



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Urithi Housing Co-operative Society Ltd v Family Bank Limited & another (Environment and Land Case Civil Suit E042 of 2021) [2022] KEELC 2464 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE CIVIL SUIT E042 OF 2021
LN GACHERU, J
JULY 14, 2022**

BETWEEN

URITHI HOUSING CO-OPERATIVE SOCIETY LTD APPLICANT

AND

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS

AGENCIES 1ST RESPONDENT

FAMILY BANK LIMITED 2ND RESPONDENT

RULING

1. Vide a Notice of Motion application dated 31st January, 2022, the Plaintiff/Applicant moved this Court for orders;
 1. That upon hearing and determination of this application Ex parte, this Honorable Court be pleased to review, vary and/ or set aside the dismissal order issued by the virtual Court on the 26th January, 2022
 2. That upon hearing and determination of this application Ex parte, this Honorable Court be pleased to issue an order reinstating the Plaintiff/ Applicant's Notice of Motion dated 17th December, 2021
 3. That upon hearing and determination of this present application ex parte, this Honorable Court be pleased to grant prayers No. 2 and 3 sought in the reinstated Applicant's Application dated 17th December, 2021.
 4. That the costs of this Application be in the cause
2. The application is predicated on the Grounds stated on the face of it and the Supporting Affidavit of Peter Mwenda Njagi. It is the Applicant's case that his application dated 17th December, 2021, was coming up for hearing on 26th January, 2022. That he was reliably informed that the matter was



- to proceed physically. He contends that he later learnt that the matter proceeded online and his application was dismissed for non-attendance, despite there being no express information on how the same was to proceed.
3. The Applicant further avers that the Court failed to issue orders on their application on the mistaken believe that the instant suit is similar to ELC No. 25 of 2019. He further deponed that it is in the interest of justice that the applicant be given a chance to dispense with their application as the non-attendance was not deliberate. That should the application not be allowed, the Applicant will risk disenfranchisement of its interest in 11486/6 part of L.R.No. 11486(L.R.20122).
 4. The Application is opposed by the 1st Respondent vide a Replying Affidavit sworn by Moraa Onsare, on the 8th February, 2022. The 1st Respondent deponed that whereas there was no indication that the matter was to proceed virtually or physically, the Court placed aside the matter to enable the Court Assistant to find out whether counsel was in Court. That subsequently when the matter was later called out, they were informed that counsel for the Plaintiff/Applicant was not in open Court and the Court proceeded to dismiss the application. That subject to the dismissal orders issued by the Court, the 1st Respondent sought the Court's direction on their Notice of Preliminary Objection dated 20th January, 2022.
 5. It is the 1st Defendant/Respondent's case that the instant application cannot be entertained as the Notice of Preliminary Objection, has not been determined and as such the same is a non-starter. Further the 1st Respondent contends that they continue to suffer prejudice because the facility in dispute is non-performing and continues to accrue interest at default rates.
 6. This Court gave directions that the instant application together with the Notice of Preliminary Objection dated 20th January, 2022 be dispensed together by way of written submissions.
 7. In the said Notice of Preliminary Objection, the 1st Respondent herein opposed the Plaintiff/Applicant's suit and the impugned Notice of Motion dated 17th December, 2021 on the grounds that;
 1. That the Plaintiff's Application and entire suit filed herein is incompetent, fatally and incurably defective and is an abuse of the Honorable Court for the following reasons This Honorable Court lacks jurisdiction to hear and determine this matter in so far as the dispute is commercial in nature and falls within the jurisdiction of the High Court The Plaintiff's application and entire suit falls short on the doctrine of *res judicata* under Section 7 of the [Civil Procedure Act](#) as prayer for an injunction was heard and determined in Murang'a ELC Case No. 25 of 2019 – [Anthony Mbugua Njihia & 36 Others vs Urithii Housing Co-operative Society Limited & Another](#)
 2. That the Plaintiff's application and entire suit is based on an incurable illegality and ought to be struck out forthwith with costs to the 1st Defendant
 8. This Court notes and appreciates that issues of Preliminary Objection ought to be determined at the first instance. In support of the Preliminary Objection, the 1st Defendant filed their submissions dated 22nd February, 2022. In affirming that this Court is without jurisdiction, the 1st Defendant/Respondent invited this Court to the contents of the Plaint and submitted that the predominant issue is on amount due and owing and the legality of the Statutory Power of sale.
 8. It invited this Court to the case of [Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others](#)[2017]eKLR, where the Court observed the jurisdiction of this Court in respect of charges. It further submitted that this Court being without jurisdiction, the instant suit ought to be struck



out. Reliance was placed on the case of *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others*{2019}eKLR, where the Apex Court in concluding that a matter filed in a Court of no competent jurisdiction cannot be transferred to a Court with competent jurisdiction relied on *Kangenyi v Musiramo & Another*[1968]EALR 43.

