



**Noolbarisho & another v Seme & 3 others (Environment & Land Case E002 of 2023) [2023] KEELC 20285 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE E002 OF 2023  
EM WASHE, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**NASHIPAE NOOLBARISHO ..... 1<sup>ST</sup> PLAINTIFF**

**MERIS NOLKILORIT SARONE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEONARD OLE SEME ..... 1<sup>ST</sup> DEFENDANT**

**PETRO SARUNI OLE KOITAAT ..... 2<sup>ND</sup> DEFENDANT**

**BHAVIN ASHWIN GUDKA ..... 3<sup>RD</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 4<sup>th</sup> Defendant (hereinafter referred to as “the Applicant”) filed a Preliminary Objection dated March 20, 2023 (hereinafter referred to as “the present P.O.”) seeking for the Plaint dated 30<sup>th</sup> of January 2023 (hereinafter referred to as “the present suit”) to be struck out for the following grounds; -
  - i. The Honourable Court herein is bereft of jurisdiction to hear and determine the instant suit.
  - ii. The suit herein contravenes the doctrine of non-convenience and thus the Plaintiffs are guilty of forum shopping.
  - iii. The suit herein is misconceived, frivolous and/or otherwise an abuse of the due process of the court.
2. The Present P.O. was then served on the Respondents who expressed their wish to oppose the same.
3. The Honourable court then directed that parties to file their written submissions regarding the present P. O.



4. The Applicant filed his submissions on the 2<sup>nd</sup> June 2023 and a Further Submission on the 17<sup>th</sup> of June 2023 while the Plaintiff/Respondents filed theirs on 26<sup>th</sup> of June 2023 and the 2<sup>nd</sup> Defendant/Respondent on the June 26, 2023.
5. The first issue for determination in the Present P.O is whether or not this Honourable Court has jurisdiction to entertain and/or determine the present suit before it.
6. The Applicant's ground upon which the present P.O premised is outlined in paragraph 19 of his submissions dated June 2, 2023 and reads as follows; -

“The applicant submit that the main issue raised by the Plaintiffs in the Plaint is a commercial transaction and not an issue covered under Section 13 of the Environment and Land Court. For clarity, the issue of charges does not relate to the land use. Plainly put, the issue of charges is a civil matter hence the suit herein should be filed before the High Court which has jurisdiction to hear and determine suits of a civil nature pursuant to Article 165 of the Constitution.”

7. It is on the basis of this reasoning that the Applicant is seeking to have the Plaint herein to be struck out forthwith as this Honourable Court does not have jurisdiction to handle the dispute before it.
8. On the other hand, the Plaintiffs/Respondents have opposed this line of argument on the grounds that the property known as L.R.NO. Transmara/Moyoi/1489 (hereinafter referred to as “the suit property”) was a matrimonial property registered in the name of the 2<sup>nd</sup> Defendant/Respondent on behalf of the entire family.
9. Consequently, the purported borrowing and/or charging of the suit property by the 2<sup>nd</sup> Defendant/Respondent in favour of the 3<sup>rd</sup> Defendant/Respondent required the express consent of the Plaintiffs/Respondents as the spouses due to the fact that the security was a matrimonial property thereof.
10. In essence therefore, the Plaintiffs/Respondents submitted that their cause of action is the validity and/or legality of the security issued by the 2<sup>nd</sup> Defendant/Respondent in favour of the 3<sup>rd</sup> Defendant/Respondent which issue relates to the provisions of Section 28 (a) and 93 of the Land Registration Act, No. 3 of 2012, Section 79 (3) of the Land Act, No. 6 of 2012 and Section 12 of the Matrimonial Properties Act.
11. According to the Plaintiffs/Respondents, the issues of compliance with the above mentioned statutes can only be interpreted and/or handled by the Environment & Land Court as provided by the Environment and Land Court Act, No. 19 of 2012 and therefore this Honourable Court is seized of jurisdiction to hear and determine the issues before it.
12. The 2<sup>nd</sup> Defendant/Respondent submitted on Page 3 of the submissions filed on 26<sup>th</sup> of July 2023 as follows; -

“Your Lordship, Part VII of the Land Act (Section 78 to 106) provides for charges and all matters appurtenant thereto and the jurisdiction of the Court in respect of the matters that arise thereto. These include the power of the Court under Section 104 to grant remedies and reliefs to the chargor or charge, and the Court's power to re-open certain charges and revise terms thereof under Section 106 of the Land Act.”



