



Kiewa Group Limited & another v Co-operative Bank of Kenya Ltd & another (Environment & Land Case E246 of 2022) [2023] KEELC 20039 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E246 OF 2022
EK WABWOTO, J
SEPTEMBER 21, 2023**

BETWEEN

KIEWA GROUP LIMITED 1ST PLAINTIFF

EQUATORIAL NUT PROCESSORS LIMITED 2ND PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

GARAM AUCTIONEERS 2ND DEFENDANT

RULING

1. This ruling is in respect to the Plaintiffs application dated July 19, 2022 and the Defendants Preliminary Objection dated August 26, 2022. The Plaintiffs application was supported by an Affidavit sworn by Wairimu Kanina a director of the 1st Plaintiff. In the said application, the Plaintiffs sought the following orders:
 - i. Spent.
 - ii. That a temporary injunction do issue restraining the Defendants/Respondents themselves, their agents, servants and or employees by whatever name called from advertising, offering for sell, selling, disposing of, auctioning, or transferring all that parcel of land known and or described as LR No 19148/3 Original Number 1948/1/2 (IR No 120208) pending hearing and determination of this application.
 - iii. That pending hearing and determination of the instant application and suit, an order be and is hereby made directing the 1st Defendant/ Respondent to furnish the Plaintiffs with data/ information sought vide letter dated June 8, 2022 which information/data is held by the 1st Defendant to facilitate taking of accounts to ascertain the correct loan arrears owing.



- iv. That a temporary injunction do issue restraining the Defendants/Respondents themselves, their agents, servants and or employees by whatever name called from advertising, offering for sell, selling, disposing of, auctioning, or transferring all that parcel of land known and or described as LR No 19148/3 Original Number 1948/1/2(IR No 120208) pending hearing and determination of this suit.
 - v. That costs of this Application be provided for.
2. The Application was premised inter alia on the grounds that the 2nd Plaintiff is the registered owner of the suit property and the property is currently charged to the 1st Defendant to secure various loan facilities advanced to the 1st Plaintiff/Applicant, the Defendants jointly and severally set in motion plans to sell or dispose the suit property in disregard of the borrower's and the chargor's rights of redemption by levying punitive interests and unexplained penalties on the facilities resultant to which the debt has grown exponentially making it impossible for the Plaintiff to settle the liabilities, the 1st Defendant has sought to exercise its statutory power of sale by instructing the 2nd Defendant who has issued the Plaintiffs with a Notice for the Plaintiffs to redeem fictitious loan arrears of Kshs 490,450,873.38 allegedly owing as at June 2, 2022 and that the Defendants are set to sale the charged property by way of public auction.
 3. It was also averred that that the Defendants' said move is illegal and in breach of statutory provisions, prior to issuance of the notice, the 1st Plaintiff had engaged the 1st Defendant for bank statements to analyse and ascertain as to how the loan accrued to alleged arrears of Kshs 490,450,873.38. The statements were analysed by the Plaintiff's audit firm-Nahashon Ngugi & Associates who compiled a report that identified fundamental flaws. In totality, the report concluded that the 1st Defendant demand constituted unexplained amount of Kshs 218,162,118.00 Contrary to the figures fronted by the 1st Defendant, the Plaintiffs avers that loan balance stands at Kshs 177,609,194. The Plaintiffs have expressed intention and indeed undertaken to deposit Kshs 20,000,000 to the 1st defendant and upon taking of accounts and ascertaining the actual loan balance, be allowed to have the property be discharged and same offered as a security to an alternative financial institution on condition that the actual loan balance with the 1st defendant be settled from the funds to be secured from the said alternative financial institution.
 4. It was also averred that the Plaintiffs are apprehensive that if the sale is allowed to proceed as scheduled by the defendants, they will suffer irreparable and unjustified financial loss and damage as their right to redeem the property will have been extinguished.
 5. In opposition to the application, the Defendants raised a preliminary objection dated August 26, 2022 which was raised on the grounds that the Court lacks jurisdiction to hear and determine both the suit and Notice of Motion dated July 19, 2022 in view of Section 13 of the *Environment and Land Court Act* and principles enunciated in the case of *Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017]eKLR
 6. The Defendants also filed a replying affidavit and further affidavit by William Mboga dated September 12, 2022 and November 17, 2022.
 7. Pursuant to the directions issued by this court, it was directed that both the application and the preliminary objection be canvassed simultaneously by way of written submissions for consideration by the court. The Plaintiffs filed written submissions dated April 1, 2023, supplementary written submissions dated May 3, 2023 and further supplementary written submissions dated June 23, 2023. The Defendants filed written submissions dated June 17, 2023 all of which have been duly considered by this Court.



