



**Al-Yelika Consultants Travel and Tours Ltd v Ncba Bank Kenya PLC & another (Environment and Land Case E280 of 2024) [2025] KEELC 5268 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5268 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E280 OF 2024**

**JA MOGENI, J**

**JULY 9, 2025**

**BETWEEN**

**AL-YELIKA CONSULTANTS TRAVEL AND TOURS LTD ..... APPLICANT**

**AND**

**NCBA BANK KENYA PLC ..... 1<sup>ST</sup> RESPONDENT**

**AUCKLAND AGENCIES AUCTIONEER ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Coming up for determination before me is the 1<sup>st</sup> Respondent's Preliminary Objection dated 19/07/2024 challenging the jurisdiction of this Court to determine the present suit and the Notice of Motion dated 09/07/2024. In the said Preliminary Objection, the 1<sup>st</sup> Respondent stated that the present suit principally revolves around the 1<sup>st</sup> Respondent's exercise of its Statutory Power of Sale hence it is a commercial dispute. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on the Supreme Court's decision in *Republic v Karisa Chengo & 2 Others* [2011] eKLR, *Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna and 5 Others* (2017) eKLR, Mombasa, Civil Appeal No. 18 of 2020, *Diamond Trust Bank Kenya Limited v Fatma Hassan Hadi* (unreported), among others.
2. According to the 1<sup>st</sup> Defendant it is evident that the cause of action arises out of the 1<sup>st</sup> Defendant's exercise of a Statutory Power of Sale over charged property. As such the same does not relate to the ownership or use of land and therefore it is a commercial matter which should be before the High Court.
3. Therefore the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent pray that the Plaintiff's Notice of Motion dated 9/07/2024 and the Plaintiff's entire suit borne in the Plaint also dated 9/07/2024 be dismissed with costs.
4. The brief background to the suit is that the Applicant vide the Supporting Affidavit sworn by Enosh Ochieng Gaga the Director of the Applicant Company deposed that the 1<sup>st</sup> Respondent advanced a



mortgage amount of Kesh 20,000,000 to the Applicant over the suit property Title Number Nairobi/Block 1X5/1XX3 which is registered in the name of the Applicant as a legal charge on the same.

5. That the Applicant has been issued with a Notification of Sale by the 2<sup>nd</sup> Respondent to auction the property at the instructions of the 1<sup>st</sup> Respondent without any legal justification purporting to exercise their Statutory Power of Sale of the suit property. That the public notice issued by the 2<sup>nd</sup> Respondent under the instruction of the 1<sup>st</sup> Respondent for public auction for 9/07/2024 is illegal since it invited the interested buyers to bid for the suit property without the Redemption Notice period expiring.
6. The Applicant's last instalment paid was for Kesh 260,000 in September 2023 but that it undertakes to make good reduced monthly instalments by making payment of Kesh 100,000 every month. That the proposal to pay the Kesh 100,000 was made by the Applicant to the 1<sup>st</sup> Respondent who however did not respond to the proposal made making the instructions issued to the 2<sup>nd</sup> Respondent irregular, unprocedural, illegal, null and void and of no legal consequence.
7. That the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are intended to diminish the Applicant's right over the suit property and the same warrants an order of injunction. Since the notice has been issued yet the property is yet to be valued and the current market value ascertained.
8. That in the event the sale of the suit property must proceed then an independent valuation ought to be conducted. Because, without a Court Order the Respondent will proceed to transfer the suit parcel to another party occasioning the Applicant, prejudice and loss.
9. On its part the 1<sup>st</sup> Respondent in response to the Notice of Motion filed a Preliminary Objection and then a Replying Affidavit in opposition and contested the jurisdiction of this Court to handle this matter. According to the 1<sup>st</sup> Respondent the matter at hand is a commercial matter to be handled by the High Court and not the Environment and Land Court.
10. The parties chose to canvass the Preliminary Objection and the Notice of Motion Application by way of written submissions. The 1<sup>st</sup> Respondent filed their submissions for both the Preliminary Objection and the Notice of Motion Application dated 22/10/2024 and the Applicant filed their submissions in opposition to the Preliminary Objection and in support of the Application dated 27/11/2024.
11. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Nyaaga & Mugisha Advocates submitted that the Honorable Court's jurisdiction is provided under Article 162 (2) (b) of the Constitution of Kenya and Section 13 of the Environment and Land Court Act and that the Court cannot stray from the strict mandate. That the dispute before the Court does not relate to the ownership or use of the suit property but to the 1<sup>st</sup> Defendant's Power of Sale over the suit property which is charged to it.
12. The Counsel submitted that the suit property was provided as security for the loan advanced by the 1<sup>st</sup> Defendant to the Plaintiff and that the Plaintiff defaulted and the default has been admitted by the Plaintiff in its pleadings.
13. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also submitted that this Court is bound by the decisions of the Court of Appeal as per the cases referred to at paragraph 1 and cannot deviate from the same as per the principle of stare decisis which is a fundamental jurisprudential yardstick and a constitutional requirement as per Article 163 (7) of the Constitution whose aim is to enhance certainty and predictability in the legal system. To buttress this point further the Respondents referred to the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR.
14. The Respondents urged the Court to find that it had no jurisdiction to entertain the suit.



