



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E25 OF 2021**

**JULIUS KIPKENY KOLIL ..... 1<sup>ST</sup> APPLICANT**

**RUTH JEMUTAI KAMAR ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**NANCY WAITHIRA KIRURI ..... 2<sup>ND</sup> RESPONDENT**

**MUGANDA WAKULWA T/A KEYSIAN AUCTIONERS..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR NAIROBI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

***(In respect to the Preliminary Objections dated 16<sup>th</sup> and 23<sup>rd</sup> September 2021)***

1. The Applicants initiated this suit through an Originating Summons dated 18<sup>th</sup> June 2021. It was the Applicants case that they were the lawfully registered owners of L.R No. 9042/685 Maisonette No. B4, Simba Villas, Embakasi. That on or about 24<sup>th</sup> May 2007, the first Respondent offered them a financial facility to the tune of Ksh 3,910,000.00 which was secured against their property and a charge was registered.

2. The Applicants' further contended that on or about 14<sup>th</sup> December 2011, the 3<sup>rd</sup> Respondent purported to auction the property without furnishing them with any statutory notice. It was their further contention that the auction was unlawful and they had subsequently filed **NAIROBI HCCC No. 407 of 2012** seeking to stop the 2<sup>nd</sup> Respondent from interfering with the property and a declaration that the auction was illegal and unlawful. According to the Applicants, the said suit was later dismissed on technicalities and hence necessitated the need to file the present suit before this Court.

3. The Applicants sought the following reliefs against the Respondents:

***a) A permanent injunction restraining the 2<sup>nd</sup> Respondent whether by herself and/or agents from evicting, entering or in any way interfering with the Applicants' quiet possession of the property known as L.R No. 9042/685.***

***b) A declaration that the purported sale of L.R No. 9042/685 Massionette No. B4 between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent is unlawful.***

***c) This Honourable Court be pleased to issue an order compelling the 4<sup>th</sup> Respondent to cancel and revoke transfer to the 2<sup>nd</sup> Respondent.***

***d) Costs of this summons be provided for.***

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents both filed Notices of Preliminary Objections which was premised on two limbs one being to the effect that the current suit was res judicata in view of **Nairobi HCC 407 of 2012 Julius Kipkeny Koli & Ruth Jemutai Kamar v Kenya Commercial Bank Limited and 2 Others** and the other limb being that this Court lacks jurisdiction to entertain the current suit which according to the

Respondents is a commercial dispute arising from the 1<sup>st</sup> Respondent's exercise of statutory power of sale.

5. Pursuant to the directions of this Court issued on 18<sup>th</sup> November 2021, the Court directed that both preliminary objections be canvassed through written submissions. The 1<sup>st</sup> Respondent filed their written submissions dated 18<sup>th</sup> November 2021 through the firm of **Kemboy Law Advocates** while the 2<sup>nd</sup> Respondent filed her written submissions dated 2<sup>nd</sup> December 2021 through **Ochieng' Ogotu Advocates**. The Applicants, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submissions were not on record at the time of preparation of this Ruling.

6. It was submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Court of Appeal in the case of **Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR** had held that the ELC court lacks jurisdiction to deal with such disputes to contracts of mortgages, charges, collection of dues and rents and that such disputes fall within the jurisdiction of the High Court and the instant suit was affected by the same.

7. Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent also submitted that this suit is res judicata in view of **Nairobi HCC 407 of 2012 Julius Kipkeny Koli & Ruth Jemutai Kamar v Kenya Commercial Bank Limited and 2 Others**. It was further submitted that the said suit was dismissed for want of prosecution vide a ruling delivered on 21<sup>st</sup> May 2021.

8. I have considered the tenor of the preliminary objection. I have also considered the parties' submissions, and the relevant constitutional and legal framework. Further, I have considered the prevailing jurisprudence on the key issues in the preliminary objection. The following two key issues fall for determination in the preliminary objection: (i) Whether this suit is res judicata and whether this court has jurisdiction to adjudicate the dispute in this suit.

9. Because the notices of preliminary objections raise the question of jurisdiction of this court, the law requires me to dispose it first [see the decision in **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**].

10. It is trite law that a preliminary objection is urged and contested or challenged on the basis of the law and pleadings before court [see **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**]. No supporting affidavit is admissible to support a preliminary objection. Similarly, no replying affidavit, by whatever name, is admissible to challenge or oppose a preliminary objection. I will therefore ignore the document titled "Replying Affidavit" filed by the Applicants in response to the Preliminary Objections. The Applicant ought to have only filed written submissions in response.

11. **Article 162(2)(b) of the Constitution** states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, **Section 13 of the Environment and Land Court Act** expounds on the jurisdiction of this Court 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."***

12. From a careful examination of the pleadings herein, the suit relates to a dispute on whether or not the statutory notice for sale was issued prior to the statutory sale and the tabulation of the amounts that had been paid. The Applicants are also seeking a declaration that the purported sale was unlawful. Clearly this is a commercial dispute that can only be resolved by the High Court. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).

13. I am also guided by the Court of Appeal case of **Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR**, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to 'use' of land and do not include mortgages, charges, collection of dues and rents are within the civil jurisdiction of the High Court. The Court further held that exclusive jurisdiction of the ELC is limited to **Articles 162 (2) (b) of the Constitution and Section 13 of the ELC Act** which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by **Article 165(3) of the Constitution**. Having found that this court is not the proper court to adjudicate dispute in this suit, I will instead lay down my tools [see **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**].

14. The second issue in the preliminary objection focuses on whether this suit is res judicata. A close reading of **Section 7**, reveals that for the bar of **res judicata** to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are

stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: -

*i) The suit or issue raised was directly and substantially in issue in the former suit.*

*ii) That the former suit was between the same party or parties under whom they or any of them claim.*

*iii) That those parties were litigating under the same title.*

*iv) That the issue in question was heard and finally determined in the former suit*

*v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.*

15. The said suit *Nairobi HCC 407 of 2012 Julius Kipkeny Koli & Ruth Jemutai Kamar v Kenya Commercial Bank Limited and 2 Others* having been dismissed by the High Court, the Applicants are barred from filing a similar suit over the same parties and raising the same issues in any Court since the current suit is res judicata.

16. I will therefore uphold the objection of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and dismiss the Applicants' suit with an order that each party to bear their own costs.

17. It is so ordered.

**Dated, Signed and Delivered at Nairobi this 15<sup>th</sup> day of February 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the Virtual Presence of: -**

**N/A for the Applicants.**

**N/A for the 1<sup>st</sup> Respondent**

**Ms. Otieno for the 2<sup>nd</sup> Respondent.**

**N/A for the 3<sup>rd</sup> Respondent.**

**N/A for the 4<sup>th</sup> Respondent.**

**Court Assistant: Caroline Nafuna.**