize the security in the land parcel number Kericho/Kapsoit/620 which was charged to secure a loan. The suit was transferred to this court which is seized with the requisite jurisdiction and subsequently filed as Civil Suit No 6 of 2018 the instant matter which has been proceeding in this court since then. On 12th June, 2023 the defendants filed a further list of documents to wit a copy of the green card for land parcel number Kericho/Kapsoit/620 indicating that the title to the suit land which is the subject matter of the present suit was cancelled vide ELC Case No 13 of 2019.



2. The application coming up for this court's determination is a notice of preliminary objection filed on 12th June, 2023 on the basis that the instant suit is incompetent and fatally defective because the title to the suit land which is the subject matter of the suit was cancelled vide Environment and Land Court Case No 13 of 2019 at Kericho and therefore the substratum of the suit is extinguished.
3. This court directed the parties to file written submissions which I have duly considered.
4. The defendants filed submissions in support of the preliminary objection dated 12th June 2023. The defendants reiterated that the subject matter of the suit which is LR No number Kericho/Kapsoit/620 was cancelled vide Kericho ELC Case No 13 of 2019 and the said cancelation is tantamount to the loss of the substratum of the present suit and therefore there was no need to go to full trial given that the suit was based on a non-existent land. They cited the case of *Julius K. Atunga v Naumy Jebyegon Kemboi* (2014) eKLR whereby under similar circumstances the court held inter alia as follows; "It seems to me, given the above scenario that there is nothing to go for trial. The suit land no longer exists and since it does not exist, one cannot continue a case on non-existent land."
5. The defendants maintained that the preliminary objection satisfies the test set out in law, requiring that a preliminary objection be based on a pure point of law. The cited *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 the court held that:

“ ... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
6. The defendants were therefore seeking to have the plaint filed by the plaintiff dismissed and/or stuck out with costs to the defendants and consequential orders issued by this court on 29th August, 2018 be set aside and for a further order directing the garnishee herein to release the decretal sum to the defendants' advocates.
7. The plaintiff filed submissions in opposition to the preliminary objection and maintained that the substratum of the suit has not been extinguished. The plaintiff had advanced a loan facility to Linner Chepkoech Chumo in the sum of Kshs 4,500,000/= on the security of LR No Kericho/Kapsoit/620 by a charge which was registered on 1st July, 2011. The chargor died leaving operations and management of the estate to the defendants herein. The plaintiff contends that the outstanding sums of the loan advanced remain unpaid.
8. The 1st defendant having been issued with a grant for special purposes to manage and operate the business of the deceased failed to service the outstanding loan. Whereas the 2nd and 3rd defendant were issued with a grant of letters of administration intestate and they too made no effort to service the outstanding loan despite indicating that the loan advanced was a liability of the estate before obtaining the grant.
9. The plaintiff submitted on the findings in ELC Case No 13 of 2019 whereby one Josephat Kiprotich (suing on behalf of the estate of Kiplangat Arap Kerich) who sought judgment against the defendants herein and the plaintiff for cancellation of transfer and registration of land parcel no Kericho/Kapsoit/620 in the name of the deceased Linner Chepkoech and that the same land parcel be reversed in the name of Kipbiegon Arap Cheres pending the filing of the succession cause.
10. The matter was referred to mediation and it was agreed that the title to the suit land in the name of the deceased be cancelled and reversed to the name of Kipbiegon Arap Cheres and thereafter parties to take out letters of administration in respect of her estate. The said agreement was adopted as an order of the court.



11. The plaintiff also pointed out the fact that the defendants had raised a preliminary objection in ELC Case No 13 of 2019 that the suit was subjudice as the matter was before this court and in a ruling dated 19th October, 2023 the judge of the Environment and Land Court found that the matter was indeed sub judice and that the suit was an abuse of court process and she proceeded to dismiss the suit.
12. The plaintiff reiterated that based on the ruling of the Land and Environment Court dismissing the ELC Case No 13 of 2019 as being sub judice on account of the fact that the instant suit formerly Kericho ELC Case No 12 of 2015 is pending determination in this court, the matter could not therefore be dismissed for loss of substratum as cited by the defendants. The plaintiff cited the case of *Mrao Ltd v First American Bank of Kenya Ltd & others* (2003) eKLR in which the court was of the view that:

“... If courts are going to allow debtors to avoid paying their debts by taking some of the defences, I have seen in recent times for instance challenging contractual interest rates, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.”
13. The plaintiff was adamant that there was a loan secured on the suit property and that the defendants herein had defaulted in servicing the loan whereas the plaintiff had complied with all the requirements and followed due process in registering the charge.
14. The plaintiff reiterated that the pending succession proceedings notwithstanding the defendants having obtained grant of the estate of Linner Chepkoech Chumo and having acknowledged her indebtedness to the bank, were therefore responsible for settling the amount due.
15. The plaintiff therefore urged this court to dismiss the preliminary objection with costs.
16. I have considered the preliminary objection and the submissions by the parties and I find that the main issue for this court’s determination is whether cancellation of transfer and registration of land parcel No Kericho/Kapsoit/620 amounts to a loss of substratum of the suit. I find the answer to be in the negative. The main issue for determination in the substantive suit is that Linner Chepkoech Chumo (now deceased) secured a loan with the suit property and that she failed and/ or reneged to make repayments and upon her demise the defendants who are the personal representatives in her estate despite acknowledging her indebtedness had defaulted in servicing the loan. I therefore find that the cancellation of title which was held a collateral is not tantamount to loss of the substratum of this suit. This court is duty bound to determine the nature of indebtedness which can only be done upon the instant suit proceeding going to full trial and not through the instant preliminary objection. Consequently, I dismiss the preliminary objection with costs abiding the outcome of the suit.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 23RD DAY OF NOVEMBER, 2023.

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J.K. SERGON

JUDGE