15. The Counsel of the Applicants Bwari Abiero Associates opposed the Preliminary Objection and in their submissions they relied on the cases of *Two Thirds Investment Limited & 9 Others v Katana Said Kalama & 3 Others* [2018] eKLR, *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR, *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR and *Isaack Ben Mulwa v Jonathan Mutunga Mweke* CA Civil Appeal No 6 of 2015 [2016] eKLR.
16. It was the Counsel's submissions that the Preliminary Objection filed failed to meet the threshold of a Preliminary Objection since there were factual issues being contested such as the fact that the Applicant alleges the Respondents did not acknowledge that the Applicant wrote to them seeking a restructuring of the loan. Further that there are issues raised on the illegality of the auction which will deny the Applicant use of its property and that is an issue of the Environment and Land Court and not the High Court.
17. That the Court should reconsider the Respondents submissions to terminate the suit before going to the root of the claim of the Applicant. That a plethora of Court decisions caution against striking a suit at a preliminary stage without going to the root of the case where rights are at stake.
18. The Respondents urged the Court to find for the Applicant.

#### **Analysis and Determination.**

19. The parameters of consideration of a Preliminary Objection are now well settled. As of necessity, a Preliminary Objection must only raise pure points of law. A Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. If successful, a valid Preliminary Objection can dispose of the suit preliminarily without delving into the merits of the case.
20. On the question of what constitutes a Preliminary Objection, the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is clear that:
 

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”
21. In the same case Sir Charles Newbold, P. stated:-
 

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”
22. The 1<sup>st</sup> Respondent raised the issue of want of jurisdiction by this Court to determine the Plaintiff's Application as well as the entire suit. From the above authority, an objection to the jurisdiction of the Court is one of the Preliminary Objections that consists a point of law. The locus classicus case on the



question of jurisdiction is the celebrated case of The *Owners of Motor vessel Lillian 'S' v Caltex Kenya Limited*. [1989] KLR 1 where the 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

23. Jurisdiction has been hailed to be such an important and central issue that it can be raised at any stage of the proceedings even on appeal. It can neither be conferred by consent of parties nor be assumed on grounds that parties have acquiesced to presume its existence. The Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that:-

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on Courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain.”

24. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (2012) eKLR held 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 counsels 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law.”

25. From the foregoing, it is clear that a Court’s jurisdiction is derived from either the Constitution, an Act of Parliament or both. The jurisdiction of the Environment and Land Court is prescribed under Article 162 (2) (b) of the *Constitution* which directed Parliament to establish a Court to hear and determine disputes relating to ‘the environment, and the use and occupation of, and title to land’. Pursuant to this and Article 162(3) and (4), the *Environment and Land Court Act* was enacted, which at Section 13 sets the jurisdiction of the Environment and Land Court as hereunder:-

“13. Jurisdiction of the Court(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. (4)In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”

26. From the foregoing, it is not in dispute that this Court has jurisdiction to deal with disputes relating to use and occupation of land. With regards to whether this Court has jurisdiction to deal with the instant suit, I will be guided by the case of Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another (2016) eKLR where Ngugi J held as follows:-

“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. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

27. This set the stage for the application of the Predominant Purpose Test in determining whether a Court has jurisdiction to determine a dispute before it. In Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2018] eKLR Munyao J further explained the predominant purpose test as follows:-

“On my part, I would modify the above test, and hold the position that what is important when determining whether the Court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before Court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before Court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before Court. That is why I hold the view, that in making a choice of which Court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.”



28. Thus, it is essential for the Court to interrogate the predominant purpose of the suit to determine whether the issues raised herein constitute ‘use’ of land so as to bring the dispute within the meaning of Article 162 (2) (b). In the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others (2017) eKLR, the Court of Appeal defined the term “use” in following words:-

“As for land use, the Black’s Law Dictionary, 9<sup>th</sup> Edn; gives the basic definition of the word ‘use’ as being:- ‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.” (Emphasis added)

29. The Court of Appeal in the Cooperative Bank of Kenya Case (*supra*) went further to define the term “use of land”, holding that:-

“While the National Land Commission is already operational, the land use policy envisioned under (b) above is yet to be passed. The same is still at the drafting stage with the latest draft having been published in 2016; titled ‘Land Use Policy’ While not binding on this Court, the same may provide some insight and guidance as to the proposed definition of ‘land use’. According to that draft, ‘land use’ is defined under part 2.3.1 as: “... the activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land. Emphasis added.<sup>35</sup>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.<sup>36</sup>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 charger.<sup>37</sup>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.<sup>38</sup>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.”

