



Oduory & another v Ncba Bank Kenya Ltd & another (Environment & Land Case E030 of 2024) [2025] KEELC 1355 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E030 OF 2024**

**BN OLAO, J
MARCH 20, 2025**

BETWEEN

GILBERT ANYANGO ODUORY 1ST PLAINTIFF

RESTER NAFULA ODUORY 2ND PLAINTIFF

AND

NCBA BANK KENYA LTD 1ST DEFENDANT

AUCKLAND AGENCIES AUCTIONEERS 2ND DEFENDANT

RULING

1. What calls for my determination is the Notice of Motion dated 13th November 2024 by Gilbert Anyango Oduory and Rester Nafula Oduory (the 1st and 2nd Applicants herein) anchored under the provisions of Order 40 Rule 1 and Order 53 Rule 3 of the Civil Procedure Rules in which they seek the following orders against NCBA Bank Kenya Ltd and Auckland Agencies Auctioneers (the 1st and 2nd Respondents respectively) the following orders in respect to the land parcel No Bukhayo/Mundika/11942 (the suit property):

1. Spent
2. Spent
3. An order of injunction be and is hereby issued restraining the 1st and 2nd Respondents whether by themselves, their agents, workers and/or servants from alienating, selling or in any way interfering with the land parcel Number L.R Bukhayo/Mundika/11942 pending the hearing and final disposal of this suit.
4. An order be and is hereby issued suspending further deduction and/or the Applicants' loan facility with the 1st Respondent pending hearing and determination of the suit herein.



5. An order be and is hereby issued requiring the 1st Respondent to render accounts and avail an up-dated account statement for the Applicants.
 6. That costs of this application be provided for.
2. The Motion is premised on the grounds set out therein and supported by the joint affidavit of the Applicants also dated 13th November 2024.
 3. The gravamen of the application is that the 1st Applicant is the registered owner of the suit property which he used as security to obtain a loan from the 1st Respondent. The loan facility was deposited in a joint account belonging to both Applicants and which, save for a few instances, the Applicants have been fully servicing. The Applicants were therefore shocked to learn that the suit property had been offered for sale by public auction on 29th October 2024 yet the 1st Respondent has never communicated the fact of default and the exact outstanding balances to the Applicants.
 4. The Applicants had earlier obtained an order stopping the sale vide Busia CMC ELC Case No E141 of 2024 but that suit was later struck off for want of jurisdiction because the value of the subject matter is Kshs.55,000,000 which exceeds the pecuniary jurisdiction of the Chief Magistrate's Court.
 5. The Applicants are apprehensive that since there is no order protecting the suit property from being auctioned, the Respondents may auction it without notice yet the Applicants have a good defence as the Respondents' actions are in bad faith and will occasion the Applicants untold suffering.
 6. The following documents are annexed to the Motion:
 1. The plaint herein.
 2. Court order issued on 28th October 2024 in Busia CMCC ELC Case No E141 of 2024.
 3. Copies of WhatsApp messages.
 4. Copy of Identity Card of the 1st Applicant.
 5. Copy of the Certificate of Official Search for the suit property.
 6. Statement of account between the Applicants and the 1st Respondent.
 7. Charge instrument between the Applicants and the 1st Respondent to secure the sum of Kshs.13,200,000.00.
 7. In response to the Motion, the Respondents filed a Notice of Preliminary Objection dated 9th December 2024 and a replying affidavit by Christine Wahome the 1st Respondents Senior Legal Counsel dated 6th December 2024.
 8. In the Preliminary Objection, the Respondents question the jurisdiction of this Court to entertain the suit and the Motion on the following grounds:
 - a. That the Applicants are aggrieved with the enforcement of the terms of the loan and fault the 1st Respondent for failing to communicate the nature of the default in repayment of the outstanding balances to enable them comply.
 - b. The cause of action is a question of accounts and settlement of the amounts owing from the Applicants to the Respondents on account of a contractual relationship between a banker and a lender.



