



Cherono (Suing as the legal representative of the Estate of Cherono Cherop Chepngal (Deceased)) v National Bank of Kenya Limited & another (Environment & Land Case E005 of 2022) [2022] KEELC 13669 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE E005 OF 2022
L WAITHAKA, J
OCTOBER 7, 2022**

BETWEEN

**PAUL CHERUIYOT CHERONO PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHERONO
CHEROP CHEPNGAL (DECEASED)**

AND

**NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT
JANE JELAGAT 2ND DEFENDANT**

RULING

1. This suit was commenced by way of plaint dated June 13, 2022. In the plaint, the plaintiff averred that he was served by an auctioneer with a 45 days' notice that his father's Land LR No 329 Moiben Chebara had been placed under public auction. He denies that his father (now deceased), ever took a loan from the 1st defendant or gave out his title to any person to secure a loan. It is the plaintiff's case that the notices as issued by the defendant vide its agent Keysian Auctioneers are invalid for non-compliance with the provisions of Section 97 of the Land Act, 2012 and the Land Administration Act, 2012.
2. The plaintiff in his plaint seeks a permanent injunction restraining the defendants, its servants, agents and/or employees against engaging in further acts detrimental to the plaintiff's possession, use, trade and enjoyment of the suit land known as LR No 329 Moiben Chebara.
3. Simultaneously with the plaint, the plaintiff filed a notice of motion seeking an order of temporary injunction against the 1st defendant, its agents, servants and/ or employees from auctioning, selling, and disposing off and/or any other way dealing and/or disposing Land known as LR No 329 Moiben Chebara either by themselves or through any of their agents.



4. In opposing the notice of motion, the 1st defendant raised a preliminary objection and filed a replying affidavit sworn by Edwin Lubanga on July 15, 2022.
5. Directions were taken on July 19, 2022 that the preliminary objection would be disposed of by way of written submissions.
6. In the notice of preliminary objection dated June 29, 2022, the 1st defendant has averred that this court (Environment and land court) lacks jurisdiction to determine the dispute between the parties as the substratum of the suit relates to a Legal charge and the subsequent exercise of a statutory power of sale that is unrelated to any Land use and /or utilization.

1st Defendant's submissions.

7. It is submitted that jurisdiction is everything as discussed in the Locus Classicus Case of ownership of the *Motor Vessel M V Lillian S v Caltex Oil (K) Limited* [1989] KLR1
8. The 1st defendant's advocate submitted that this court's jurisdiction is set out in Section 13 of the *Environment and Land Court Act* and that on the face of it, the Act as read together with Article 162(2) (b) of *the Constitution* does not confer jurisdiction to this court to deal with matters relating to Legal charges.
9. Reference is made to the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR and submitted that the finding by the court of Appeal in the aforesaid case is binding on this court as cited with approval by Angote J in the case of *Thomas Mutuku Kasua v Housing Finance Company Ltd* (HFC) & another [2021] eKLR
10. It is further submitted that the Cause of action in the case at hand arose from statutory notice issued by an auctioneer relating to the intended sale of the suit parcel in exercise of the 1st defendant's statutory power of sale; that it is these notices that are being challenged by the plaintiff as illegal, oppressive and invalid for non-compliance with the provision of Section 97 of the *Land Act*.
11. He submits that a question then arises; what is the fate of a matter that is filed in a court that has no jurisdiction. Can that court transfer the matter to a court that has jurisdiction?
12. On that question, it is submitted that because the suit was filed without jurisdiction, the same ought to be struck out in the first instance as the court will not have the power to move a single step and consider any discretion to maintain or transfer the suit to any other court including the subordinate courts. Reference is made to the case of *Joel Kipkosgei v Thomas Kiprop* [2018] eKLR where the court relied on the case of *Rob De Jong & Another v Charles Mureithi Wachira* [2012] eKLR
13. Finally, the 1st defendant submits that based on the authorities cited, the filing of this suit was null and void ab initio and there is nothing to found any competent proceedings that this court can exercise its judicial powers.
14. The plaintiff filed submissions dated September 19, 2022 but he failed to pay the requisite fees. The submissions are found not to be properly on record and are expunged.



Analysis and Determination

15. Jurisdiction is everything and without it a court cannot take a single step and should down its tools as held in the case of ownership of the [Motor Vessel M.V Lillian S.v Caltex Oil \(K\) Limited](#) [1989] KLR1 where the Court of Appeal held:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

16. This was similarly held in the Case of [Republic v Karisa Chengo & 2 others](#) [2017]eKLR where the Supreme Court pronounced itself as follows:-

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

17. This court’s jurisdiction is set out in Article 162(2)(b) of [the Constitution](#) of Kenya and Section 13 of the [ELC Act](#). Article 162(2)(b) of [the Constitution](#) of Kenya provides;

‘Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the.....

