



**Tendenei v Kiptoo & another (Environment & Land Case E007 of 2022)
[2022] KEELC 4800 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4800 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E007 OF 2022
SM KIBUNJA, J
SEPTEMBER 21, 2022**

BETWEEN

SALINA TABUNE TENDENEI PLAINTIFF

AND

TANUI JAMES K. KIPTOO 1ST DEFENDANT

**PARAMOUNT BANK LIMITED (FORMERLY KNOWN AS PARAMOUNT
UNIVERSAL BANK LIMITED) 2ND DEFENDANT**

RULING

1. The plaintiff commenced this suit through the plaint dated the February 3, 2022, seeking for permanent injunction, specific performance, and declaratory orders in respect of a quarter acre of parcel Pioneer/Ngeria/Block 1 (EATEC)11533, the suit land, among others. The plaint was filed contemporaneously with the notice of motion of even date that seeks to restrain the 2nd defendant or its agents from selling, advertising for sale, transferring or in any way disposing or interfering with the plaintiff's occupation and ownership of the said land. The 2nd defendant filed a replying affidavit sworn by Timothy Kimani, on the February 8, 2022, and notice of preliminary objection of the same date, in opposition to the application and suit.
2. The 2nd defendant's preliminary objection dated February 8, 2021 seeks for the dismissal of the plaintiff's suit on the following grounds *inter alia*:
 - i. That this suit is bad in law, inadmissible and incurably defective and incompetent as the plaintiff does not have *locus standi* to institute this suit for the following reasons:
 - a) The plaintiff is not the registered owner of the suit property or the chargor and therefore has no any proprietary interest in the suit property.



- b) It is trite law that it is only a chargor who has a registered and proprietary interest in the land and who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively.
- ii. That this honourable court has no jurisdiction to entertain this suit on account that the suit property is valued at Kshs 7,800,000.00. Therefore, this suit is below the pecuniary jurisdiction of this court.
3. The on the March 14, 2022, the court gave directions after hearing both counsel present that the preliminary objection be heard and determined first, and further gave timelines for filing and exchanging submissions.
4. The plaintiff filed their submissions dated the April 11, 2022 contending that she has the *locus standi* to institute and prosecute the suit as she has shown she had purchased the suit land and developed it. She referred to article 48 of the *Constitution* and cited the case of *Attorney General & Anor v Randu Nzai Rwai and 2 others* Civil Appeal No 275 of 2012, in which the Court of Appeal held that “The right of every person to enter the courts unrestrained and should be availed the instruments of justice” and submitted that though she is not the registered owner of the land but a purchaser, she has the locus to sue as she is in actual possession. That further the 1st defendant who sold the land to her and six months later charged it to defraud her, has not come to court though he has been served. The plaintiff further submitted that this court has unlimited original jurisdiction as shown in section 13(1) of the *Environment and Land Court Act* No 11 of 2011. That she filed the suit in this court, and not the lower court, because the notice served upon the plaintiff had indicated the outstanding sum to be Kshs 41,000,000/-. That accordingly this is the court with jurisdiction.
5. The following are the issues for the court’s determinations;
- a. Whether the plaintiff has the locus standi to file and prosecute this suit.
- b. Whether this court has jurisdiction to hear and determine the suit.
6. The court has carefully considered the grounds on the 2nd defendant’s notice of preliminary objection, the plaintiff’s submissions and come to the following determinations;
- a. The Supreme Court in *Hassan Ali Jobo & Another V Suleiman Said Shabbal & 2 Others* cited the leading decision on preliminary objections in *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd* (1969) EA 696, where the court held as follows:
- “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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

I take note of the fact that the grounds raised in the preliminary objection herein, being locus standi and jurisdiction, are pure points of law capable of disposing of the plaintiff’s suit if upheld.



- b. That in *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others* the court 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.”

And article 162(2) (b) of the *Constitution* and section 13 of the *Environment and Land Court Act* confirms that the Environment and Land Court has original and appellate jurisdiction to hear and determine all disputes relating to environment and the use and occupation of and title to land. Section 9 of the *Magistrates Court Act, 2015* confers jurisdiction to the Magistrates Courts to hear and determine land disputes in exercise of jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act*. The aforementioned jurisdiction is subject to the pecuniary limits outlined in section 7 of the *Magistrates Court Act, 2015*. The said section 7 (1) (a) provides as follows:

“(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed:
(a) Twenty million shillings, where the court is presided over by a chief magistrate;”

Section 11 of the *Civil Procedure Act* is instructive and provides as follows:

“Every suit shall be instituted in the court of the lowest grade competent to try it...”

- c. The plaintiff submitted that she resolved to file the instant claim before this court because the courtesy notice marked as STT-3 indicated that a sum of Kshs 41,000,000.00 (sic) is due to the 2nd defendant. The court has perused the said notice dated the September 30, 2021 and it indicates the outstanding balance as Kshs 42,533,112.96 as at September 29, 2021. That figure cannot in any way be taken to be the value of the quarter acre of the land that the plaintiff has sued over. The value of the subject matter of a claim or suit is the one to guide advocates and litigants when making the decision of the court to file a claim or suit. The 2nd defendant has in ground 2 of the preliminary objection indicated the suit property is valued Kshs 7,800,000.00. That value has not been disputed by the plaintiff. That being the case I am inclined to agree with the counsel of the 2nd defendant's submission that this matter ought to have been filed before the Chief Magistrates' Court, and not this court since the value of the subject matter is approximately Kshs 7,800,000.00. by the ction indicated the suit property is valued in actual possession. That in *Rebecca Chumo V Christina Cheptoo Chumo* [2021] eKLR the court made the following observation:

“21. Further in *Boniface Waweru Mbiyu vs Mary Njeri & Another* [2005] eKLR the court had held that:

“Whenever a matter is filed before a court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other court. It is the duty of the court or tribunal before which



such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other court”...

