



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. E001 OF 2022**

**CHARLES MURUGU MUKINDIA ..... 1<sup>ST</sup> PLAINTIFF**

**RISE UP COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD..... 1<sup>ST</sup> DEFENDANT**

**PHILIPS INTERNATIONAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH ELC NO. 1 OF 2022**

**GACHERI DAVID MUKINDIA ..... PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD. .... 1<sup>ST</sup> DEFENDANT**

**CHARLES MURUGU MUKINDIA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court is an application dated 12.1.2022 brought under **Order 40 Rules 1, 2, 4 Order 31 Rules 1, 3 and 14, Order 51 Rule 1, Sections 1A and 3A of the Civil Procedure Act** and any other enabling provisions of the law.

2. The prayers sought are:-

a) A temporary injunction restraining the respondents, their agents, servants and or employees from selling or in any way dealing with all those property known as title No's Nkuene/Taita/859. Nkuene/Taita 398/162, Nkuene Taita/398/157. Ontulili/Ontulili Block 1/Katheri/925, Nkuene/Lower Mikumbune/894 and 903 Imenti South District and Title No. Ntakira/417 situated within Imenti South District.

b) A permanent injunction restraining the respondents, their agents, servants and or employees from selling or in any way dealing with all those properties known as title No's Nkuene/Taita/859. Nkuene/Taita 398/162, Nkuene Taita/398/157. Ontulili/Ontulili Block 1/Katheri/925 Buiri District, Title No. Nkuene/Lower Mikumbune/894 & 903, Imenti South District and Title No. Ntakira/417.

c) A permanent injunction restraining the respondents, their agents, servants and or employees from selling or in any way dealing with all those properties known as Title No's Nkuene/Taita/859. Nkuene/Taita 398/162, Nkuene Taita/398/157. Ontulili/Ontulili Block 1/Katheri/925 Buiri District, Title No. Nkuene/Lower Mikumbune/894 & 903, Imenti South District and Title No. Ntakira/417.

d) In the alternative, and without prejudice to order b and c above pending the hearing and final determination of this application and suit, an order for status quo do obtain with respect to all those properties known as Title No's Nkuene/Taita/859. Nkuene/Taita 398/162, Nkuene Taita/398/157. Ontulili/Ontulili Block 1/Katheri/925 Buiri District, Title No. Nkuene/Lower Mikumbune/894 & 903, Imenti South District and Title No. Ntakira/417.

**e) The orders of the Honourable court be enforced by the OCS Nkubu police station.**

**f) Costs of this application be borne by the respondents.**

3. The application is supported by an affidavit sworn on 12.1.2022 by Charles Murugu Mukindia the 1<sup>st</sup> plaintiff.

4. The grounds upon which the application is sought are: the applicants properties offered as security for loan with the 1<sup>st</sup> respondent have been put up for public auction in default of the loan due to Covid effects; the parties had negotiated for monthly repayments of **Kshs. 400,000/=**; the properties have been undervalued; over Kshs. 20 million out of the initial loan of Kshs. **39,260.087/=** has so far been repaid; the alleged outstanding balance is unjust and unfair; no forced current valuation has been provided; there is need for reconciliation of the accounts; statutory redemption notices have not been issued in line with **Sections 90 and 96 of the Land Act 2012**; the 45 days redemption notice by 2<sup>nd</sup> respondent is premature, invalid and illegal; no advertisement has been issued; the applicants would be denied an opportunity to redeem the properties and or be rendered homeless.

5. To support the application, the 1<sup>st</sup> applicant has attached a bank statement, copy of a court order in **Meru High Court Matrimonial Case No. 14 of 2019**, an auctioneer's redemption notice, Newspaper print out as annexures **CMM 1 – 6** respectively.

6. Further the 1<sup>st</sup> applicant states he undertakes to repay the entire outstanding loan balance before the expiry of the facility period once the accounts are reconciled. Unfortunately, the 1<sup>st</sup> applicant has not attached the charge documents.

#### **A. PRELIMINARY OBJECTION**

7. The 1<sup>st</sup> respondent has opposed the notice of motion through a preliminary objection dated 24.1.2022 on the following grounds:-

**a) The court lacks jurisdiction as the subject matter is charged property as such a commodity for sale and thus the jurisdiction of the court stand ousted.**

**b) The suit and the application amounts to abuse of court's process in lieu of the litany of suits.**

**c) The matter should go to the family division of the High Court.**

#### **B. PLEADINGS**

8. By a plaint dated 12.1.2022, the 1<sup>st</sup> plaintiff admits he offered the suit properties as collateral to secure a loan facility from the 1<sup>st</sup> defendant in 2015 – 2017 which was advanced to the 2<sup>nd</sup> plaintiff. He avers he has been servicing the loan diligently until the outbreak of Covid 2019 when his businesses as were adversely affected. He has not disclosed the nature of his alleged business, wherein he has been deriving income to repay the loan.

