



**Otieno v Kenya Commercial Bank Ltd (Environment & Land Case
33 of 2020) [2023] KEELC 19975 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 33 OF 2020
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

JOACQUEM OGINDO OTIENO PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD DEFENDANT

JUDGMENT

1. The orders sought by the plaintiff in the plaint dated August 25, 2021 are as follows:
 - a. A declaration that the suit property was sold below market value;
 - b. A declaration that the defendant's actions are illegal, arbitrary, and flagrant breach of the statutory duties under section 90 and 97 of the Land Act No 6 of 2012;
 - c. An order directing the defendant to carry out and deliver proper books of account to the plaintiff on respect of the loan account;
 - d. An order of compensation based on the true market value of the suit property;
 - e. General damages for illegal and unprocedural sale of the plaintiff's property;
 - f. Costs of the suit together with interest thereon at such rate and for such a period as this court may deem fit to grant;
 - g. Any other relief.
2. The plaintiff's claim is that he took out a 10-year mortgage of Kshs 23,000,000/= with the defendant on or about 31/8/2016 to finance the purchase of a residential house on Nakuru Municipality Block 12/66. The loan was secured by that same title. However due to the advent of the covid 19 pandemic the plaintiff failed to repay the loan as scheduled, but the defendant continued to charge him interest which the plaintiff claims was unjustifiable, inflated, exaggerated, illegal and unconscionable and he



was as a result allegedly unable to repay the loan, leading to the auction of the suit property in exercise of the defendant's statutory power of sale.

3. The plaintiff claims that the process of the exercise of the power of sale was illegal and irregular in that he had never received any notices from the defendant as required by Section 90 of the [Land Act 2012](#) and he was thus not accorded the opportunity to exercise his right of redemption. He stated that he had serviced more than Kshs 15,000,000/= of the debt and that the amount owing on the notification of sale was thus incorrect. The plaintiff alleges that the property was resurveyed and found to be larger than the acreage on the title. The defendant is also alleged to have failed to conduct a valuation before exercising its right of sale as required by Section 97 of the [Land Act 2012](#) and thus disposing of the suit land at a gross undervalue of Kshs 18,000,000/= way below its proper market value of Kshs 26,500,000/= as assessed by a government valuer hence the prayers sought.
4. The defendant's statement of defence admitted the loan issued to the plaintiff and the repayment plan and denied the claim that the covid pandemic prevented the scheduled repayment or that it charged unjustifiable, inflated, exaggerated illegal and unconscionable interest rates as alleged. It also claimed that the auctioneers served the plaintiff with a demand, a statutory notice, a 40-day statutory notice, a redemption notice and a notification of sale in accordance with the law. It also claimed that a valuation of the suit property was done, which arrived at Kshs 24,000,000/= as current open market value and Kshs 18,000,000/= as forced market value respectively. It denied the claim by the plaintiff that the land was larger on the ground than indicated on title; it also denied that the proper market value of the suit land was Kshs 41,500,000/= and asserted that the plaintiff was not entitled to any form of compensation as its actions were legal and justified.

Evidence of the parties

5. The plaintiff gave evidence and adopted his written witness statement which reiterates the matters in the plaint. He also called PW2, a land surveyor and PW3, an actuarial expert. The sum total of the plaintiff's evidence is that he took out a mortgage as per the offer letter issued by the defendant; that the plaintiff never conducted any valuation at the time of charging of the suit property but the bank did so; that the resurvey of the suit property was done after the sale by the defendant; that he received a notification of sale from the auctioneers; that he was absent at the sale; that he was in communication with the defendant even after he received the notification of sale and he even proposed a restructuring of the loan repayment. The plaintiff stated that the price the property was sold at is low. That the resurvey by PW2 found that the land measured 0.2303 ha rather than the 0.0928 ha indicated on the title; that according to PW3's analysis based on the letter of offer, charge, bank account statement and Central Bank of Kenya interest rates applicable as per Section 33 B of the [Banking Amendment Act 2016](#), he came to a conclusion contained in his report produced in evidence that the defendant overcharged the plaintiff on interest by Kshs 4,178,446.06. PW3 stated that the plaintiff had paid Kshs 27,188,622.20 to the defendant.
6. The defendant called only one witness, Anthony Collins Aolo who adopted his witness statement filed in the suit and produced the defendant's documentary evidence. According to DW1 the defendant followed due process in disposing of the suit property. Though he admitted that an advertisement is necessary prior to sale he produced no such advertisement for the suit property. He stated that the suit property was sold for Kshs 18,000,000/= and that such sale proceeds are supposed to be deposited into the customer's loan account; he stated that the purchaser deposited the proceeds into the plaintiff's account in 3 tranches; he could not verify how much was paid to the defendant by the plaintiff. However, when given time by the court he stated that he had ascertained that the plaintiff had paid the sum of Kshs 9,078,622.20 to the defendant by the time of the auction of the suit property. He added



that the sum of Kshs 9,034,469.70 is still due from the plaintiff. He disclosed that the disbursement was done in the year 2017 and the loan was initially for 10 years, then for 15 years upon restructuring. He stated that interest was applied only up to the time of the sale of the property. On re-examination DW1 stated that disposal can also be by way of private treaty by the owner (chargor) and that the plaintiff was accorded several chances to sell. He stated that upon recovery, interest is recovered first, then the principal then the penalties come last. He stated that the defendant had never been informed of any change in acreage.