- c. The jurisdiction of this Court is limited to the arrears specified under Article 162(2)(b) of *the Constitution* 2010, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act* none of which concerns the determination of questions of accounts or outstanding debts.
- d. Consequently, the dispute does not fall within any of the arrears envisioned by the provisions of Article 162(2)(b) of *the Constitution* 2010, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act*.

In the circumstances, this suit ought to be dismissed in limine with costs.

9. In the replying affidavit by Christine Wahome, it is deponed, inter alia, that the Applicants approached the 1st Respondent for an advancement of credit facility of Kshs.15,588,581 and charged the suit property as security. That the sum was disbursed but the Applicants failed, refused and/or neglected to comply with the terms of the loan by failing to pay the instalments when they fell due and so the 1st Respondent initiated the recovery proceedings by issuing the requisite statutory notices. On 29th February 2024, the 1st Respondent through it's Advocates issued a three (3) months statutory notice and upon the lapse of the said period, the 1st Respondent issued a forty (40) day statutory notice and so the allegations of non-service under the *Land Act* are untrue. The 1st Respondent therefore discharged its obligations under Section 97(2) of the *Land Act* as well as the provisions of Rule 15 of the Auctioneers Rules. Therefore, nothing should stand in the way of the 1st Respondent from recovering the balance which now stands at Kshs.19,924,000.59 while arrears are Kshs.5,700,851.22 and continues to accrue interest. The Applicants have been dishonest with the Court by stating that the 1st Respondent never communicated the default. The Motion should be dismissed with costs as it is only meant to scuttle the efforts by the 1st Respondent to exercise it's statutory power of sale.
10. I wish to point out at this stage that although Christine Wahome made reference to several annexures in her replying affidavit being annexures CW1 to CW7, none of the said annexures were annexed to the said affidavit.
11. The Applicants' response to the Preliminary Objection was to file Grounds of opposition dated 13th December 2024 raising the following issues:
 1. The predominant issue and prayer sought in the suit before this Court is for a permanent injunction against the alienation, selling or such other interference with the Applicants' occupation use of L.R No Bukhayo/Mundika/11942 and the manner in which the 1st Respondent is to exercise it's power of sale which cause of action is the preserve of the Environment and Land Court as opposed to the High Court.
 2. That this Court has jurisdiction to enforce a charge created under Section 150 of the *Land Act*, Section 101 of the *Land Registration Act* and Section 13(2)(d) of the *Environment and Land Court Act* which expressly grant this Court the requisite jurisdiction to hear and determine disputes relating to instruments granting any enforceable interest in land.
 3. That the Court with the requisite jurisdiction to handle disputes relating to instruments created under the *Land Act* and the *Land Registration Act* in the *Environment and Land Court Act* as opposed to the High Court as held by the Court in Lydia Nyambura Mbugua v Diamond Trust Bank Ltd & Another 2018 Eklr And Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Ltd & Another 2016 eKLR.



4. That the Court of Appeal in *Co-operative Bank Of Kenya v Patrick Kangethe & Others* 2017 eKLR did not expressly oust the jurisdiction of the Environment and Land Court to handle a dispute based on a charge as held in *Bank Of Kenya Ltd v John Ndungu Gachara* 2022 eKLR.
5. That Article 165(5) of *the Constitution* expressly ousts the jurisdiction of the High Court to hear and determine any matter which falls under Article 162(2) of *the Constitution* such as the one before this Honourable Court.
6. That the predominant issue before this Court is therefore the manner in which the 1st Respondent is to exercise its statutory power of sale arising from a registered interest in land which cause of action is the preserve of the Environment and Land Court as opposed to the High Court.

When the Motion was placed before me on 14th November 2024, I did not certify it as urgent nor issue any *ex parte* orders. I directed that it be canvassed by way of written submissions. The same have been filed both by MR OBIMBA instructed by the firm of B. M. Ouma & Company Advocates for the Applicants and by Mr Nyanchwa instructed by the firm of Mwaniki Gachoka & Company Advocates for the Respondents.

