



Muguika & 2 others v Consolidated Bank of Kenya Limited & another (Environment and Land Appeal E011 of 2023) [2025] KEELC 1484 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1484 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E011 OF 2023
CA OCHIENG, J
MARCH 20, 2025**

BETWEEN

**KABURU MUGUIKA 1ST APPELLANT
PROSOYA KENYA LIMITED 2ND APPELLANT
LUCY KAIMURU KABURU 3RD APPELLANT**

AND

**THE CONSOLIDATED BANK OF KENYA LIMITED 1ST RESPONDENT
PHILLIPS INTERNATIONAL AUCTIONEERS 2ND RESPONDENT**

RULING

1. The Appellants commenced this Appeal vide a Memorandum of Appeal dated the 16th May 2023. The appeal arose out of the Ruling of Hon. Wendy K. Micheni (CM) delivered on 2nd July 2023 in Nairobi CMCC No. E431 of 2023 Kaburu Mugika & Others v The Consolidated Bank of Kenya and Others.
2. Subsequently, the 1st Respondent filed a Notice of Preliminary Objection dated the 1st August 2024, which is for determination, contending that the court lacks jurisdiction to hear and determine disputes relating to Charges.
3. The Notice of Preliminary Objection was canvassed by way of written submissions. However, the Appellants' despite being served neither filed a response nor submissions to the said Preliminary Objection.
4. In its submissions, the 1st Respondent outlined the background of the dispute herein. He explained that the 1st and 3rd Appellants offered their title to Land Reference Number 13324/49 (I. R No. 42640) jointly registered in their names as security over a loan of Ksh.20 million advanced to the 2nd Appellant. Subsequently, they failed to honour their loan obligations leading to accrued default arrears on the facility and culminating in its exercising its statutory power of sale.



5. However, before it could exercise its statutory power of sale, the Appellants filed a suit together with an application for injunction in Nairobi CMCC No. E431 of 2023 Kaburu Mugika and Others v The Consolidated Bank of Kenya and Others. Further, on the 21st July 2023, the court dismissed the Appellants' application for injunction culminating in their lodging this Appeal.
6. It contends that the dispute herein revolves around the enforcement of a Charge, which this court is devoid of jurisdiction to handle. It explains that this court's jurisdiction, revolves around use, occupation, or title to land pursuant to Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. To buttress its averments, it relied on the following decisions: Bank of Africa Kenya Limited & Another v TSS Investment Limited & 2 Others (Civil Appeal AE055 OF 2022) [2024] KECA 410 (KLR) and Kinuthia v Kanyi & Another (Environment & Land Case E007 OF 2023) [2024] KEELC 1625 (KLR) (20 MARCH 2024) (RULING).

Analysis and Determination

7. Upon consideration of the instant Notice of Preliminary Objection including the 1st Respondent's submissions, the only issue for determination is whether this Court has jurisdiction to deal with this Appeal.
8. In the case of Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; the Court described a Preliminary Objection as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
9. The 1st Respondent argues that this court has no jurisdiction to entertain the dispute herein as it is of a commercial nature since the fulcrum of the Appeal revolves around a Charge. The 1st Respondent submitted that the jurisdiction of this court is set out under Article 162(2) as read together with Section 13 of the ELC Act, 2011 and that the same relates to the use, occupation and title to land. The Appellants did not oppose the instant Preliminary Objection.
10. The undisputed facts in the matter are that the Appellants are contesting an intended auction of Land Reference Number 13324/49 (I. R No. 42640) wherein a Charge was registered over the said land. In the case of Cooperative Bank v Patrick Kangethe Njuguna & 5 Others [2017] eKLR the Court of Appeal observed that Charged land is not land use and held inter alia:

“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, the air above it or ground below it is adapted. To the law, therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.”



11. Further, in the case of Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR, the Court of Appeal held inter alia:’

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises.”

12. Based on the facts as presented while associating myself with the decisions cited, I find that this court is indeed devoid of jurisdiction to handle this Appeal whose fulcrum revolves around Charges. I opine that the Appellants should have instituted their Appeal in the High Court.

13. In the circumstances, I find the instant Notice of Preliminary Objection merited and will proceed to strike out this Appeal with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20th DAY OF MARCH 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Munene for 1st Respondent

Court Assistant: Joan