It is important to note that under Section 2 of the [Land Act](#), the Court is defined to mean; “Court” means the Environment and Land Court established under the [Environment and Land Court Act](#), No. 19 of 2011.”

13. Further to the submissions hereinabove, the 2<sup>nd</sup> Defendant/Respondent also referred the Honourable Court to the provisions of Section 79 (3) of the [Land Act](#) and concluded his submissions by stating that this Honourable Court had the relevant statutory jurisdiction to entertain and determine this present suit before it.
14. Indeed, this Honourable Court has perused the present P.O and the submissions of the parties herein in detail.
15. The substantive issue raised by the Applicant is jurisdiction of the Honourable Court to entertain and determine the present suit before it.
16. However, the Applicant has sought to expand the present P.O to include other issues in his Further Submissions filed on the July 17, 2023 using the third ground in the present P. O.
17. Be as it may, this Honourable Court will now deal with the issue of jurisdiction first.
18. In the case of Owners Of The Motor Vessel “lillian S”-versus- Caltex Oil (kenya) Limited (1989) eKLR, the Court stated as follows;-

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. The essence of this observation is that a Court of law should not entertain and/or make any determination if it does not hold the appropriate Constitutional, Statutory and/or pecuniary jurisdiction.
20. Turning to the present suit, the Plaintiffs/Respondents herein are seeking for the following Orders in their Plaint dated January 30, 2023; -
  - a. A declaration that the 2<sup>nd</sup> Defendant has always held the suit property in trust for the Plaintiffs.
  - b. A declaration that the Plaintiffs have beneficial and overriding interests over the suit property as part owners and wives of the 2<sup>nd</sup> Defendant.
  - c. A declaration that the Charge dated 5<sup>th</sup> August 2014 is null and void ab initio for failure of compliance with the provisions of the then Section 28 (a) of the [Land Registration Act](#), the provision of Section 93 of the Land Registered Act, Section 79 (3) of the [Land Act](#) and Section 12 of the Matrimonial Properties Act.
  - d. A declaration that any subsequent actions by the 3<sup>rd</sup> Defendant on the strength of or on the basis of the impugned and illegal charge over the suit property including but not limited to the exercise of the statutory power of sale and the eventual sale by action to the 4<sup>th</sup> Defendant is null and void.
  - e. A permanent injunction restraining the Defendants, their agents and/or servants from trespassing upon, selling and/or dealing with the suit property other than in a manner allowed in law.