12. I have considered the Motion, the rival affidavits and annexures, the Preliminary Objection and the submissions by counsel.
13. The Preliminary Objection by the Respondents questions the jurisdiction of this Court to determine this dispute. Since the jurisdiction of this Court has been questioned, that is a proper Preliminary Objection as defined in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* 1969 E.A 696 where Sir Charles Newbold P defined it thus:

“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.”

And as was held in *Owners Of The Motor Vessel “lilian S” v Caltex Oil (Kenya) Limited* 1989 KLR 1:

“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.”

I must therefore interrogate whether indeed I have the jurisdiction to determine this dispute or whether I should down my tools. While the Applicants believe that this Court has the requisite jurisdiction to determine this dispute, the Respondents think otherwise. The Respondents’ case is that the jurisdiction of this Court is set out in Section 13 of the *Environment and Land Court Act*, Section 150 of the *Land Act* and Article 162(2) (b) of *the Constitution* and does not include determining questions of accounts or outstanding debts. On the other hand, the Applicants in paragraphs 2, 3 and 5 of their grounds of opposition filed in response to the Preliminary Objection take the view that this Court has the jurisdiction to enforce a charge created under the *Land Act*, to handle disputes relating to instruments created under the said Act and that the issue before this Court arises out of the 1st Respondents’ exercise of its statutory power of sale arising out of a registered interest in land.

14. The substantive remedies sought by the Applicants in their plaint are:



- a. “A permanent injunction restraining the 1st and 2nd Defendants/Respondents whether by themselves, their agents, workers and or servants from alienating, selling or in any way interfering with the land parcel numbers L.R No. Bukhayo/Mundika/11942”.
- b. “An order requesting the 1st defendant to render accounts and avail an updated account statement for the plaintiff.”

A careful examination of the parties pleadings show that although the Applicants also seek an order of permanent injunction restraining the Respondents from selling, alienating or in any way interfering with the suit property, the predominant issues that call for my determination herein are for the 1st Respondent “to render accounts and avail an updated account statement for the plaintiff” as pleaded in paragraph 15 (b) of the plaint. It is not in doubt that the parties agree that the Applicants obtained credit facilities from the 1st Respondent which was secured using the suit property as security. That the suit property is registered in the name of the 1st Applicant is not in dispute. That is not an issue for determination by this Court. What will be in issue is whether the 1st Respondent should be directed to render proper accounts of the credit facility to the Applicants. That is not a matter for the determination by this Court whose jurisdiction is circumscribed by Section 13(2) of the *Environment and Land Court Act* which reads:

13 (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 interests in land; and
- e. any other dispute relating to environment and land.”

In an attempt to persuade this Court to find that it has jurisdiction in this matter, counsel for the Applicants cited the decision of Sila Munyao J In The Case Of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & Another 2018 eKLR and proceeded to submit that it is this Court which has the requisite jurisdiction. I have looked at the judgment of my brother in the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya (supra) and at paragraph 2 therefore the plaintiff sought judgment as follows:

- a. “A declaration that the purported sale of Njoro Ngata Block 1/478 by the 1st defendant to the 2nd defendant is and was for all purposes and intent inequitable, illegal, irregular and wrongful and null and void and as a result, the Court cancels the entire sale of 28 March 2002.”
- b. “A permanent injunction restraining the 2nd defendant by himself, his agents and servants from claiming any ownership on Njoro Ngata Block 1/478 and from evicting the plaintiff from the said parcel of land.”

The defendant had also filed a counter-claim seeking vacant possession of the land. An issue of the Court’s jurisdiction was raised but dismissed.



15. The Court of Appeal in the case of Co-operative Bank Of Kenya Ltd v Patrick Kangethe Njuguna & Others C.A. Civil Appeal No 83 of 2016 [2017 eKLR] had the following to say in a dispute involving the taking of accounts at paragraph 38:

“Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge but a question of accounts.” Emphasis mine.

The Court went on to add at paragraph 40 that:

“To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purpose of this suit, the instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.” Emphasis mine.