23. It is therefore clear that since this suit was instituted before the Chief Magistrate’s Court that had no jurisdiction. Such a suit, it is trite cannot be transferred in pursuant to the provisions of section 18 to the Environment and Land Court, where it ought to have been instituted in the first instance, as the same was a nullity in law. The court can only transfer a cause whose existence is recognized by law”.

That being the position of the law, it follows that the 2nd defendant’s preliminary objection therefore succeeds on this ground.

- d. The court now turns to the ground that the plaintiff lacks the requisite *locus standi* to file a claim, as she was not privy to the charge that was registered over the suit land between the 1st defendant and the 2nd defendant. The Court of Appeal in *Alfred Njau & 5 Others V City Council Of Nairobi* [1983] eKLR discussed *locus standi* at length stated as follows inter alia:

“... to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.”

The plaintiff has submitted that following her purchase of the suit land *vide* a sale agreement dated April 17, 2015 marked STT 1, she took immediate possession of the suit land. That she has constructed houses on the suit land as is evidenced by the photographs marked as STT 2, and urged the court to find that she ought to be allowed to have unrestricted access to the court, as was held by the Court of Appeal in *Attorney General & Another V. Randu Nzai Rwai And 2 Others* Civil Appeal No 275 of 2012. The court is of the considered view that, had the plaintiff provided proof that consent of the Land Control Board was applied for and obtained in accordance with section 6 of the *Land Control Act* chapter 301 of the Laws of Kenya, after the execution of the agreement and payment of the consideration amount of Kshs 6,000,000.00 made to the 1st defendant, who has so far not participated in the proceedings, she would have established her interests on the suit land. In the absence of such evidence the court finds that the plaintiff has not established that she has an enforceable interest on the suit land. The plaintiff has also not provided any reasonable explanation to justify the delay in obtaining the requisite statutory consent and transferring the suit land to herself from April 2015, when she alleges to have purchased the suit land herein from the 1st defendant. In the absence of the Land Control Board consent having been obtained within the six months from the date of the alleged sale agreement between the plaintiff and the 1st defendant, the inevitable conclusion is that if the said agreement existed, it became void in 2015. The court in *Maxvictor Enterprises Limited V Gulf African Bank Limited & Another* [2020] eKLR observed as follows:

“ 8. For a plaintiff to bring an action in court it ought to have some legal or equitable status in connection with the subject matter of the court action. In this case the subject matter is the suit property. Maxvictor, as the plaintiff, should have some legal or equitable status in connection with the suit property. That is to say Maxvictor should show some interest therein or right thereto enforceable at law or enforceable at equity. In this case it is clear Maxvictor has not acquired any interest in the suit property rather it is an entity known as Ngongo Engineering Limited which owns the suit property and which consented to charge the suit property in favour of the bank as security for the facility the bank granted to Maxvictor. Consequently, Maxvictor has no locus to maintain an action for injunction either in law or equity



to restrain the Bank from exercising its statutory power of sale of the suit property. This indeed was the holding in the case *Insignia Limited v Zadock & 3 Others* (2012) eKLR where the court stated:

“.....it is highly doubtful whether the *mala fide* of a chargee can be challenged by a non-party to the contract of charge. In *Nairobi Mamba Village vs National Bank of Kenya Nairobi Case* (Supra) Ringera, J (as he then was) stated: “An interlocutory injunction is an equitable remedy which may be issued at the instance of a party to the suit to protect his legal rights from violation by unlawful acts of another party. In the context of rule (1) of order 39 of the *Civil Procedure Rules*, the party seeking to prevent alienation, wastage or damage to the property in dispute therein must establish that he has legal rights in that property which he seeks to protect by the injunction sought...Whereas the plaintiff can legitimately complain of the alleged breaches of the loan agreements and seek other relief in connection therewith, he cannot properly seek to restrain the chargee from selling the charged property for the reason that the intended sale is pursuant to the exercise of the contractual and statutory powers of the chargee which were expressly or impliedly contained in the contract of charge to which the plaintiff is not a party. The only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargor...Whereas it is true that a guarantor cannot be called upon to pay the debt guaranteed unless the principal debtor is default, the fallacy lies in the proposition that the principal debtor can object to the guarantor being sued or otherwise brought to shoulder his obligations under the guarantee...The mere fact that the plaintiff has an interest in the charged property does not suffice to give him *locus standi* to obtain an injunction against the chargee as the debtor’s interest in the property is not proprietary interest therein and cannot question the exercise of the power of sale”.

The above leads the court to find that the plaintiff has no *locus standi* to file a claim over the suit land, as she is neither the registered proprietor nor has she established that she is likely to get specific performance order as the purchaser of the land. I therefore uphold the 2nd defendant’s preliminary objection dated February 8, 2022.

e. That as the 2nd defendant has entered appearance through counsel and filed replying papers in opposition to the notice of motion among others, and has succeeded in their preliminary objection, then pursuant to section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, it is entitled to costs.

7. That upon finding merit in the 2nd defendant’s preliminary objection dated the February 8, 2022, the court orders as follows;
 - a. That the plaintiff’s suit and application commenced *vide* the plaint and notice of motion dated the February 3, 2022 are hereby dismissed.
 - b. The plaintiff to pay the 2nd defendant’s costs.



Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 21ST DAY OF SEPTEMBER, 2022

S. M. Kibunja,J.

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: No appearance

DEFENDANTS: No appearance

COUNSEL: No appearance

COURT ASSISTANT: ONIALA

S. M. Kibunja,J.

Environment & Land Court - Eldoret