Submissions of the parties

7. The plaintiff and the defendant filed submissions of which I have had regard in preparing the present decision.

Issues for determination

8. In the submissions of the defendant the issue as to whether this court has jurisdiction to determine the matter was raised though it had not been raised in the defence or by way of a preliminary objection. Ordinarily an objection to jurisdiction ought to be raised at the earliest stage in the proceedings. However, a preliminary objection can be raised at any stage in the proceedings as long as the suit has not been determined, and now that it has been raised this court must deal with it as is capable of disposing of the entire suit. That accords well with the holding of the court in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where Nyarangi JA stated as follows:

“...a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

9. It would appear that a more recent position is that the issue of jurisdiction may be raised even where the suit has already been heard and determined. In the case of *Phoenix of EA Assurance Ltd v SM Thiga T/A Newspaper Service* [2019] eKLR (CA) where the court held as follows:

“17. Ms. Wambua informed the Court that the substantive suit proceeded to hearing before the High Court (Sewe J) and judgment had already been entered in favour of the respondent on 2nd September, 2016. That decision is the subject of Civil Appeal No6 of 2018 Phoenix East Africa Assurance Co Ltd v Sm Thiga T/a Newspaper Services currently pending determination before this Court. It is opportune for us to say that the outcome of this appeal will determine the fate of Civil Appeal No 6 of 2018. If we find that the suit was filed before a court bereft of jurisdiction, the principle encapsulated in the time honoured locus classicus case of *Macfoy v United Africa Co Ltd* [1961] 3 All ER, 1169, comes into play and Appeal No 6 of 2018 would therefore fall by the wayside. In that case it was held thus: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably



bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

10. In the *Phoenix case* (supra) the Court of Appeal observed that the decisions on the issue of jurisdiction are legion and in particular quoted the case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* (2013) eKLR where it was held as follows:

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

11. The defendant’s argument is that this suit revolves around the issue of charges and mortgages and accounting, and the defendant’s right to exercise its statutory power of sale and that the proper forum for such a matter is the High Court. The defendant cites the case of *Cooperative Bank of Kenya v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR. Citing the case of *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR the defendant avers that the suit can not be transferred to the High Court. The plaintiff never responded to the issue of jurisdiction.
12. The issue of whether or not the court is possessed of jurisdiction may be determined by looking at the issues arising from the suit and making findings as to whether they fall within the mandate of the Court as provided for in Article 162(2)(b) of *the Constitution* and Section 13 of the *ELC Act*. These are: whether a declaration ought to issue to the effect that the suit property was sold below market value; whether a declaration should issue that the defendant’s actions are illegal, arbitrary, and flagrant breach of the statutory duties under Section 90 and 97 of the *Land Act* No 6 of 2012; whether the plaintiff ought to be compensated based on the true market value of the suit property and finally whether the plaintiff is entitled to general damages for illegal and unprocedural sale of his property.
13. Under Article 162(2) (b) of *the Constitution*, this court is mandated to determine only matters relating to the environment and use and occupation of, and title to, land. This certainly is a matter not concerning the environment.
14. The question as to whether the title was disposed of below market value and whether the plaintiff ought to be compensated for such disposal are not so clear cut and this court must investigate as to which side of the borderline between land cases and non-land cases envisioned by Article 162 (2) (b) of *the constitution* they ought to fall. Section 13 of the *Environment and Land Court Act* fleshes out the scope of jurisdiction of this court as follows:

“ 13. Jurisdiction of the Court

- (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 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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No 12 of 2012, Sch.
- (6) Deleted by Act No 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.”

