



**Thabiti Capital Limited v Equity Bank (Kenya) Limited & another (Environment & Land Case E046 of 2023) [2023] KEELC 22310 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22310 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E046 OF 2023  
NA MATHEKA, J  
DECEMBER 14, 2023**

**BETWEEN**

**THABITI CAPITAL LIMITED ..... PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> defendant raised a preliminary objection to the plaintiffs suit instituted by a plaint dated 18<sup>th</sup> May 2023 on the following grounds;
  1. This court lacks jurisdiction to adjudicate this matter as the dispute as set out in the plaint dated 18<sup>th</sup> May 2023 is not a dispute relating to the environment or the use and occupation of, and title to, land.
  2. The suit seeks to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale.
  3. This is a commercial matter for adjudication before the High Court.
  4. The verifying affidavit sworn on 18<sup>th</sup> May 2023 is fatally defective as it is sworn by an undisclosed person only described as Mwangi W. It is impossible to ascertain whether the deponent is an officer of the plaintiff or is duly authorised to swear the affidavit on behalf of the plaintiff. As the suit is supported by a defective verifying affidavit, the suit is also defective.
2. The preliminary objection raised herein by the 1<sup>st</sup> defendant is dated 3<sup>rd</sup> July 2023 and is premised on the ground that this court lacks the jurisdiction to hear and determine the dispute as set out in the plaint dated 18<sup>th</sup> May 2023, and that the same is a commercial dispute which is a reserve of the High Court.



3. The law on Preliminary objection was settled in *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd* (1969) EA 696, where it was held that;

a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

4. The Supreme Court settled the question of jurisdiction in the case of *Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others* (2012) eKLR wherein the Court stated as follows;

A court’s jurisdiction flows from either *the constitution* of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

5. The plaintiff herein charged Plot No. LR No. MN/I/5708 Kshs 90,000,000/=. It is the plaintiff’s case that it has paid Kshs 79,811,203 towards settling the charge. In a quest to ascertain balance, the plaintiff has requested a true and just statement of accounts from the 1<sup>st</sup> defendant, but the 1<sup>st</sup> defendant has refused to supply the same to the plaintiff. The plaintiff has averred that the 1<sup>st</sup> defendant has exercised its statutory power of sale through an illegal statutory notice dated 15<sup>th</sup> March 2023, which the plaintiff contends is meant to log his right to redeem the suit property. The plaintiff avers that the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant has advertised the intended sale slotted for 31<sup>st</sup> May 2023 on an advertisement dated 8<sup>th</sup> May 2023, which will occasion the 1<sup>st</sup> defendant irreparable loss and damage.
6. The jurisdiction of this court to hear and determine charges as an interest in land was set out by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others* (2017) eKLR where the issue at hand was whether a disputed charge is within the jurisdiction of this court or a commercial dispute that could only be determined by the High Court. The appellant court sought to define land use as used in Article 162 (2)(b) of the *Constitution* which gives this court jurisdiction. The court relied on Article 260 of *the Constitution* which echoes the traditional definition of land and proceeded to find that the definition of land use ought to remain as the “*necessary and ordinary use and enjoyment of land and structures upon it.*” The court was of the view that the inevitable conclusion that should be drawn is that land connotes the surface of the land and/or the surface above it and/or below it. The appellant court then used this definition of land to find that since a charge is an interest in land the same does not include the use of land, within the meaning of Article 162 (2)(b) for a dispute of charge to fall within the jurisdiction of this court. It held that;
7. 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.



8. 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...

Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.”

9. This court has applied Patrick Kangethe’s case, in particular, Sila J in *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & another* (2018) eKLR sought to distinguish himself. He found that;

My own understanding of the above decision, is that the Court of Appeal was of opinion that the particular dispute was more in relation to accounts of which the High Court had jurisdiction to hear.

10. I do not think that the Court of Appeal was holding the position that once the Environment & Land Court (ELC) sees the word “charge” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what *the Constitution* under Article 162 (2) (b), and parliament under Section 13 of the *Environment and Land Court Act* No.19 of 2011, have prescribed as being the jurisdiction of the ELC.”

