



REPUBLIC OF KENYA



KENYA LAW
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**Mugeu v Smep Microfinance Bank & 2 others (Environment & Land
Case E004 of 2022) [2023] KEELC 19036 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19036 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E004 OF 2022**

**CK YANO, J
JULY 26, 2023**

BETWEEN

DAVID MUGEU APPELLANT

AND

SMEP MICROFINANCE BANK 1ST RESPONDENT

VIEWLINE AUCTIONEERS 2ND RESPONDENT

JOHN GITHINJI MBUI 3RD RESPONDENT

RULING

1. By a notice of motion application dated November 9, 2022 brought under order 51 order 40 rule 1 of the *Civil Procedure Rules*, article 159 of *the Constitution* of Kenya and all other enabling provisions of the law, the plaintiff/applicant seeks for orders-;
 1. That the application be heard ex-parte in the first instance and be certified urgent, whence service be dispensed with as against the defendants/respondents.
 2. That pending interpartes hearing of the application the court issues an interim orders of injunction restraining the respondents whether by themselves, agents, workers, auctioneers from advertising selling for money recovery on that parcel Title No. Kathwana/845 measuring 14.17 Ha pending the hearing and determination of the application interpartes or till further orders of this court.
 3. That pending the hearing and determination of the main suit in the attached plaint dated 9th November, 2022 an order for temporary injunction be issued, restraining the 1st and 2nd respondents, its agents, auctioneers, from advertising, selling by way of public auction or private treaty title No. Kathwana/845.



4. That the Honourable court be pleased to give order for the 1st respondent to issue bank statements of any account held by the 3rd respondent at first instance pending hearing of the application inter-parte.
5. That costs of this application be provided for.
2. The application is supported by the affidavit of David G. Mageu, the applicant herein sworn on November 9, 2022 and is premised on the following grounds-;
 - i. That the land title Kathwana /845 initially belonged to the applicant's father, Peter Mageu Mwindu but he later followed on the adjudication process and got the title registered in his name.
 - ii. That the 3rd respondent and the applicant used to be friends and in the year 2018 he approached the applicant and told him that he had a business idea and that he had approached SMEP Microfinance Bank for a loan of Kshs. 2,100,000/=.
 - iii. That the loan offer provided that the loan was to be guaranteed by 2 titles. One title Kathwana/845 belonging to the applicant and title Inoi/thaita/1763 belonging to the 3rd respondent.
 - iv. That after conducting a search to title LR. Inoi/thaita/1763 belonging to the 3rd respondent, the applicant realized that the 1st respondent never charged the 3rd respondent's title as agreed as per the loan offer.
 - v. That the 1st respondent has now threatened to dispose of title No. Kathwana/845 only hence treating the applicant as the principal debtor.
 - vi. That if the court does not grant the orders herein sought then the applicant stands to lose suit land Kathwana/845.
 - vii. That the 1st & 2nd respondents have threatened to dispose the applicant's title without doing a proper forced valuation yet his title is valued at around Kshs. 70,000,000/=.
3. The 3rd respondent filed a replying affidavit dated January 26, 2023 in which he admitted being issued a credit facility from the 1st respondent and states that he is enthusiastic in paying the said loan to finality, but complains about the interest rates charged.
4. The 1st respondent also filed a replying affidavit sworn by Ruth Njuguna on March 24, 2023 wherein it is deposed inter alia, that the 1st respondent's statutory power of sale over the suit land has lawfully arisen.
5. The court directed that the application be canvassed by way of written submissions which were duly filed by the applicant and the 1st and 3rd respondents.
6. I have considered the application, the responses and the submissions filed as well as the authorities cited. The issues I find for determination are whether this court has jurisdiction over the matter and whether the orders sought should be granted or not.
7. In the case of *Owners of Motor Vessel "Lilians" Vs Caltex Oil (Kenya) Limited* (1989) KLR 1 Nyarangi, JA expressed himself as follows:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.



Jurisdiction must be acquired before judgment is given...

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. 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”

8. Article 162(2) (b) of *the Constitution* states that this court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. Further, section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this court as follows-;

“13(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of *the constitution* and with the provisions of this Act or any other law applicable in Kenya relating to Environment and Land.

(2) In exercising 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.”

9. I have perused the pleadings in this case. In the plaint dated November 9, 2022, the plaintiff prays for judgment against the defendants herein jointly and severally for-;

- a. Permanent injunction against the defendants jointly and severally against the sale, proclamation or in any way dealing with land title Kathwana/845.
- b. General damages for fraud and deceit perpetuated upon the plaintiff to be assessed by the court.
- c. An order declaring the loan approval void ab initio on account of misrepresentation and deceit by the defendant.
- d. An order declaring that charge created over Title Kathwana/845 illegal.
- e. An order declaring that all the statutory notices were never served upon the plaintiff as a guarantor.
- f. Costs of the suit at court’s rate.

10. From a careful examination of the pleadings, the suit herein relates to monies due pursuant to a charge registered over the property known as title No. Kathwana/845. In the case of *Co-operative Bank Of Kenya Limited Vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, the Court of Appeal determined the jurisdiction of this court to deal with disputes connected to “use” of land and held that it did not include mortgages, charges, collection of dues and rents, and held that those disputes



are within the jurisdiction of the High Court. The Court of Appeal further held that exclusive jurisdiction of this court (ELC), is limited to article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* which are not concerned with accounting questions.

11. In view of the above decision which is binding on this court, this court has no jurisdiction over this matter, and I down my tools. I find that this matter falls within the jurisdiction of the High Court. In the result, the order which commends itself to this court and which I hereby make is that this matter be heard and determined by the High court and the Deputy Registrar of this court is directed to facilitate the same.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 26TH DAY OF JULY 2023

IN THE PRESENCE OF:

Court Assistant – Martha

Ms. Kijaru for 3rd Respondent

Ms. Masamba for 1st Respondent

Applicant present in person

N/A for 2nd Respondent

C.K YANO

JUDGE