The above decision was approved by the same Court, differently constituted, in the case Joel Kyatha Mbaluka T/a Mbaluka Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates C.a. Civil Appeal No 250 of 2017 [2019 eKLR]. The judges therein rendered themselves as follows at paragraph 12:

“We reiterate the position taken in Co-operative Bank Of Kenya Ltd v Patrick Kangethe Njuguna (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to land.” Emphasis mine.

It must be clear by now that the circumstances in this case are distinguishable from the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya (supra). Further, superior Courts have held that a dispute over accounts is not within the realm of this Court’s jurisdiction.

16. Having said so, it is obvious that while this Court has the jurisdiction to grant the relief of a permanent injunction restraining the Respondent from interfering with the suit property, the precedent cited above disclose that the issue of rendering up-dated account statements or suspending deduction or accrual of interest is the purview of the High Court. So this is a case where both this Court and the High Court have concurrent jurisdiction. The way I look at this matter is that if this court were to hear the dispute and grant the Applicants the order of permanent injunction which is prayer (a) of the plaint, there will still be the issue of accounts in prayer (b) still pending and which, as I have already stated above, is the predominant issue in my view. On the other hand, if the High Court determines that predominant issue of accounts, it is more likely than not, that the claim for permanent injunction may fall by the way side or, better still, be compromised because it is essentially founded on the dispute over accounts. In the circumstances, I am not persuaded to dismiss this suit and application for lack of jurisdiction as sought in the Preliminary Objection. That would be drastic given the fact that while I have jurisdiction to determine one limb of the Applicants’ claim, I have no jurisdiction to determine the second limb. It would, in the interest of justice, be more preferable to transfer the suit to the High Court. This is because this is not a situation where it can be said that this suit was filed in a Court without jurisdiction at all. Rather, this is a case where two Courts have concurrent jurisdiction but the



predominant dispute is with the High Court. In doing so, I am persuaded by the ruling of Justice F. Gikonyoin in the case of Dominic *Et 3 Others v County Government Of Narok Et Another Constitutional Petition No E002 Of 2023* [2023 KEHC 17908 KLR] where at paragraph 30 the judge rendered himself in the following terms:

“It should, therefore, be observed that where Courts have concurrent jurisdiction, it may be prudent to borrow from the use of Force Cases model, that, the inherent powers of the Court include that of not exercising a jurisdiction that it has in order to protect the integrity of the judicial processes, in this case ordained in *the Constitution* and defer to the jurisdiction of the Court with jurisdiction on the primary subject matter as well as the purpose of the Court subject matter in the litigation. This is not purely a matter of preferred choice but exercise of discretion depending on the circumstances of each case.” Emphasis mine.

The core subject in this matter, as I have already found, is the issue of accounts.

17. Having said so, and with regard to prayer No3 of the Motion which was the subject of this ruling, it is clear from paragraph 7 of the Applicants’ supporting affidavit that the suit property was infact offered for sale by public auction on 29th October 2024. That is why this Court on 14th November 2024 declined to grant the ex-parte order of temporary injunction pending hearing of the Motion inter-parte. It follows that even if this Court was minded to grant prayer No 3 of the Motion, it was already spent by the time the Motion was being placed before me on 14th November 2024. It is not therefore available for consideration.
18. The upshot of all the above is that having considered the Preliminary Objection dated 9th December 2024, this Court hereby issues the following directions:
 1. This suit be and is hereby transferred to the High Court for mention before Hon. Musyoka J on 14th May 2025 for further direction as to hearing.
 2. I make no orders as to costs.

BOAZ N. OLAO

JUDGE

20TH MARCH 2025

Ruling dated, signed and delivered on this on this 20th day of March 2025 by way of electronic mail with notice to the parties.

BOAZ N. OLAO

JUDGE

20TH MARCH 2025

Explanatory Note:

This ruling was due for delivery on 13th March 2025 but I was away in Nairobi at the Supreme Court for official engagement on 14th March 2025. The delay is regretted.

BOAZ N. OLAO

JUDGE

20TH MARCH 2025

