



Ropart Trust Co Limited v LTI Kisii Safari Limited & 3 others (Environment & Land Petition 6 of 2022) [2022] KEELC 14563 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 6 OF 2022**

AE DENA, J

OCTOBER 26, 2022

BETWEEN

ROPART TRUST CO LIMITED PETITIONER

AND

LTI KISII SAFARI LIMITED 1ST RESPONDENT

UNIQUE SHELTERS LTD 2ND RESPONDENT

LAND REGISTRAR KWALE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. For a better understanding of the preliminary objection herein, I find it necessary to give a summary background on the petition herein. The petition was filed on 7/07/21. According to the pleadings, the petitioner was appointed security trustee under a debenture trust deed dated July 1991. The debenture was between the 1st respondent and Coopers Trust Corporation. The debenture was to secure facilities extended to the 1st respondent by several lenders that are stated in the petition together with sums secured. The petitioner holds as trustee two charges over properties Kwale/Diani Beach/ 810, 868, 869,870 and 655 (the properties). Following default, the lenders and the petitioners appointed receivers of the 1st respondent to manage the affairs of the 1st respondent. The 1st respondent challenged this appointment in three suits namely
 - 1) HCCC 1579 of 1994 which was settled amicably
 - 2) HCCC 2409 of 1996 which was dismissed for raising similar issues in 1) above.
 - 3) Kisumu HCCC 83 of 2003 which sought several declarations some touching on the legality of appointment of the receivers herein and that the debenture and charges over the properties were bonafide mortgages/charges. It is pleaded that this suit was dismissed by Mwera J in 2007.



The 1st defendant appealed under Civil Appeal No 72 of 2008 which appeal was determined in November 2011 where the receivership was removed and an order of accounts given which orders the petitioners state they complied with.

2. It is further pleaded that as at 2014 the 1st respondent was still indebted to the Petitioner culminating into statutory demand notice by the petitioners for payment of instalment arrears together with interest and compensation for late repayment and expenses from the 1st respondent. It is noteworthy that in response the 1st respondent filed HCCC No. 142 of 2014 for orders to restrain the petitioner from exercising its statutory rights under the Land Act, 2012. That in this suit the 1st respondent urged that the court of appeal in 72 of 2008 above had prevented the petitioners from any actions or claims based on the debenture. The suit was dismissed.
3. It is the petitioner's case that sometime in August 2020 the 3rd respondent land registrar Kwale had removed the legal charges over the properties and transferred the same to the 1st and 2nd respondents. That upon inquiry the 3rd respondent stated inter alia that pursuant to an order in Appeal 72 of 2008 new titles were issued on April 2013 to the 1st respondent on the said two properties who subsequently transferred one to the 2nd respondent in 2017, that yet another property had been subdivided by the 1st respondents and that the green cards did not indicate any encumbrances. It is pleaded by the petitioner that the appeal court did not invalidate the debenture, the duly registered securities nor had it made a declaration that the outstanding amounts (which then stood at Kshs.1.4 billion) had been settled nor were the petitioners restrained from enforcing the property charges neither was the 3rd defendant directed to cancel and restore the titles to the 1st respondent. That the petitioner did not at any time consent to the changes effected by the 3rd respondent as required under Section 87 of the Land Act, 2012. That petitioner still held the original titles to the properties. The petitioner attributes fraud, illegality, irregularities on the part of the 1,2 and 3rd respondents effectively impairing them from recovering the outstanding sums from the 1st respondent and violation of its fundamental rights and freedoms contrary to articles 10, 20, 21, 40,47 and 60 of the Constitution thus the instant petition.
4. The petitioner seeks the following orders; -
 - 1) A declaration that the legal charges registered on 23/7/91 and 9/3/1995 over properties title numbers Kwale/Diani Beach Block/810, 868, 869, 870 and Kwale/Diani Beach/655 are valid legal charges registered in favor of the petitioner.
 - 2) A declaration do issue that the purported cancellation, removal and/revocation of the Petitioner's valid legal charges over properties title number Kwale/Diani Beach Block/810, 868, 869, 870 and Kwale/Diani Beach/655 was irregular fraudulent, illegal, null and void.
 - 3) A declaration do issue that the purported transfers of properties title No. Kwale/Diani Beach Block/868,867, and 870 to the 2nd Respondent were irregular, fraudulent, illegal and null and void.
 - 4) A declaration do issue that the purported sub-division of property title No. Kwale/Diani Beach Block/810 into Kwale/Diani Beach Block/2143 and 2146 irregular, fraudulent, illegal, null and void.
 - 5) An order do issue directing the 3rd respondent to cancel and revoke the titles issued in respect of Kwale/Diani Beach Block/2143 and 2146 and to revert to the original parcel being property title No. Kwale/Diani Beach Block/810.
 - 6) An order do issue directed at the 3rd respondent to cancel and revoke the title issued to the 2nd Respondent for properties Kwale/Diani Beach Block/868,867, and 870