10. On *Res judicata*, the 1st Defendant submitted that the instant suit is *Res judicata* to ELC No. 25 of 2019;- *Anthony Mbugua Njibia & 36 others v Urithi Housing Co-operative Society Ltd & another* [2021] eKLR. It is the objector's submissions that the issue of injunction was an issue in the foregoing case and the Court rendered itself on the same in paragraphs 90 & 91 of its Judgment. The objector relied on a litany of cases in support of its claim that the instant suit is *Res judicata* and urged this Court to strike out the suit with costs to the 1st Defendant.
11. The Plaintiffs filed their submissions dated 22nd March, 2022 on the 13th April, 2022, opposing the Preliminary Objection. It is its submissions that the Preliminary Objection as filed fails the test of a competent Preliminary Objection, laid out in the case of *Mukisa Biscuit Manufacturing and Co. Ltd v West End Distributors* [1969] EA 696 and *Nitin Properties Ltd v Singh Kalsi & Another* [1995] eKLR, for the reason that the grounds relied upon need to be investigated. It submitted that this Court has the jurisdiction that flows from Article 162(2) of the Constitution and Section 13 of the *Environment and Land Court Act*.
12. On *Res judicata*, the Plaintiff submitted that the issues raised in the instant suit were not conclusively determined in ELC No. 25 of 2019. It invited this Court to the determination of what constitutes *Res judicata*, as was laid out in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*[2017]eKLR and *John Florence Maritime Services Limited & Another Vs Cabinet Secretary, Transport and Infrastructure & 3 Others*{2021}eKLR. In the end, it urged this Court to find that the Preliminary Objection is incompetent and is ripe for dismissal.

Analysis and Determination

13. The legal position on Preliminary Objection was well established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696, where the Court held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”
14. The Court further held:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop”
15. For a Preliminary Objection, to succeed, the same must raise pure points of law that it would not be difficult to ascertain and there must be no proper contests of facts. The Purpose of Preliminary



Objection was well stated by the Supreme Court in Civil Application No. 36 of 2014 *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where it held:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

16. Having been well guided above, this Court shall move to determine whether the Notice of Preliminary Objection is merited or not.
 17. The first ground on the Preliminary Objection is on the jurisdiction of this Court to determine the instant suit. As alluded to herein above, an issue of jurisdiction can be raised through a Preliminary Objection. This is because this Court need not investigate facts as to established whether its clothed with jurisdiction or not.
 18. Jurisdiction is the power conferred on a Court to hear and determine issues and give orders. It is the cornerstone of determination of any suit without which a Court cannot entertain any matter before it. It is trite that issues of jurisdiction should be determined at the first instance. In the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR the Court of Appeal extensively determined the issue of jurisdiction and held:
 19. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.
 20. The superior Court quoted the celebrated case of “*Owners of the Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd.* [1989], where the trial Court held
- “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....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
21. Similarly, in *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, the Supreme Court observed that:

“A Court’s jurisdiction flows from either *the Constitution* or 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 submission 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...Where *the Constitution* exhaustively provides for



the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

22. The jurisdiction of this Court is founded under Article 162(2)(b) of the Constitution and it draws its power from Section 13 of the [Environment and Land Court Act](#) which provides:

“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.

23. The objector disputes the jurisdiction of this Court to determine the instant suit on the basis that the instantaneous suit is founded on a commercial transaction, which is a matter within the jurisdiction of the High Court. Whereas this Court and the High Court are Courts of equal status, both Courts have distinct powers as donated by their respective statutes and Constitutional pronouncements. This was espoused by the Supreme Court in Petition No. 5 of 2015 *Republic v Karisa Chengo & 2 others* [2017] eKLR, when it stated at paragraph 79 that:-

“It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165 (5) of [the Constitution](#), which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162 (2)”.

24. The issue giving rise to the suit between the Plaintiff and the 1st Defendant was a loan agreement. A reading of the Plaint indicates that the 1st Defendant advanced the Plaintiff a loan to a tune of Kshs. 500,000,000/= an amount whose payment the Plaintiff has since defaulted. That as a result of the default, the 1st Defendant’s attempted to exercise their Statutory Power of sale donated under Section 96 of the [Land Act](#).

25. Even though the Plaintiff is seeking an injunction based on land, which is security held for the loan, the facts founding the injunction are based on disputed loan amounts and alleged revised loan payment. The charge instrument created interest in the suit land, but the cause of action herein is not the charge but the amounts due and owing thereunder. A charge over land does not constitute land use, it only creates rights over land, which merely crystalize upon default. They are therefore limited rights for purposes of payment of the monies so advanced.