- f. ....”
21. The 4<sup>th</sup> Defendant/Applicant filed a Statement of Defence on the 21<sup>st</sup> March 2023 denying the reliefs sought in the present suit on various grounds.
  22. According to the 4<sup>th</sup> Defendant's/Applicant's Statement of Defence, the facility obtained by the 2<sup>nd</sup> Defendant/Respondent was lawfully secured by the 3<sup>rd</sup> Defendant/Respondent and therefore the subsequent sale through a public auction was legal and bestowed legitimate ownership on him.
  23. The 4<sup>th</sup> Defendant/Applicant further stated in the Statement of Defence that there is another suit already filed in this Honourable Court known as Kilgoris Hcc No. E001 Of 2021 (formerly Narok Hcc No.11 Of 2019 And Narok Elc No.468 OF 2017) which is dealing with various issues relating to the same suit property.
  24. A further perusal of the 4<sup>th</sup> Defendant's/Applicant's Statement of Defence clearly gives the impression that the issues in the proceedings known as Kilgoris Hcc No.E001 OF 2021 relate to eviction orders and/or the legitimacy of the Charge document between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant in view of the occupational rights after the sale of the charged property.
  25. The reason why this Honourable Court has taken time to give a background analysis of the Plaint in this suit and the 4<sup>th</sup> Defendant/Applicant's Statement of Defence is to understand what are the main issues for determination.
  26. According to the Honourable Court's opinion, the issues for determination in the present suit is the validity of a Charge dated 14<sup>th</sup> August 2014 in favour of the 3<sup>rd</sup> Defendant/Respondent in view of the Spousal Consent provided for under Section 93 of the Land Registration Act, Section 79 (3) of the Land Act and Section 12 of the Matrimonial Properties Act.
  27. To begin with, Section 13 of the Environment and Land Court Act provides as follows:
    - (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.



28. Section 78 (1) of the [Land Act](#), No. 6 of 2012 reads as follows; -
- “ This part applies to all charges on land.”
29. Section 79 (1) provides as follows; -
- “ An owner of private land or a Lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purposes including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition.”
30. Section 79 (3) further provides as follows; -
- “ A Charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial homes, or there is evidence from the document that it has been assented to by such persons.”
31. Section 98 of the [Land Act](#), No. 6 of 2012 provides for the powers of the Chargee to sale the whole or part of the charged property to recover its funds.
32. Section 104 of the [Land Act](#), No. 6 of 2012 grants the Power to the Court to deal and/or determine various remedies and reliefs that any party to a charge may apply
33. The term Court in the [Land Act](#), No. 6 of 2012 is described as “the Environment and Land Court”
34. Another aspect of the Plaintiffs/Respondents present suit is that the suit property was co-owned between the 2<sup>nd</sup> Defendant/Respondent and themselves as provided in Section 93 of the [Land Registration Act](#), No. 3 of 2012 which provides as follows; -
- “ Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such a property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).”
35. Again, any dispute as to whether a property was occupied by a spouse or spouses based on marriage can only be handled by the Court which is in the Preliminary part of the [Land Registration Act](#), No. 3 of 2012 is the Environment and Land Court.
36. This Honourable Court having gone through the above-mentioned provisions of the [Land Registration Act](#), No. 3 of 2012 as well as the [Land Act](#), No. 6 of the 2012, it is of the considered view that the present suit was filed in the correct Court with the appropriate statutory jurisdiction thereof.
37. In the case of Co-operative Bank Of Kenya Limited-versus- Patrick Kangethe Njuguna & 5 Others (2017) eKLR, the Court of Appeal provided the following guidance; -
35. Accordingly, for land use to occur, the land had to be utilized for the purpose for which the surface of the land, air above it or ground below it was adapted. Therefore, to the law, land use entailed 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 was adapted. Neither the *cujus* doctrine nor Article 260 of [the Constitution](#) whether expressly or by implication recognized charging land as connoting land use.



36. By definition, a charge was an interest in land securing the payment of money or money's worth or the fulfillment of any condition. As such, it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money's worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that the chargee was assured of the repayment of the money he had advanced the chargor.
37. Further, Section 2 of the *Land Act* recognized a charge as a disposition in land. A disposition was distinguishable from land use. While the former created the relationship, the latter was the utilization of the natural resources found on, above or below the land. Land use connoted the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land. Saying that creation of an interest or disposition amounted to use of the land, was akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constituted land use. The mere acquisition or conferment of an interest in land did not amount to use of that land. If that were the case, there would neither be 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 constituted use of land within the meaning of Article 162 of *the Constitution* had to fail. In addition, the cause of action before the Court was not the validity of the charge, but a question of accounts...