8. On the issue of jurisdiction, it was submitted that this court has the requisite jurisdiction to hear and determine the suit. Plaintiffs submitted that Section 13 (d) of the *Environment and Land Court Act* gives this court jurisdiction to hear disputes over instruments granting any enforceable interests in land and that as such a registered charge is not only a commercial contract but also an interest in land capable of being transferred under Section 86 of the *Land Act*. The Plaintiff also submitted that by dint of the charge(s) created over LR No 19148/3 Original Number 1/2 (IR No 120208) the charges do bring the dispute between the parties herein within the purview and or meaning envisaged in Article 165(5) of the *Constitution* and Section 13 (2) of the *ELC Act*.
9. The Plaintiffs also submitted that in the unlikely event that the court holds otherwise then that once the 1st Defendant chose to exercise its statutory power of sale, the provisions under Section 96 -101 of the *Land Act* and legitimate expectations automatically ought to be considered.
10. The Plaintiffs further submitted that should the court in any way find that it has no jurisdiction, then this suit should be transferred to the High Court instead of striking out the same.
11. In the submissions dated June 17, 2023, the Defendants submitted that the plaintiff had admitted to both owing Kshs 177,609,194 and receiving financial leeway from the bank and still failed to pay any amount towards servicing the loan since June 30, 2021.
12. It was also submitted that the 1st Defendant had a contractual right and duty to vary the interest rate upon the Plaintiffs breach and has discretion to advise the Plaintiffs of any variation of interest. Relying on cases of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR and *Fina Bank Ltd v Ronak Ltd* [2001] EA 54. it was submitted that a dispute on accounts is not a basis for the Court to grant an injunction.
13. I have considered the applications together with the rival affidavits and written submissions filed. The main issue for determination herein is whether this Court has jurisdiction to hear and determine the application herein and whether the Plaintiffs had made out a case for grant of the injunctive orders sought.
14. With regards to the issue of jurisdiction, it is now a well-founded principle that jurisdiction is the most crucial component of a suit. The Supreme Court in the case of *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others*, Civil Appl No 2 of 2011, observed that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by constitution the Constitution}} or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”
15. My interpretation of the Court of Appeal case of *Cooperative Bank (Supra)* is that the High Court’s jurisdiction is triggered only where accounting issues have been raised in connection to the disposition of land vide a charge. In this instance, it is undisputed that the Plaintiffs owes money to the 1st Defendant accruing from a loan facility. Furthermore, the substantive issues in the suit are centred on determining the correct amounts owed to the 1st Defendant. I therefore find that the suit falls squarely within the jurisdiction of the High Court.
16. Having found that the High Court is the appropriate forum for this dispute, I must answer a second, consequential question: must I then strike out the suit. The Plaintiffs have urged me not to take the



“draconian” step of striking out the suit but instead transfer it to High Court. They cite, in their aid, the needs for substantive justice.

17. In the case of *Pamoja Women Development Programme & 3 Others v Jackson Kihumbu Wang’ombe & Another* (Kiambu HC Civil Suit No 16 of 2016), Justice Prof Ngugi (as he then was) when faced with a similar issue had this to say:

“Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts. Kenyans’ objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit.”

18. Similarly, in the case of *Spinners & Spinners Limited v Spinners & Spinners Limited* [2017] eKLR, it was held as follows;

“In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.”

19. In view of the foregoing, I see no to reason depart from the aforementioned decisions.

20. The upshot of the foregoing and for the interest of justice, I hereby issue the following orders;

- a. This suit is hereby transferred to High Court (Commercial and Tax Division) and the Deputy Registrar of this Court is directed to facilitate the same.
- b. That pending further directions to be issued by the High Court (Commercial and Tax Division) the prevailing status quo shall be maintained.
- c. Costs to abide the determination of the main suit.



21. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Nanyuki for the Plaintiffs/Applicants.

Mr. Muthee for the Defendants/Respondents.

