



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**E.L.C. CASE NO. 178 OF 2016**

**JOYCE NANCY KABIRU.....PLAINTIFF**

**VERSUS**

**FAULU MICRO-FINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

**CREATIVE LINKS ENTERPRISES LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant filed a Notice of intention to raise a Preliminary Objection dated 26<sup>th</sup> November, 2019 on the following grounds: -

**a. That the Honourable Court lacks jurisdiction to hear and determine the suit herein by virtue of the Court of Appeal Authority of Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] e KLR.**

2. On 22<sup>nd</sup> January, 2020 the parties through their advocates on record agreed that the said Preliminary Objection be disposed of by way of written submissions

3. The 3<sup>rd</sup> Defendant filed her submissions on 27<sup>th</sup> November, 2019 while the Plaintiff filed her submissions on 27<sup>th</sup> September, 2021.

**3<sup>RD</sup> DEFENDANT'S SUBMISSIONS**

4. The 3<sup>rd</sup> Defendant submitted that the Plaintiff had not disputed that she had a loan with the 1<sup>st</sup> Defendant and that she duly executed a legal charge whose genuineness and terms she did not dispute.

5. The 3<sup>rd</sup> Defendant submitted that the issue at hand is a commercial transaction and not an issue covered under Section 13 of the Environment Act No. 19 of 2011 as the challenge raised by the Plaintiff is on the accounts relating to the loan and the manner in which the statutory notices were issued.

6. The 3<sup>rd</sup> Defendant submitted that the Court lacked Jurisdiction to entertain the claim and prayed that the Preliminary Objection be upheld. She relied on the case of *Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] e KLR*.

**PLAINTIFF'S SUBMISSIONS**

7. The plaintiff submitted that the preliminary objection lacks merit and should be dismissed as the facts of the case in *Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] e KLR* are distinguishable from that of the case herein.

8. She submitted that the issues in contention at the Court of Appeal was solely on taking of accounts where the amount owed to the bank was being disputed by the applicant who had defaulted payment of the same.

9. She submitted that her suit raised the following issues among others against the defendants: -

a. Fraudulent dealings by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant over land Parcel Number Mwerua/Mukure/1643.

b. Payment of special damages and general damages by the defendants.

10. She submitted that this Honourable Court has jurisdiction pursuant to *Section 13 (7) of the Environment and Land Court Act* to deal with cases where a party seeks permanent injunction and payment of damages or compensation as the plaintiff has sought among others.
11. She submitted that the case before this Honourable Court does not touch on the issue of taking accounts as she has raised issues against the 2<sup>nd</sup> Defendant over the valuation of land parcel Number Mwerua/Muure/1673.
12. She invited the court to look at the pleadings in a whole and pick out the issues being raised without going to the merits of the case and find that her suit has been filed before a court with requisite jurisdiction.
13. She prayed that the Preliminary Objection be dismissed with costs.

#### **ANALYSIS**

14. I have considered the Preliminary Objection, the rival submissions by the parties herein as well as the relevant law.
15. *What constitutes a Preliminary Objection is set out in the case of 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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”*

16. The 3<sup>rd</sup> Defendant has raised an objection as to the issue of jurisdiction. An issue of jurisdiction is a preliminary point of law that can be taken at the very first instance as jurisdiction is everything and without it a Court/Tribunal has no power to make one more step. This position was held in the Locus classicus case of *The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR1*, where **Nyarangi J.A.** held as follows:

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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”.*

17. In determining the issue of jurisdiction, the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 others* held as follows:

*“... a Court can only exercise jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

18. This Court’s jurisdiction is outlined under **Section 13 of the Environment and Land Court Act No.19 of 2011** which provides that:

*“(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.”*

19. A Preliminary Objection similar to the one raised in this matter was raised in the case of *Lydia Nyambura Mbugua Vs Diamond Trust Bank Kenya Limited & another [2018] e KLR*. In interpreting the case of *Cooperative Bank Vs Patrick Kangethe* (supra) the Honourable Court held as follows: -

*“15. 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. This would also go contrary to the Supreme Court decision in the case of R Karisa Chengo & 2 others (2017) e KLR...”*

22. 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 –vs- Agricultural Finance Corporation (2015) e KLR). 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....”

20. Turning to the case at hand, the 3<sup>rd</sup> Defendant contends that the issue in this suit is a commercial transaction and not an issue covered under **Section 13 of the Environment Act No. 19 of 2011** as the challenge raised by the Plaintiff is on the accounts relating to the loan and the manner in which the statutory notices were issued.

21. It is further the contention of the 3<sup>rd</sup> Defendant that this Court lack Jurisdiction to entertain the claim and relied on the case of **Co-operative Bank of Kenya Limited -vs-Patrick Kangethe Njuguna & 5 others [2017] e KLR**.

22. The plaintiff on the other hand argued that the Preliminary Objection lacks merit and should be dismissed as the facts of the case of **Co-operative Bank of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] e KLR** are distinguishable from the facts in this case. She contends that this Court has jurisdiction pursuant to **Section 13 (7) of the Environment and Land Court Act** to deal with cases where a party seeks permanent injunction and payment of damages or compensation as the plaintiff has sought among others.

23. I have looked at the Plaintiff’s amended Complaint which was filed on 28<sup>th</sup> September, 2017. Though the suit is premised on a charge instrument dated 13<sup>th</sup> February 2014 over property number Mwerua/Mukure/1643 securing a loan of Kshs. 1,100,000/- together with interests thereon, the plaintiff’s claim is for a declaration that the sale of the land by public auction be declared fraudulent, unlawful, null and void among other prayers.

24. From those prayers being sought, I find and hold that this Court has jurisdiction to hear and determine the Plaintiff’s suit. I take the same view as was held in the case of **Lydia Nyambura Mbugua** (supra) where the Court pronounced itself as follows;

*“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”*

## **CONCLUSION**

25. In the circumstances, I find that the Notice of Preliminary Objection dated 26<sup>th</sup> November, 2019 is without merit and the same is hereby dismissed with costs to the Plaintiff.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF MARCH, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Makworo for the Plaintiff
2. Ms Amba holding brief for Magee for the 3<sup>rd</sup> Defendant
3. Kabuta – Court clerk.