(b)environment and the use and occupation of, and title to, land.’

Section 13 of the ELC Act provides:

“(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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.”
18. In the case of *Thomas Mutuku Kasua v Housing Finance Company Ltd (HFC) Supra, Angote J* faced with a similar matter, cited with approval supreme court and the court of appeal decisions on the jurisdiction of this court vis a vis the jurisdiction of the High court in respect of matters falling within the jurisdiction of the courts contemplated under Article 162 (2) of *the Constitution*. He held;
- “ 17. Article 165(5) of *the Constitution* divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of *the Constitution*. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of High Court in great detail in the case of *Republic v Karisa Chengo & 2 Others* [2017] eKLR in which it held as follows:
- “[52] In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act*... From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa...”
19. The Plaintiff has not denied that as security for a loan facility, he executed a Charge dated February 26, 1998 and later a Further Charge dated April 22, 1999 over Land Reference Number 337/2057 (Original Number 337/2019/38). The Plaintiff has confirmed in the Plaint that the 1st Defendant is seeking to exercise its statutory power of sale of the charged property. On his part, the Plaintiff has contended that he did not receive the requisite statutory notices.
20. The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settle by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR where the court held as follows:
- “35. Accordingly, for land use to occur, the land had to be utilized for the purpose for which the surface of the land, air above it or ground below it was adapted. Therefore, to the law, land use entailed 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 was adapted. Neither the *cujus* doctrine nor Article 260 of *the Constitution* whether expressly or by implication recognized charging land as connoting land use.
21. By definition, a charge was an interest in land securing the payment of money or money's worth or the fulfillment of any condition. As such, it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money's worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that the chargee was assured of the repayment of the money he had advanced the chargor.
 22. Further, Section 2 of the *Land Act* recognized a charge as a disposition in land. A disposition was distinguishable from land use. While the former created the relationship, the latter was the utilization of the natural resources found on, above or below the land. Land use connoted the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land. Saying that creation of an interest or disposition amounted to use of the land, was akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constituted land use. The mere acquisition or conferment of an interest in land did not amount to use of that land. If that were the case, there would neither be 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.
 23. Consequently, the assertion that a charge constituted use of land within the meaning of Article 162 of *the Constitution* had to fail. In addition, the cause of action before the Court was not the validity of the charge, but a question of accounts...
 24. To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the Environment and Land Court. However, under Section 2 of the *Environment and Land Court Act*, an instrument was a writing or enactment which created or affected legal or equitable rights and liabilities. For the purposes of the instant suit, that instrument was the charge. The cause of action 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.
 25. Furthermore, the jurisdiction of the Environment and Land Court to deal with disputes relating to contracts under Section 13 of the *Environment and Land Court Act* ought to be understood within the context of the Court's jurisdiction to deal with disputes connected to 'use' of land. Such contracts, ought to be incidental to the 'use' of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.
 26. While exclusive, the jurisdiction of the Environment and Land Court was limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act*; none of which concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting matters was without doubt, as evidenced by article 165(3) of *the Constitution*. The Appellant's objection on jurisdiction was rightly dismissed."



27. The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

28. On the question of the fate of a suit filed without jurisdiction, Angote J in the aforesaid case held;

“21. Although it has been the practice of this court, and the High Court, to transfer suits to the High Court and vice versa in instances where the court finds that it has no jurisdiction, the said practice has since been held to be illegal. In the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR the Supreme Court held that a suit filed before a court without jurisdiction could not be transferred to another court. The court held as follows:

aves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

(154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.” [emphasis mine]

22. The above position has been followed by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR where it was held as follows:

“We are not persuaded that that proposition by the respondent is correct in law. 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. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction...These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a



court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* [2013] eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo [1968] EA 43*. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.”

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No 6 OF 2018 *Phoenix East Africa Assurance Co.ltd vs. S.M. Thiga T/a Newspaper Services* is therefore a nullity as it was based on a nullity.”

29. From the holding in the aforesaid case which has cited with approval decisions from the supreme court and the court of appeal, it is clear that this court has no jurisdiction to entertain disputes relating to a legal charge and the subsequent exercise of a statutory power of sale. This suit having been filed in a court found not to the requisite jurisdiction, cannot transfer the matter to the High Court.
30. Consequently, this suit is struck out with costs to the defendants.
22. Orders Accordingly



DATED, SIGNED AND DELIVERED, AT ITEN THIS 7TH DAY OF OCTOBER 2022.

L N WAITHAKA

JUDGE

Ruling read virtually in the presence of:

Mr Oburu for the Plaintiff

Mr Kibet for the 1st Defendant

Mr Muiruri holding brief for Mr Mwinamu for the 2nd Defendant

Christine Towett: Court Assistant

