



REPUBLIC OF KENYA



**KENYA LAW**  
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**Isaka v Equity Bank Limited & another (Environment and Land Appeal  
E009 of 2022) [2023] KEELC 20687 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E009 OF 2022  
MN KULLOW, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**NYANOKWI NYANCHAMA ISAKA ..... APPELLANT**

**AND**

**EQUITY BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NYALUONYO AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appellant/ Applicant herein filed a Notice of Motion dated 27<sup>th</sup> January, 2023, seeking the following orders: -
  - i. Spent
  - ii. There be a Temporary Injunction barring the Respondents from selling or auctioning and maintenance of status quo on L.R. No. Bugembe/Mabera/1183 pending the hearing and determination of this Application inter partes.
  - iii. There be a temporary injunction barring the Respondents from selling or auctioning and maintenance of status quo on L.R. No. Bugembe/Mabera/1183 pending the hearing and determination of the Appeal herein lodged.
  - iv. Costs of this Application be in the cause.
2. The Application is premised on 11 grounds thereon and on the Applicant's Supporting Affidavit sworn on even date. The Applicant stated that he filed a suit in the trial court, which was heard and determined vide a judgment issued on 01.03.2022. Aggrieved by the said judgment, he lodged the instant Appeal and the Application, seeking to stop the Respondents from unlawfully auctioning the suit land, which she currently occupies and has built her home thereon.



3. It is her contention that she stands to suffer substantial loss and injury if execution of the trial court judgment proceeds. It is her claim that she has occupied the suit land for a very long time and therefore the intended eviction by the Respondents will cause her great prejudice.
4. The Applicant is apprehensive that unless the court protects her and issues the orders sought herein, the Respondents shall move to sell the land. She further stated that she is willing to comply with any terms or conditions as may be directed by the court if the Application is allowed and thus urged the court to allow the same as sought.
5. The Application was opposed, the Respondents filed their Grounds of Opposition dated 28<sup>th</sup> February, 2023. They dismissed the Application as being frivolous, vexatious, bad in law, incurably defective and amounts to an abuse of the court process. It was their contention that the prayers sought by the Appellant/ Applicant have no basis in law and thus urged the court to dismiss the same with costs.
6. The Application was canvassed by way of written submissions. Both Parties filed their rival submissions together with authorities, which I have read and taken into consideration.

### **Analysis And Determination**

7. I am of the considered view that the issues arising for determination are as follows: -
  - i. Whether this court is vested with the requisite jurisdiction to entertain the instant Appeal.
  - ii. Whether the Applicant is entitled to the reliefs sought in the Application pending the hearing and determination of the Appeal.

#### **I. Whether this Court is Vested With the Requisite Jurisdiction to Entertain the Instant Appeal**

8. 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 is thus mandated to down its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction.
9. When faced with a controversy whether a particular case is a dispute about land which should be entertained by the ELC or not, Courts are called upon to apply the Pre-Dominant Purpose Test, by critically looking at the subject matter of the suit and whether the same falls within the jurisdiction of the ELC, that is, what is the predominant issue arising in the cause of action. See *Suzanne Achieng Butler & 4 Others vs Redbill Heights Investments Limited & Another* (2016) ECLR.
10. The Parties herein did not raise the issue of jurisdiction either at the trial court or at the Appellate stage. This court is however cognizant of the fundamental nature of jurisdiction and the fact that a court can raise the same suo moto. The Court of Appeal in *Kenya Ports Authority vs Modern Holding [EA] Limited* [2017] eKLR stated as follows: -
 

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself....” (emphasis mine)
11. A court’s jurisdiction flows from either, *the Constitution* or legislation or both and the Court cannot arrogate to itself jurisdiction where none exists or in excess of that which is conferred upon it by law.



(See *Samuel Kamau Macharia & Another V. Kenya Commercial Bank Limited & 2 others*, S.C. Civil Application No. 2 of 2011.)

12. The jurisdiction of this Court flows from Article 162 (2) and (3) of *the Constitution*, Section 150 of the *Land Act* and Section 13 of the *ELC Act*. Article 162 (2) & (3) of *the Constitution* provides that the ELC shall be established to hear and determine disputes relating to the environment, use and occupation of and title to land. Section 150 of the *Land Act* on the other hand also provides that; the ELC shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.
13. Section 13(2) of the *ELC Act* on the jurisdiction of the court provides as follows: -
  - “(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.
14. The dominant issues at the centre of the Appeal herein is on the validity of the spousal consent required before the registration of the Charge instrument in favour of the 1<sup>st</sup> Respondent against the title of the suit parcel and whether the Appellant is actually the one who executed the said spousal consent; approving the registration of the Charge Instrument against the title of the suit land.
15. The Appellant contends that she did not sign the spousal consent contained in the 1<sup>st</sup> Respondent’s documents as legally provided and thus the intended sale of the suit land; where she has her matrimonial property would be illegal.
16. The Respondents on the other hand maintained that the said spousal consent was signed by the Appellant in person, when she appeared before their advocate preparing the charge instrument. The said process was explained to her and she thereafter duly signed the said document. It is further their claim that the suit land was used to secure a loan facility and his deceased husband, who was the guarantor to the borrower of the said loan one Thomas; voluntarily gave his title to be used as security. They thus contend that the intended public auction is in exercise of its statutory power of sale to recover the loan arrears that had been advanced to the borrower.
17. This court will not delve into the merits of the rival claims by the parties herein or on the merits of the trial court judgment at this interlocutory stage but only seeks to determine whether the Appellant’s claim as explained above, falls within the contemplated jurisdiction of the ELC as outlined above or whether the same is a commercial dispute which can adequately be determined by the High Court.
18. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR in discussing whether a dispute relating to the creating of a charge against the title of a



land parcel and the processes thereto fell within the jurisdiction of the High Court or the ELC held as follows: -

- “ 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, 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.
36. By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/ disposition over the property.
38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails....”

This decision was upheld by the Court of Appeal in the case of *TSS Investments Limited & another v NIC Bank Limited* [2019] eKLR

19. Guided by the decision in the Kangethe Case; I find that the dominant issue in the Appeal is on the legality of the spousal consent and Charge Instrument generally and consequently whether based on the said Charge Instrument, the 1<sup>st</sup> Respondent acquired rights to enable it exercise its statutory power of sale in respect to the suit land.
20. In essence, it is the Appellant’s case that the intended sale of the suit parcel is illegal, for the reason that she did not sign the spousal consent and the same should not be allowed to proceed. This in my view is purely a commercial issue/dispute and this court is therefore not vested with the requisite jurisdiction



to determine the same. Further, it is only the High Court that can adequately determine the rights accruing from the said charge instrument and the extent of the Appellant's liability as a guarantor of the loan facility advanced.

21. Having held that this court does not have requisite jurisdiction to determine the issues raised herein, it is common ground that I cannot make any further step and this court is required to down its tools.

**Conclusion**

22. The upshot of the above is that the Memorandum of Appeal dated 28<sup>th</sup> March, 2022 and the Notice of Motion Application dated 27.01.2023 are hereby Struck Out with no orders as to costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**MOHAMMED KULLOW**

**JUDGE**