9. The 1<sup>st</sup> plaintiff states he approached the 1<sup>st</sup> defendant to restructure the loan and they were allowed to be making monthly repayments of **Kshs. 400,000/=**. Unfortunately the applicant were served with a redemption notice on 2.12.2021 by the 2<sup>nd</sup> defendant for a public auction of the charged properties. Efforts to seek audience with the 1<sup>st</sup> defendant became futile hence this suit.

10. The applicant claim there exists an order from **Meru High Court Matrimonial Case No. 14 of 2019** stopping any disposal of the suit properties hence the defendants are in contempt, the properties are undervalued. Kshs. 20 million has already been repaid; balance reconciliation is yet to be made; statutory notices have not been served in line with the law and the notification of sale issued on 10.1.2022 was unprocedural and irregular and that in the event the public auction takes place they shall be denied their right of redemption of the properties some of which are the 1<sup>st</sup> applicant's residential homes.

11. Despite service of the summons to enter appearance upon the defendants, have not filed a defence to the plaint. Similarly the defendants did not file any replying affidavit to the notice of motion dated 12.1.2022 after the court directed them to do so particularly on the issues of the issuance and service of the statutory notices of the power of sale.

12. Instead the defendants filed and made submissions restricted to the preliminary objections.

13. What constitutes a preliminary objection was set out in the case of ***Mukisa Biscuits Manufacturing Biscuits Co. Ltd –vs- West End Distributors Ltd [1969] E.A 797*** as a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued may dispose of the suit.

14. The defendants' preliminary objection is based on three grounds. The 1<sup>st</sup> ground is that the court lacks the requisite jurisdiction while the 2<sup>nd</sup> ground is that there are litany of other suits hence the suits are vexatious, frivolous and an abuse of the court process.

15. The 3<sup>rd</sup> ground is that the orders sought in the notice of motion and by extension can only be made by a commercial division of the High Court and or under the pending matrimonial property suit.

#### **C. WRITTEN SUBMISSIONS**

16. With leave of court, parties in both suits were directed opted to address the application and the preliminary objection by way of written submissions which were to be filed and served by 11 o'clock on 25.1.2022.

17. The 1<sup>st</sup> defendant by submissions dated 25.1.2022 takes the view the court has no powers to handle disputes over charged properties and that it was only a commercial court which has such jurisdiction. The defendants rely on *Bii –vs- Kenya Commercial Bank Ltd [2001] KLR 458, National Bank of Kenya Ltd –vs- Christian Community Life Church [2020] eKLR, Cooperative Bank of Kenya Ltd-vs- Patrick Kangethe Njuguna & 5 Others [2017] eKLR*

18. The 2<sup>nd</sup> respondent who is also the plaintiff in E001 relies on

*Kenwood Property Developers Ltd –vs- Family Bank Ltd, Onesmus Ngige Munyambu & Another (Interested Party) 2020 eKLR, Lydia Nyambura Mbugua –vs- Diamond Trust Bank (K) Ltd & Another [2018] eKLR, Alphose Yankulije –vs- One Twiga Road Ltd & 2 Others [2019] eKLR.*

19. On the issues of the res judicata and subjudice, the 1<sup>st</sup> defendant submits the plaintiffs in the two suits, namely **ELC 1 of 2022** and **ELC E001 of 2022** have a pending **Meru High Court Matrimonial Originating summons No. 14 of 2019** touching on the suit premises hence the suit should be determined by the family division of the High Court. Reliance was placed on *ACS –vs- ECK & Another [2020] eKLR.*

20. Similarly, given the **Meru High Court (O.S) No. 14 of 2019** the 1<sup>st</sup> defendant submits the doctrine of res judicata and subjudice, is vexatious, frivolous and an abuse of the court process as held in *Naitore M'Iburi & Another –vs- Attorney General & 2 Others Sebastian Kaaria Interested Party.*

21. On the part of the applicants, it is submitted this court has jurisdiction since the issues raised in the two suits are beyond matters of accounting. They rely on *Kenwood Property developers Ltd. –vs- Family Bank Ltd, Onesmus Ngige Mumyamba & Another [2020] eKLR, Lydia Nyambura Mbugua –vs- Diamond Trust Bank Kenya Ltd & Another [2018] eKLR, Alphose Yankulije –vs- One Twiga Road Limited & 2 others [2019] eKLR.*

22. On the issue of the matrimonial property case pending before the High Court, it was submitted the 1<sup>st</sup> defendant was not party to the matter and hence the said court lacked jurisdiction to determine an issues of statutory power of sale which in any event are validly before a competent court.