15. A sale of land normally involves contractual as well as title issues in so far as first, there is a contract, and secondly, the rights and interests of the registered proprietor are transferred by that transaction from one person to another. It is deemed to fall under Section 13(2) (d) of the *ELC Act* in so far as sale of real property affects the previous registered owner’s rights to occupy and use land; it makes him subject to the power of the new proprietor who holds the proprietary rights upon transfer. The protection



accorded by the provisions of the law in Section 25 of the Land Registration Act cease applying to the seller; that protection is shifted to the buyer. Section 25 states as follows:

“25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

16. In the instant case a disposal occurred, albeit under a statutory power of sale. The issues that the plaintiff raises are not those of whether he should be granted back possession of the suit land to occupy or the title should be reinstated back to his name, but rather whether he is entitled to a declaration that the suit property was sold below market value and whether he is entitled to compensation based on the true market value of the suit property and to general damages for illegal and unprocedural sale of the property. This is a matter in which issues arise as to whether the proper interest rates were applied by the defendant, whether the plaintiff overpaid on his account, whether there was valuation before exercise of power of sale and whether there was a disposal at a gross undervalue of the suit property at the sale.
17. In the case of Cooperative Bank of Kenya case (*supra*) the respondents who had defaulted in servicing their charge facility had in their claim in the High Court felt that the appellant’s exercise of statutory power of sale was being improperly exercised, that the sum demanded by the appellant was inflated and in excess of what was owed and that the exercise of statutory power of sale was premature having commenced prior to the issuance of the requisite prior statutory notices. In the Cooperative Bank of Kenya case (*supra*) the issue of jurisdiction, unlike in the present case, was raised early during the proceedings in the High Court. Arguments over jurisdiction were pursued by the parties respectively on appeal, it being argued for the appellant that the High Court lacked jurisdiction in view of Article 162 (2) (b) and Section 13 of the ELC Act granting ELC jurisdiction over matters relating to environment use and occupation of and title to land, the allure of the appellant’s argument in favour of jurisdiction of the ELC rather than the High Court lay in the proposition that Section 13 of the ELC Act gave the ELC jurisdiction to hear disputes over instruments granting enforceable interests in land, and a charge, being a contract between parties as recognized by Section 13(2) (d), is enforceable. On the other hand, the respondents argued that the issues raised by their case before the High Court were matters of accounting and the legality of the exercise of the statutory power of sale, and that none of these issues related to the use of land and the High Court thus had jurisdiction under Article 162(2) (a).



18. The High Court had ruled that it had jurisdiction on the ground that the matter before it was of commercial nature and not relating to land. On its part, the Court of Appeal held that the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land and that those contracts ought to be incidental to the 'use' of land; It found that those contracts do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. It further found that the exclusive jurisdiction of the ELC under Article 162 and Section 13 of the ELC Act and Section 150 of the Land Act is not concerned with the determination of accounting questions. The Court of Appeal held that the appellant's objection on jurisdiction was rightly dismissed by the High Court.
19. I find no distinction between the present suit and the Cooperative Bank of Kenya Ltd dispute (supra) in so far as the claim of excessive levying of interest and charges and another claim that the exercise of the power of sale was illegal and irregular feature in both matters. The only 4 distinguishing features in the present case are as follows: first, that there has been no live application for injunction in the present matter; secondly, that the statutory power of sale has already been exercised and the suit property has been disposed of; thirdly, that no retransfer of the title is sought and fourthly, that a resurvey of the land after the sale disclosed the fact that the land measurements on the title are at variance with those on the ground.
20. It is noteworthy that the claim that the land was bigger in size than was indicated in title may, only if well-grounded, have an effect of persuading the court that the same was disposed of at a gross undervalue. However, the fact remains that default in loan repayment is admitted by the plaintiff and the re-transfer of the land to him or cancellation of the buyer's title are not sought in the present suit which would, if they had been included, altered the nature of the claim. Besides, they could not have been so included, for it is already an established legal rule that a claimant who has proved irregular or wrongful exercise of a statutory power of sale is entitled only to damages from the chargee.
21. The foregoing analysis brings this court to the inevitable conclusion that the fact that the land was larger on the ground does not convert the present suit into a land dispute; it only brings to the fore the need to re-compute whether there was any loss and, if so, how much, that the plaintiff may have suffered by reason of irregular disposal of the land or wrongful exercise of the chargee's statutory power of sale. Therefore, any attempt to resolve that issue and the other issues raised in the suit would only result in some mathematical computations that would endeavour to firstly, correlate the actual value of the physical extent of the land with the value at which the same was disposed of under the power of sale, and secondly, establish if a gross undervalue occurred to the plaintiff's detriment. In this court's view those issues do not therefore fall within the purview of the mandate of the ELC envisioned by Article 162(2)(b) and Section 13 of the ELC Act to hear and resolve disputes relating to the environment and the use and occupation of, and title to, land.
22. The upshot of the above is that this court must agree with the defendant that it lacks jurisdiction to hear and determine this dispute and it must thus down its tools and take no other step or proceeding in the present matter and the instant suit must be dismissed.
23. I therefore issue the following final orders:
 - a. The plaintiff's suit herein is hereby dismissed for want of jurisdiction.
 - b. Each party shall bear their own costs of the instant suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