- 7) An order do issue directing the 3rd Respondent to restore the duly registered charges over properties title numbers Kwale/ Diani Beach Block/ 810,868,869,870 and Kwale/Diani Beach/655.
- 8) An order for a permanent injunction be made restraining the 1st and 2nd Respondents herein, by themselves, their agents, servants, employees, relatives and / or whomsoever else acting on their behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating and/or in any other manner whatsoever from interfering with the Petitioners' rights to realize its securities registered against properties title numbers Kwale/Diani Beach Block/ 810,868,869,870 and Kwale/ Diani Beach/655.

The Preliminary Objection

5. The 1st Respondent herein has raised a preliminary objection to the petition and which is subject of this ruling. The notice of preliminary objection is dated 4/10/2021 and is raised on grounds that the petition is a commercial one and this Honourable Court under Article 162[b] of *the Constitution* lacks jurisdiction to entertain commercial disputes. Further that the court is barred from resolving the dispute raised in the petition on account of Section 7 of the *Civil Procedure Act* as the issues in dispute have been determined by the Court of Appeal in Nairobi Civil Appeal No 72 of 2008 *LTI Kisii Safari Inns Ltd & 2 others versus Deutsche Investments Und.* Further that the Petitioner on its own admission is a representative in interest within the meaning of section 34 of the *Civil Procedure Act* and consequently the petition can be treated as an application of the execution of the order of the Court of Appeal. The same raises questions that were raised in Kisumu High Court Civil Suit No 83 of 2006 on discharge or satisfaction of the decree and the same can only be determined in the said Kisumu High Court Civil Suit No 83 of 2006.
6. The 2nd 3rd and 4th Respondents did not take part in the preliminary objection. The 3rd and 4th Respondents have not entered appearance in the petition. The 2nd Respondent filed a reply to the petition on November 23, 2021 and had earlier filed their notice of appointment on October 15, 2021. By the 7/6/2022 these parties had not filed any documents in relation to preliminary objection.
7. Parties were directed to canvass the preliminary objection through written submissions.

1st Respondents Submissions

8. It is submitted that the preliminary objection is raised on issues of substance and of procedure. The issue of procedure is whether the petition is barred by section 34[1] of the *Civil Procedure Act*. It is submitted that this suit concerns the execution of the orders made by the Court of Appeal on November 18, 2018 and which is barred by section 34[1] of the *Civil Procedure Act*, which provides that all questions concerning execution of orders or decree are to be determined by the court which passed the decree. Reliance is placed on *Kuronya Auctioneers versus Maurice O Odhoch & Another* [2003] eKLR.
9. It is contended that the court is barred by the doctrine of res judicata as was held in the case in *Ngugi versus Kinyanjui & 3 others* 1989 eKLR. That the issue of the 1st appellant assets has been determined by the Court of Appeal and hence this court lacks jurisdiction to adjudicate upon the same. The court is urged to strike out the petition with costs. The applicant has annexed several authorities and excerpts of the law on *res judicata* and on the issue of jurisdiction. The same are as per the supplementary list of authorities filed before court on 23/5/2022.