30. The Court of Appeal therefore also seems to have adopted the Predominant Purpose Test in determining whether the Environment and Land Court had jurisdiction to determine that suit. This Court is persuaded by the decision in the *Suzzanne Achieng Buttler Case* (*supra*) as well as Munyao J’s words in *Lydia Nyambura Mbugua* (*supra*), and is bound by the decision of the Court of Appeal in the *Cooperative Bank of Kenya Case* (*supra*) among others Court of Appeal on the same. In determining this Preliminary Objection therefore, the Court must decipher what the dominant issue(s) in the dispute are and whether they relate to the environment and the use and occupation of, and title to land.
31. From the instant suit, it is not in dispute that, the Applicant herein applied for and was advanced by the 1<sup>st</sup> Respondent a loan facility of Ksh. 20,000,000/=, which facility was secured by the Applicant’s security namely Title No. Nairobi/Block 1X5/1XX3.
32. It is also not in dispute that the Applicant was issued a Notification of Sale by public auction of the suit property by the 2<sup>nd</sup> Respondent which was to be conducted through public auction on 9/08/2024. However, it is the Applicant’s contention that the notices issued did not comply to the redemption periods as stipulated in law.
33. At the same time, it is the averment of the Respondents failed to conduct valuation of the property at its current value prior to issuing the notification of sale by public auction which is a violation of the Applicant’s right to own property.
34. It is also a fact that the Applicant defaulted due to what it terms as serious business setbacks and following the default the Applicant made proposals to the 1<sup>st</sup> Respondent to allow latitude of time to repay the amount to reduce the monthly instalments to Kesh 100,000 but the proposals were never acknowledged nor responded to by the 1<sup>st</sup> Respondent. The Applicant therefore claims to have been issued with irregular notices which overlapped without complying to the timelines on the periods of the notices.
35. The 2<sup>nd</sup> Respondent, on instructions of the 1<sup>st</sup> Respondent has thus caused the charged property to be advertised in the newspaper for sale on the 9/08/2024 although the auction did not materialize. The Applicant does not however dispute defaulting in servicing of the loan.
36. It is also clear that the Plaintiff/Applicant has fallen behind in servicing the loan and the 1<sup>st</sup> Respondent has then decided to exercise its Statutory Power of Sale and advertised the land for sale by way of public auction.
37. One of the Plaintiff’s complaints in the suit is that it was never served with any statutory notice in compliance with mandatory provisions of the law, which notice is intended to adequately inform it of the nature and extent of default and the amount required to be paid to rectify the default. That it actually learned from a newspaper advertisement that the property had been advertised for sale. It averred that the Bank intends to exercise the Statutory Power of Sale in realization of the security, which is void in law.
38. From the documents shared as annexures 3, 4 and 5 by the 1<sup>st</sup> Respondent it is not lost to me that all the 1<sup>st</sup> Respondent notified the Plaintiff/Applicant about its right of exercising its power of sale if the loan repayments were not updated. It is therefore clear that the issue at hand is about the 1<sup>st</sup> Respondent’s right to exercise its Statutory Power of Sale in view of the Plaintiff’s failure to honor the loan repayments.



39. Without a doubt, a Bank/lender’s right to exercise its Statutory Power of Sale arises out of default to repay the amount owing. As outlined earlier in this decision, in this instant suit, neither the charge instrument nor the creation of an enforceable interest thereunder are disputed. From the pleadings herein, the Plaintiff’s main complaints are that the 1<sup>st</sup> Respondent did not respond to his proposal to adjust the loan repayment amounts downwards, alleged failure by the resonant to serve the statutory notice prior to the advertisement and the failure to undertake a valuation for the suit property which the Respondent intends to auction.
40. As to whether the charge itself is a contract under Section 13 of the Environment and Land Court Act, as was the case in the Court of Appeal, in this suit also, the cause of action does not challenge the charge itself as an instrument, but the amounts due and owing thereunder. The Court of Appeal in the Cooperative Bank of Kenya Case (*supra*) explained that:-

“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... 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. 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.”

41. Now, applying the law and from the precedents cited above, it is clear that the dispute herein does not fall under the jurisdiction of this Court, and thus the Defendant’s Preliminary Objection succeeds entirely. Consequently, the Plaint and the Notice of Motion filed herein, both dated 09/07/2024 are dismissed. As costs follow the event and the 1<sup>st</sup> Respondent has succeeded in its Preliminary Objection, the Plaintiff shall bear the costs of the Application as well as the suit herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9<sup>TH</sup> DAY OF JULY 2025 VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

**In the presence of:**

Ms. Kak for the Defendant

Mr. Abiero for the Applicant/Plaintiff

Mr. Melita – Court Assistant

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**MOGENI J**

**JUDGE**