23. Regarding the doctrine of subjudice and resjudicata, the applicant submit the instant suit has a different cause of action from the matrimonial cause and lastly the matter before the court is not vexatious, frivolous and an abuse of court as held in *County Council of Nandi –vs- Ezekiel Kibet Ruto & 6 Others [2013] eKLR.*

#### **D. ISSUES FOR DETERMINATION**

24. The issues for determination are:

- a) **Whether the court has jurisdiction to determine the suit.**
- b) **If the applications before the court have merits.**
- c) **If the preliminary objection is merited.**

#### **E. JURISDICTION**

25. The jurisdiction of this court is to be found in **Article 162 2(b)** and **Sections 4 and 13 of the Environment and Land Court Act 2011 and Practice Directions dated 25.7.2014**. The court has both original and appellate jurisdiction in matters touching on environment and land.

26. Under **Section 13 (1) of the Environment and Land Act**, the court has powers to determine disputes relating to environment and land, compulsory acquisition, land administration and management, contract, choses inaction and other instruments granting enforceable interest in law. In so doing the court has powers to grant reliefs such as injunctions, prerogative orders, damages, compensations, specific performance, restitution and declaration.

27. **Section 2 of the Land Registration Act** defines a court as the Environment and Land Court as established by the **Environment and Land Court Act 2011 No. 19 of 2011** and other courts having jurisdiction on matter related to land. **Section 101 of Land Registration Act** states:-

*“The Environment and Land Court established by the Environment and Land Act No. ... and subordinate courts has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

28. **Section 2 of the Land Act** defines the court as the Environment & Land Court established under the **Environment & Land Court Act 2011. Section 78 – 106** grants the court powers to deal with issues relating to charges, informal charges, variation of charges, covenants, equity redemption, conditions and powers thereof, remedies of a chargee, chargee powers, chargees power of sale, duties of chargees exercising the power of sale, the power of the court in respect of remedies and reliefs, re-opening of charges and revision of terms.

29. Over and above the two pieces of legislation, **Section 13 (1), the Environment and Land Court** has powers to hear cases under other laws applicable in Kenya relating to environment and land. These laws include the **Community Land Act, National Land Commission Act, the Physical and Land Use Planning Act 2019, the Land Consolidation Act, the Land Adjudication Act, Land and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301, Rent Restriction Act Sectional Properties Act 2020, Survey Act Cap 299, Forest Act, Trespass Act, Trust of Land Act Cap 290, Environment Management & Coordination Act among other laws.**

30. The 1<sup>st</sup> defendant takes the view the court has no powers as regard the suit land since they are a commodity for sale.

31. The plaintiffs' suit raised issues touching on a charge, and enforceable interests where their suit lands have been offered as security and which risk being disposed by the defendants while exercising a statutory power of sale under **Section 90 – 98 of the Land Act 2012.**

32. The plaintiffs have complained the provisions of the Land Act and the **Land Registration Act** have not been adhered to by the defendants in so far as issuance of the mandatory statutory notices of the power of sale.

33. The plaintiffs have complained of interference of its rights as a proprietor under **Section 25 of Land Registration Act Section 28**, on overriding interests, creditor's rights under **Section 52** and the statutory charge which they executed with the respondents under **Section 56, 57, 58 and 59 of the Act.**

34. In my considered view there has been a misconception that the Environment and Land Court lacks jurisdiction over commercial lending. The legislature in his wisdom has set out the law as it is and hence there can be no doubt that anything touching on Environment and land falls squarely under the jurisdiction of the Environment and Land Court.

35. Consequently, my considered view is the Environment and Land Court has jurisdiction over the suit herein. See **Lydia Nyambura Mbugua –vs- Diamond Trust Bank Kenya Ltd & Another [2018] eKLR, Alphose Yankulije –vs- One Twiga Road Limited & 2 others [2019] eKLR.**

#### **F. RES JUDICATA AND SUBJUDICE**

36. As concerns the 2<sup>nd</sup> limb of the preliminary objection, the defendants are yet to file a defence or replies to the notice of motion herein. The alleged litany of suits are not listed at all. In any event these are matters of fact and a court in looking at a preliminary objection would not be assessing matters of evidence or facts but pure points of law. Consequently, in the absence of any pleading listing the alleged suits, their status, parties and rulings would be hesitant to find such a point as raising a pure point of law as held in See **Oraro –vs- Mbaja [2005] 1 KLR 141.**

37. In **Henry Wanjama Khaemba –vs- Standard Chartered Bank Ltd & Another [2014] eKLR** the court held the issues of res judicata and duplicity of suits require the probing of evidence and are incapable of being handled as preliminary objections due to the limited scope of the court's jurisdiction on preliminary objection.

