



REPUBLIC OF KENYA



**Brainstorm Management Consultants Ltd v Consolidated Bank of
Kenya Ltd & 4 others (Environment & Land Case E095 of 2023)
[2023] KEELC 21995 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E095 OF 2023
J OMANGE, J
NOVEMBER 23, 2023**

BETWEEN

BRAINSTORM MANAGEMENT CONSULTANTS LTD PLAINTIFF

AND

CONSOLIDATED BANK OF KENYA LTD 1ST DEFENDANT

JITAN SHATILAL DHANANI 2ND DEFENDANT

SUNANDA JITAN DHANANI 3RD DEFENDANT

MOHAMED SAQIB SHEIKH 4TH DEFENDANT

HILLFOCUS HOMES MANAGEMENT LIMITED 5TH DEFENDANT

RULING

1. The matter is coming up for ruling on the Notice of Motion application dated 26th September 2023 wherein the Applicant sought the following orders:
 - a. Spent.
 - b. That an injunction do issue restraining the 1st Defendant whether by its servants agents or officers or any of them whatsoever from advertising for sale disposing of selling by public auction or otherwise howsoever alienating dealing with and/or in any manner whatsoever interfering with the Plaintiff's ownership quiet possession and enjoyment of the property known as Flat Number 29 on Title Number IR159998 and Flat Number 30 on Title Number IR159999, both being part of the development erected on Land Reference Number 37/369 (the suit properties herein), situated along Kiambere Road within Nairobi County pending the hearing and determination of this suit.



- c. That upon hearing of this Application this Honourable Court to conduct a site visit to establish the facts herein.
 - d. That this Honourable Court to direct that a structural engineers report be prepared to determine the structural integrity of the suit premises.
 - e. That the 2nd, 3rd 4th, 5th and 6th Respondent do offer alternative accommodation to the Applicants herein pending the hearing and determination of this suit.
 - f. That in alternative to prayer the prayer above the 2nd, 3rd 4th, 5th and 6th Respondents to pay the Plaintiff Ksh. 500,000.00 on monthly basis for purposes of securing alternative accommodation pending the hearing and determination of this suit.
 - g. Costs of the application be provided for
2. The Application was supported by an Affidavit sworn by the Plaintiff's director George Onyango Misinjro who deponed that the plaintiff had purchased Flat Number 29 on Title Number IR159998 and Flat Number 30 on Title Number IR159999, from the 2nd to 5th Defendants with part financing from the 1st Defendant at a consideration of ksh 58,000,000. The Applicant deponed that prior to taking occupation, it carried out inspections and noticed the premises were uninhabitable and had many defects which findings it brought to the attention of the Defendants for repair. The Applicant avers that the Defendants agreed to carry out the necessary repairs before completion of the sale and the Applicant based on this undertaking purchased the property. The Applicant avers that upon payment of the balance price the Defendants have been in breach of the agreement as they have failed to discharge obligations to repair and even went further ahead to maliciously vandalize the suit properties which have made them uninhabitable, squalid and unfit for purpose for which it was intended.
 3. The Applicant further avers that in a bid to salvage the situation and carry out repairs on its own, it approached the 1st Respondent/Defendant for modification of the charge instrument to include a further loan to cater for the repairs which proposal was accepted but the funds were not released. According to the Applicant this has sabotaged its effort to save its property.
 4. The Applicant further states that the 1st Respondent has since served it with a statutory demand notice and notification of sale with intention to dispose off the suit properties hence this application before court to preserve the suit property, pending hearing and determination of the main suit. The Applicant is apprehensive that if the orders sought for are not granted, the 1st Respondent will enforce the notices against the suit properties and it stands to suffer irreparable prejudice and loss.
 5. The 1st Respondents raised a notice of preliminary objection dated 13th October 2023 to the notice of motion on grounds that;
 - i. The application and entire suit against the 1st Respondent is res judicata the decision of High court suit No E482 OF 2022 Brainstorm management consultants limited v Consolidated Bank of Kenya.
 - ii. The court lacks jurisdiction to entertain the application since the matter does not relate to a dispute over ownership and use of land but emanates from a commercial dispute relating to the 1st Respondent's exercise of its statutory power to sale.
 - iii. The suit offends the mandatory provisions of section 19(2) of the Environment and [Land Act](#) as read together with section 6 of the [civil procedure Act](#) and owing to the pendency of the proceedings in High court commercial suit no E482 OF 2022 Brainstorm management consultants limited v Consolidated Bank of Kenya.