Petitioners Submissions

10. The Petitioner's raise three issues for determination;
 - a. Whether the petition and consequently the application is res Judicata
 - b. Whether the petition concerns the execution of the orders of Court of Appeal in Civil Appeal No 72 of 2008 and is thus barred by Section 34 of the [Civil Procedure Act](#) and
 - c. Whether this honourable court has jurisdiction to entertain this suit.
11. Rehashing the key elements giving rise to *res judicata* as pronounced in [Kenya Commercial Bank Limited Versus Benjob Amalgamated Limited](#) [2017] eKLR and section 7 of the [Civil Procedure Act](#) it is submitted that threshold for marking the matter as resjudicata has not been met as the parties in the appeal and the instant suit are not the same. That the acts which precipitated this petition occurred well after the decision in the appeal. That in the event their actions are lawful because of the past decision in the appeal, the same would constitute a substantive response to the claim but not a preliminary objection as raised. It is stated that what has precipitated the instant suit is the purported discharge of charges as listed herein.
12. Highlighting the reliefs granted in Civil Appeal No 72 of 2008 it is stated the discharge of the charges over the suit properties was neither sought nor granted in the appeal. That Justice Onyago Otieno in the High Court and Justice Tunoi in the Court of Appeal found that the loan was neither being serviced or repaid and stood at over Kshs 1.4 billion. That the assumption that the 1st respondent had repaid the loan was therefore wrong. That the issue in the appeal was how receivership as an enforcement tool for recovery of the debt was conducted and accounted for. It was not about availability of other securities apart from the debenture to be enforced to satisfy the debt. That it is against this background that the Petitioner initiated steps to enforce charges over the suit properties which the 1st respondent resisted in Mombasa HCCC No 142 of 2014 and which suit was dismissed. The preliminary objection is without basis and is unsupported by pleadings.
13. On whether the petition concerns the execution of the orders of the Court of Appeal in Civil Appeal No 72 of 2008. The court is referred to the provisions of Section 34 of the [Civil Procedure Act](#) and the court's decision in [Richard Boke Chacha & 3 others versus Linus Kaikai & Another](#) [2021] eKLR. That the issues in the petition cannot be deemed related to the execution of decree of the judgement in the appeal. That the appellate court was not asked to determine validity of the legal charges herein. That there was no legal issue arising in execution of the orders and on validity of the charges.
14. Lastly it is submitted the substratum of the petition is that the petitioner holds a legal charge over the suit properties, there has been a series of fraudulent transactions over the same conducted in the absence of the true and original titles and without due notice to the petitioner which fell within the jurisdiction of this court as outlined in section 13 of the [Environment and Land Court Act](#) 2011. Further reliance was placed on [Lydia Nyambura Versus Diamond Trust Bank Kenya Limited & Another](#) [2018] eKLR.

Issues For Determination

15. Since I agree with the issues for determination as identified by the petitioner I will adopt the same for purposes of this ruling. I see no need for reinventing the wheel.
16. I will start with the issue of whether this court has jurisdiction to entertain this suit for it is trite that jurisdiction is everything and without it, a court cannot move one more step - See *Owners of*



the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1. It has been submitted that the petition is a commercial one and this Honourable Court under Article 162[b] of *the Constitution* lacks jurisdiction to entertain commercial disputes. The facts or actions that precipitated the filing of this petition have already been enumerated earlier in this ruling including the orders sought by the petitioners.

17. Are the issues in this petition commercial as claimed by the 1st respondent? It is the Petitioners contention that the issues herein surround the discharge of the charges over the suit properties. For me the discharge of the charges flows directly from the issue whether the loan was being serviced or not. Indeed, for the charges to be discharged it would mean that there is no debt owing from the 1st respondent in respect of the financing advanced by the lenders. The petitioners have alluded to the fact that the appellate judges made a finding that the loan was not being serviced and stood at Kshs. 1.4 billion then, which I also came across in the said judgement. However, I would not look at this statement in isolation but from the entirety of the facts and judgement of the court of appeal which impugned the manner in which the receivership came into being and how it was being run including keeping the 1st respondent in the dark with regards to accounts. It is only the accounts that will reveal whether the business had made enough money to have been able to service the loan including full recovery of the amounts owed. To me this is a commercial aspect which is outside the jurisdiction of this court.

18. Additionally, there is the aspect of the judgement of the Court of Appeal where it was rendered thus; -
'the receivership and management by the 4th and 5th respondents over the appellants hotel is hereby removed forthwith'

The above also takes me back to the issue of the loan since the mandate of the receiver drew from the very fact that there were problems with the finances of the hotel which was defaulting in servicing the loan and therefore exposing the lenders and yet this very receivership has been vacated by the Court of Appeal. An assumption has been raised that the Court of Appeal order to handover full ownership ran with the assets and several definitions of ownership were mooted. This is tantamount to asking this court to interpret the judgement of the court of appeal for which I lack jurisdiction. This court has agonised over how it would delink the issues raised in the present petition from the commercial aspects of the entire dispute and I have been unable to delink them to warrant my handling of this petition.