38. The 1<sup>st</sup> defendant has not attached any pleadings in the other suits pending or otherwise for this court to determine if the suits herein are guilty of res judicata, res subjudice and or duplicity. The ground is therefore rejected as not falling under a pure point of law.

#### **G. INJUNCTION**

39. Turning to the applications before court as stated above, the respondents though given an opportunity to respond to issues and facts raised both in the complaints and the notice of motion, nothing has been filed by way of a replying affidavit or grounds of opposition.

40. Be that as it may the applicants have the onus to prove a prima facie case with a probability of success; that they will suffer irreparable damage should the court not grant the orders sought and lastly that the balance of convenience tilts in favour of granting the injunction sought.

41. **Order 40 Rule 1 of the Civil Procedure Rules** grants the court powers to issue temporary injunction where it is proved by affidavit or otherwise that any property in dispute is in danger of being alienated or is wrongfully about to be sold.

42. The applicants have admitted they offered the suit lands as security for a loan extended to them by the 1<sup>st</sup> defendant which they have defaulted in repaying. However they claim a restructuring of the repayment was discussed and to which they have been honouring by repaying **Kshs. 400,000/=** monthly.

43. Though the renegotiated document has not been attached, the bank statement from the 1<sup>st</sup> defendant indicates a consistent loan repayment of at least **Kshs. 400,000/=** for the last four months.

44. Further the applicants state they have so far repaid at least **Kshs. 20 million** of the loan yet the notice for the public auction is for **Kshs. 37 million**. This figure does not factor in the repayments and hence the applicants are of the view there should be reconciliation of the accounts before any purported public auction is undertaken.

45. Secondly the applicants have alleged the four key statutory steps under **Sections 90 and 96 of the Land Act** have not been adhered to by the respondents before they can exercise the statutory power of sale hence if the public auction proceed their right to equity redemption would be defeated.

46. The four notices are the three months demand under **Section 56 (2)** and if the default continues for at least a month, a three months' notice under **Section 90 (1) of the Land Act**, a forty days' notice under **Section 96 )2) of the Land Act** and lastly a notice of redemption under **Rule 15 of the Auctioneers Rule 1997**.

47. In ***Mrao Ltd –s- First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** the court held a prima facie case is a genuine and arguable case on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanations or rebuttal from the latter.

48. The applicants allege their statutory and equitable rights of redemption and remedies thereof are being threatened, or likely to be infringed if the public auction scheduled for 28.1.2022 proceeds before they are served with the requisite mandatory statutory notices. **See *Kenwood Property Developers Ltd –vs- Family Bank Ltd eKLR; Onesmus Ngige Munyambu & Another (Interested Party) 2020 eKLR***. The respondents have not supplied before this court any such duly issued and served notices in line with **Section 92 and 96 of the Land Act 2012**. **See *Leonard Jefwa Kalama & Another –vs- Consolidated Bank of Kenya & 3 Others [2014] eKLR***.

49. In my considered view therefore, I find the applicants have established a prima facie case with a probability of success and similarly have demonstrated that they would suffer irreparable loss and damage should the public auction sale proceed without the underlying issues are determined one way or the other.

50. Thirdly, on the issue of balance of convenience the same tilts in favour of granting a temporary injunction in line with **Section 104 of the Land Act**.

#### **H. CONSOLIDATION**

51. The actions in the two files relate to the same subject parcels of land and which are charged with the 1<sup>st</sup> defendant in both suits.

52. In essence therefore the parties are more or less the same, the subject matter the same, and the issues of law raised in the two suits are similar. The court under **Order 11 Rule 1** has the discretion to order for consolidation through an application by a party or **suo moto** before the suits are heard and determined.

53. In my view, the consolidation will not prejudice any party but instead shall save costs and time for all the parties.

54. Accordingly I allow the oral application by counsel for the plaintiffs in the two suits. I order that the two be and are hereby consolidated.

#### **I. FINAL ORDERS**

55. In the premises the application dated 12.1.2022 is allowed in terms of **prayer No. 4** as a temporary injunction as opposed to a permanent injunction on the conditions:-

- a) That the applicant continues to repay Kshs. 400,000/= monthly not later than 5<sup>th</sup> day of each month.**
- b) In default of any single instalment the orders herein shall stand vacated.**
- c) The two matters namely ELC 1 of 2022 and E001 of 2022 are hereby consolidated.**
- d) Parties are granted leave to file their pleadings and exchange list of witnesses statements and documents within 30 days from the date hereof.**
- e) Matter to be mentioned for case conference within 60 days from the date hereof.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

Kirimi for plaintiff

Kimaita for 1<sup>st</sup> defendant

Kinyua for 2<sup>nd</sup> defendant

Court Assistant

**HON. C.K. NZILI**