6. The 1st Respondent filed submissions in support of their preliminary objection in which it submitted that the preliminary objection was merited as it touched on points of law given that the Applicant filed a suit in the High Court seeking to stop the 1st Respondent from exercising its statutory power of sale over the suit properties. It was counsel's argument that these facts are self-evident from the pleadings on record. On the issue of Res Judicata counsel submitted that the Applicant has violated section 7 of the Civil Procedure Act by bringing an application similar orders as those already decided by the High Court. Counsel for the Applicant relied on the case of independent electoral and boundaries commission v Maina Kiai and 5 Others(2017) EKLr in which the principles for raising Res Judicata in a preliminary objection were laid out. He submitted that all the conditions had been met.
7. On the question of jurisdiction, he submitted that court lacks requisite jurisdiction to decide on the matter as the dispute was commercial in nature and not on touching on ownership, use and occupation of the suit properties. He referred the court to the case of Cooperative bank of Kenya v Patrick Njuguna & 5 Others (2017) Eklr.
8. Lastly, it was submitted that the Applicant's suit is *sub judice* to proceedings in the High Court since it sought orders to permanently restrain the Respondent from exercising statutory power to sale which are the same orders being sought for in the current suit. To buttress this argument they relied on the cases Muturi Investments limited v NBK (2006) eKLR and Barclays Bank of Kenya limited v Elizabeth Agidza and 2 others (2012) Eklr.
9. I have considered the submissions by both counsel and identified the following issues for determination; Whether the court has jurisdiction. Whether the application is Res Judicata to High Court Suit No E 482 of 2022. Whether the application is subjudice.

Whether the court has jurisdiction to preside over the suit

10. The importance of determining the question of jurisdiction was well settled in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1, wherein Nyarangi J. of the Court of Appeal held that:

"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."

11. The preliminary objection is brought on grounds that this Court has no jurisdiction under Article 162 2(b) of the Constitution of Kenya 2010 which establishes the Environment and Land Court which is a court vested with original and unlimited jurisdiction.
12. The preamble of the ELC Act, defines jurisdiction of the court as "a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes".

Section 13(2) of the Environment and Land Act outlines the jurisdiction of the court to determine disputes;

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- ii. relating to compulsory acquisition of land;



- iii. relating to land administration and management;
 - iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;
 - v. any other dispute relating to environment and land.
13. It is trite that this Court is a specialized court created to handle matters related to land and environment. However, in commercial/accounting matters, only the High Court is seized of the requisite jurisdiction. This was the position set forth in *Cooperative Bank of Kenya v Patrick Kangethe Njuguna* (2017) eKLR wherein the Court of Appeal held that the High Court is the proper forum to litigate accounting matters owing to its unlimited original jurisdiction in Civil Matters.
14. Courts of concurrent jurisdiction which have had occasion to consider the Cooperative Bank case have held that the Court of Appeal did not oust the jurisdiction of the ELC court to handle disputes where the process of exercising the statutory power of sale which is domiciled in the *Land Act* is in issue. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2018] eKLR the Court held that:-
- “It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of *Stephen Kibowen v Agricultural Finance Corporation (2015) eKLR*). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”
15. I ascribe to this school of thought and find that in a case where only the procedure is an issue, then this court would have jurisdiction. The question that then arises in this case is it only the process that is an issue or will the court be required to delve into accounting matters which the Court of Appeal has so clearly addressed. The answer is found in the affidavit in support of the application. There are numerous references to disputed figures which arise from accounting matters.
16. It is therefore clear that going by the *Stanley Kangethe* case *Supra* this is a matter which falls squarely under the jurisdiction of the Commercial Division of the High Court. Consequently, I find that this court has no jurisdiction to hear the matter which should be transferred to the Commercial Division of the High Court for determination.
17. The upshot of the foregoing is that the preliminary objection is upheld. The court makes the following orders;



- a. This file is to be transferred to the Commercial and Tax Division of the High Court for hearing and determination
- b. Costs to be in the cause.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF NOVEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Omondi for the Applicant

Mr. Kimaru for Kamwara for the Respondent