19. Let me speak to the issue of the jurisdiction of this court. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of *the Constitution* to hear and determine disputes relating to environment, and the use and occupation of , and title to land. This article is read together with the *Environment & Land Court Act* Sec 13 which confers the Environment and Land Court with jurisdiction as hereunder; -

(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)



- (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 (emphasis is mine)
- (e) any other dispute relating to environment and land.

(3)

(4)

20. In my view and from the facts placed before me the substratum of this petition is the removal of the charges that had allegedly been registered against the suit properties. The main prayer being sought is a declaration that the legal charges registered on 23/7/91 and 9/3/95 over the suit properties are valid legal charges. In fact the rest of the reliefs sought are hinged upon the removal of the charges. The petitioners have placed emphasis on section 3(d) above which according to them also gives this court jurisdiction to hear disputes over instruments granting any enforceable interests in land. Consequently, that a legal charge fits the definition of a dispute within the jurisdiction of this court. Such discourse was canvassed at length by the court of appeal in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR and I find guidance in the following excerpts of the judgment of the court:-

34. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.

35. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

36. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.



37. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.
38. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the *ELC Act*. The said section provides that;
2. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...
40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.
41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the *ELC Act* ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In *Paramount Bank Limited vs. Vaqui Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

40. 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;.....’

From the above dictum It is clear that this court lacks jurisdiction

21. The jurisdiction of this court is again called into question by dint of Section 34 of the Civil Procedure Act. This then takes me to the issue whether the petition herein concerns the execution of the orders of Court of Appeal in Civil Appeal No 72 of 2008 and is thus barred.

Section 34 (1) of the Civil Procedure Act provides as follows: -

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

22. My analysis in paragraph 15 and 16 of this ruling largely responds to the above issue. In addition, I’m not convinced by the petitioners arguments that the acts occurred way after judgement or that the alleged fraudulent removal of the legal charges, transfer and subdivisions of some of the properties should cement this court’s jurisdiction. I say so for the reason that the answers to whether the actions were fraudulent would still lie in the interpretation of the decree of the Court Appeal thus falling in the realm of section 34 of the civil procedure Act. I have also noted quite a number of instances in the pleadings that can be termed as an admission by the petitioners that indeed this petition goes to the issue of execution of the orders of the Court of Appeal and which were also pointed out in the respondent’s submissions. At paragraph 17 (ii) of the Supporting affidavit of Robert Ndungu filed on July 7, 2021 alluding to the 3rd respondents response as to why they removed the charges inter alia, it is deponed ‘ ..Persuant an (sic) in C.A No. 72 of 2008 dated December 18, 2012, new titles for properties title number Kwale/Diani Beach Block/868 and 869 were issued on April 13, 2013 to Kisii Safari Inns Limited’. This is also pleaded at paragraph 20 (ii) of the petition. Also see 11 (viii) which is listed as one of the prayers in the in Kisumu HCCC 83 of 2003, paragraphs 21-24 which all refer to the judgement of the court of appeal. The 1st respondent submits that in dealings of the ownership and business it has only exercised the rights conferred order number 2 issued by the court of appeal.

23. I will not spend time on the issue of whether the suit is res judicata by dint of Section 7 of the Civil Procedure Act which stipulates as follows:

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.

24. In my view my previous analysis by and large answers to above this issue. It is not enough to state that the parties in the present petition are different from the previous suit especially the addition of the Land Registrar Kwale and the Attorney General. Clearly this petition is an attempt to relitigate issues that were already in issue in the earlier suit.

25. The upshot of the foregoing is that I find the preliminary objection merited and I allow it with costs. Consequently, I must down my tools for want of jurisdiction and strike out the petition and each party shall bear its own costs.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 26TH DAY OF OCTOBER 2022 BY



A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Mutonyi holding brief for Mr. Ogonde the Petitioner

Mr. G.K. Kuria for the 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd, 4th Respondent

Mr. Denis Mwakina- Court Assistant.