To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the Environment and Land Court. However, under Section 2 of the *Environment and Land Court Act*, an instrument was a writing or enactment which created or affected legal or equitable rights and liabilities. For the purposes of the instant suit, that instrument was the charge. The cause of action 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.

41. Furthermore, the jurisdiction of the Environment and Land Court to deal with disputes relating to contracts under Section 13 of the *Environment and Land Court Act* ought to be understood within the context of the Court's jurisdiction to deal with disputes connected to 'use' of land. Such contracts, ought to be incidental to the 'use' of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.
42. While exclusive, the jurisdiction of the Environment and Land Court was limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act*; none of which concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting



matters was without doubt, as evidenced by article 165(3) of *the Constitution*. The Appellant's objection on jurisdiction was rightly dismissed."

38. If the pre-dominate test is to be applied in the present suit, it is clear that the issues before the Honourable Court is the use of the suit property by the 2<sup>nd</sup> Defendant/Respondent as a security for a financial obligation and the right of the 4<sup>th</sup> Defendant/Applicant to acquire legitimate ownership rights and use of the said suit property.
39. There is no dispute as to the amounts due from the said Charge executed on the 14<sup>th</sup> of August 2014 which would then be within the jurisdiction of the High Court as alleged by the 4<sup>th</sup> Defendant/Applicant.
40. In conclusion therefore, this Honourable Court hereby makes a finding that indeed this Honourable Court has jurisdiction to hear and determine the Complaint dated January 30, 2023.
41. The second issue raised by the 4<sup>th</sup> Defendant/Applicant regards the abuse of the Court process by the Plaintiffs/Respondents and the 2<sup>nd</sup> Defendant/Respondent collusion with the Plaintiffs/Respondents to invalidate his ownership rights over the suit property.
42. The 4<sup>th</sup> Defendant/Applicant submitted that the Plaintiffs/Applicants in this suit had already filed another suit known as Kilgoris ELC NO. E001 OF 2021 to which they failed to succeed and now had filed this present suit to try their luck in another forum.
43. Together with the present P.O, the 4<sup>th</sup> Defendant/Applicant also filed a Notice of Motion Application dated March 20, 2023 seeking for the following Order; -
  - i. The Honourable Court be pleased to grant an Order of Stay, staying the instant proceedings and/or further proceedings pending the hearing and determination of KILGORIS ELC NO. E001 OF 2021 (formerly Narok Hcc No. 11 Of 2019 And Narok Elc No.468 Of 2017)
44. This particular application is still pending before this Honourable Court and no determination has been made.
45. In the circumstances, it would be prejudicial to the parties for this Honourable Court to proceed and make a determination of whether this present suit is an abuse of the Court process or frivolous without giving the Respondents in the application dated March 20, 2023 an opportunity to respond and submit on the relationship between Kilgoris ELC No. E001 of 2021 and the present one.
46. It is already settled law that a Preliminary Objection can only be entertained if the facts of the case are admitted and/or assumed to be correct save for the interpretation of the applicable law.
47. In this case, the facts and causes of actions between the two proceedings seem to be at variance and this Honourable Court cannot therefore determine whether this suit is an abuse of the Court process through the present P. O.
48. In conclusion therefore, this Honourable Court hereby makes the following Orders in determination of the Preliminary Objection dated March 20, 2023; -
  - a. The Preliminary Objection dated March 20, 2023 be and is hereby dismissed.
  - b. Costs of the said Preliminary Objection will be borne by the 4<sup>th</sup> defendant/applicant.

**DATED, SIGNED & DELIVERED** Virtually in KILGORIS ELC Court on **21<sup>ST</sup> OF SEPTEMBER 2023.**

**EMMANUEL. M. WASHE**



**JUDGE**

**IN THE PRESENCE OF:**

**Court Assistant:** Mr. Ngeno/Mr. Brian

**Advocates for the Applicants:** Mr. Wafula H/B for Mr. O M Otieno

**Advocates for the Respondents:** Mr. Kere & Mr. Kamwaro

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