11. The court was of the view that from Section 13 (2)(d) of the ELC Act, this court has jurisdiction to hear disputes relating to contracts, choses in action or other instruments granting an enforceable interest in land. The court proceeded to find that a charge is an instrument that gives an enforceable interest in land and that a dispute over the manner in which a charge has exercised his statutory power of sale would be a dispute within the *Land Act* and *Land Registration Act* and these statutes provide that the court with jurisdiction is the ELC. The court progressed to find that;

I have already pointed out that the process of disposing of a charged property is a process elaborated in the *Land Act* and *Land Registration Act*, and these two statutes provide that it is the ELC with jurisdiction. The High Court cannot therefore have jurisdiction, given the provisions of Article 165(5) of *the Constitution*, to hear a matter relating to the process of sale of a charged property, unless that issue arises in a case relating to issues that the High Court would have jurisdiction, and the same cannot be severed from these other issues. It needs to be appreciated that the High Court cannot have jurisdiction over matters that fall within the jurisdiction of the ELC.”

12. From the Lydia Nyambura Mbugua (supra) the court was of the view that where a case presents mixed issues some falling within the jurisdiction of the ELC and some falling within the jurisdiction of the High Court, the best thing would be to dwell not so much the purpose of the transaction but the subject matter or issue before the court. In this case, the issues at hand revolve around the tabulation of the sum owing under the charge and whether the statutory right of sale had arisen or whether statutory notices were issued prior to the attempted statutory sale. In addition, the plaintiff contends that the defendants have failed to undertake a valuation of the subject matter, and if one has been undertaken the same has not been shared with the plaintiff, hence the intended sale by public auction is illegal. It is therefore clear that the plaintiff is not only disputing the tabulation amounts but also the process under which the 1<sup>st</sup> defendant seeks to exercise its statutory power of sale. In my view, this court has jurisdiction to hear this dispute even where the question is whether the party has properly calculated its figures since a charge is a form of acquisition of title to land, which is governed by the *Land Act*



and *Land Registration Act* for which this court has jurisdiction over. This was the position taken in the above case where Sila J held that;

Going back to the issue at hand, in cases revolving around a charge, and the chargee's exercise of its power of sale, where the predominant issue is whether the statutory right of sale has arisen; or whether a statutory notice was issued; or whether the property has properly been advertised; or whether generally, the process of sale is in accordance with the provisions of the *Land Act* and *Land Registration Act*, then the matter would fall under the jurisdiction of the ELC, for these processes are laid down in the *Land Act* and *Land Registration Act*, for which it is the ELC which is the court with jurisdiction. It should also not be forgotten that this is a process of acquisition of title to land. However, if the predominant complaint is whether the bank has properly calculated its figures, and not how the bank is proceeding to sell the property, then this could be a High Court matter, but again, as I have stated above, if this issue is collateral to the process of sale, and not severable, the ELC would still have jurisdiction to hear the whole of the dispute including related issues such as the amounts payable, where these cannot be severed from the dominant issue."

13. As done by my brother in the Lydia Nyambura Mbugua (supra) I wish to distinguish the case of Cooperative Bank v Patrick Kangethe (supra) and find that even where accounts arise, as it has done in this case, the same cannot be used to deprive this court of its jurisdiction to hear and determine the dispute before it. The issue at hand is the creation of a charge over Plot No. LR MN/1/5708 and the manner in which the 1<sup>st</sup> defendant sought to exercise its statutory power of sale. Where a bank proceeds to release its statutory power of sale, the resultant acquisition of title of the suit property, which falls within the jurisdiction of this court. Moreover, the *Land Act*, which provides for the chargee's power of sale under Section 96, confers the ELC in Section 150 with the exclusive jurisdiction to hear and determine disputes, actions and proceedings under the Act.
14. It is on the basis of the analysis made above that I find that this court has jurisdiction to hear and determine the dispute before it and as such the Notice of Preliminary Objection dated 3<sup>rd</sup> July 2023 lacks merit and is dismissed with no order as to costs.
15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 14<sup>TH</sup> DAY OF DECEMBER, 2023.**

**N.A. MATHEKA**

**JUDGE**