26. The jurisdiction of this Court on issues of charge was raised in *Mathew Namusei Chabasi v Cooperative Bank Limited & another* [2021] eKLR where the Court observed:

“By virtue of Sections 150 and 101 of the *Land Act* and the Registration of Titles Act respectively, the ELC is the only one that has jurisdiction over disputes that arise in relation to instruments created on land in relation to the statutes. This would include their validity, enforcement and the process of their realization.”

27. Additionally, the *Land Act* & *Land Registration Act* also provide for the Jurisdiction of the Environment & Land Court as the two Acts address the land transactions and dispositions of land. The process through which a chargee can exercise its statutory power of sale is found in the said Acts and therefore the Jurisdiction of the Environment and Land Court (ELC) in dealing with the same is justified. In *Lydia Nyambura Mbugua ...vs...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 –vs- 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.”

28. It will not be difficult to ascertain from the pleadings whether this Court is clothed with jurisdiction or not. As well laid out by the Court in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, the substance of a claim and the prayers sought are what will determine whether a Court has jurisdiction or not. Additionally this Court is well guided by the sentiments of the Court in *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR where it held

23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

29. The Plaintiff herein is not challenging the instrument giving rise to the suit, save for averring that the 1st Defendant did not carry out a Valuation and/or prepared a Valuation report. It flows from the pleadings that the Plaintiff is not in any way challenging the charge instruments or the enforceable interest thereunder. Applying the Predominant purpose test laid out above, this Court notes that the Plaintiff's substance of claim is founded on books of accounts and the accurate sums owing. The issues



of Valuation Report is an issue that is important in establishing the monies owing and in the end is an issue of account. This Court does not have jurisdiction to determine accounting issues as was rightly held by the Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR where it held that:

“While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of *the Constitution* provides inter alia, that;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.”

30. While the relief sought is an injunction on land, which this Court has the jurisdiction to grant, the facts founding the prayers revolve on accounting and/ or actual monies owing which is a matter best determined by the High Court. This Court cannot apportion jurisdiction on itself just because the matter is on land as it is alive to the facts founding the suit. To this end, this Court finds and holds that it lacks the jurisdiction to entertain the instant suit.

31. On the second limb of the Preliminary Objection which is that the instant suit is *res judicata*, the elements of *Res Judicata* are laid out in section 7 of the *Civil Procedure Act* which provides

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

32. The intent of *res judicata* is to bring litigation to a halt; it is anticipated to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence it saves judicial precious time and protects the sanctity of the court to do just what it should do. In sum, it prevents the abuse of the court process. The Court in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) held that:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice

33. While some Courts have found that the issue of *res judicata* can be determined through a Preliminary Objection, some have held otherwise. It is the finding of this Court that the same varies depending on



the facts laid out in the case where it is certain and clear then a PO can dispense with (See *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR)

34. Instantly, the Plaintiff maintains that the suit herein is not res judicata ELC No. 25 of 2019. To establish whether the claim is true or not, this Court will have to investigate facts and that being the case such an action will fall short of the threshold of what constitutes a Preliminary Objection. This Court is persuaded by the finding of the Court in *George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another* [2014] eKLR where the Court opined:

“One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata”.

35. The upshot of the above is that this Court finds and holds that the instant ground of Preliminary Objection on the fact that is *res judicata* must fail for want of facts. It follows therefore that the 1st Defendant’s Notice of Preliminary Objection dated 20th January 2022, partially succeeds in that this court has no jurisdiction to deal with the Instant Suit.
36. Having found that this Court has no jurisdiction to entertain the instant suit, it follows therefore that the Court cannot entertain any application and this Court will resist itself from determining the suit herein and proceeds to strike it out.
37. This Court in finding that the suit is ripe for striking out is guided by the case of *Albert Chaurembo Mumba*,supra and *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR,where the Courts found that a suit filed in an incompetent Court is null abinitio and should be struck out.
38. Flowing from the above, the Court finds and holds that this suit is incompetent and the same is struck out entirely with costs to the 1st Defendant/Objector.
39. Having struck out the suit for lack of jurisdiction, this Court will not make any determination on the Notice of Motion Application dated 31st January, 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 14TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of;

Joel Njonjo – Court Assistant

Mr Njeru H/B Mwendwa Njagi for the Plaintiff/Applicant

M/s Ngui for the 1st Defendant/Respondent/Objector

N/A for the 2nd Defendant/Respondent

L. GACHERU

JUDGE

14/7/2022

