



**Amanye General Suppliers Limited & another v Rafiki Microfinance Bank Ltd & another
(Environment and Land Case E078 of 2024) [2025] KEELC 5075 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5075 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E078 OF 2024**

EK MAKORI, J

JULY 3, 2025

BETWEEN

AMANYE GENERAL SUPPLIERS LIMITED 1ST PLAINTIFF

AGNES MAKU MTURI 2ND PLAINTIFF

AND

RAFIKI MICROFINANCE BANK LTD 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. The plaintiffs filed a plaint dated July 24, 2024, with this court, requesting various orders, including an order to restrain the defendants from exercising the statutory power of sale for Kambe/Ribe/Kikomani/Makobeni/236 [0.30 Ha.] located in Kilifi Municipality, Kilifi County.
2. In response, the defendants filed a Notice of Preliminary Objection [PO] dated February 26, 2025, challenging this court's jurisdiction to hear and determine the current suit, citing a violation of section 13[2] of the Environment & Land Court Act, and requesting that the suit be struck out in its entirety with costs.
3. The Preliminary Objection [PO] was thoroughly canvassed through written submissions. I acknowledge receipt of the comprehensive submissions by Mr. Ngoze for the plaintiffs and Mr. Katila for the defendants.
4. The issues before this court, based on the submitted materials and the arguments presented by the parties, concern whether the Preliminary Objection [PO] meets the criteria established in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, whether the entire suit should be dismissed for lack of jurisdiction, and who should be liable for the costs of this litigation.



5. In his submissions citing various judicial precedents, Mr. Katila, learned counsel for the defendants, argues that this matter is of a commercial nature because it involves exercising the statutory power of sale arising from a charge instrument, making it inherently commercial and therefore should be heard in the High Court rather than at the ELC. Conversely, Mr. Ngoze, learned counsel for the plaintiffs, asserts that the issues raised in the PO cannot be resolved without a hearing and that they are not merely points of law.
6. The principles upon which this court is invited to assess the merit of a notice of PO were established in the well-known Mukisa Biscuit Case [supra]. This case outlined the criteria for a PO, which include raising a clear point of law, demonstrating the accuracy of all facts pleaded by the opposing side, and showing that there is no fact that needs further investigation. The court will consistently follow these principles in its decisions.
7. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 [KLR] reiterated the same position on what would constitute a PO and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case [supra]. That is, first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”
8. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in *Owners of the Motor Vessel “Lillian S” v Caltex Oil [Kenya] Ltd* [1989] eKLR:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
9. In its ruling dated November 13, 2024, the court’s decision on whether to grant an injunction, in response to the extensive application filed on July 24, 2024—spanning 23 pages—mainly focuses on the issue of the court’s jurisdiction. This case is reported as *Amanyee General Suppliers Limited & another v Rafiki Microfinance Bank Limited & another* [2024] KEELC 13207 [KLR].
10. Significantly, in that application, the applicants contended that a charge was created on the suit property on December 24, 2018, for a loan facility from the 1st respondent in the amount of Kshs 2,500,000, and a further charge was made on July 18, 2019, for the same amount. In July 2023, the Respondents trespassed onto the subject property and conducted a valuation allegedly concerning loan arrears accrued on the loan facility. The applicant questions the valuation and the interest in the suit after taking account. The applicants argue that the unilateral valuation and the statutory notice of sale are illegal and will demand, at the hearing, the taking of accounts and information regarding the loan facility. They also state that the respondents’ actions have caused damages to the applicants, including ill health, for which they will seek compensation at the hearing.
11. The application was opposed through a replying affidavit sworn by Samuel Njoroge, Assistant Manager of the Debt Recovery Unit Department of the respondent, on August 6, 2024. He states that the applicant took a loan facility with the respondent and used the suit property Kabe/Ribe/



Kikomani/Makobeni/236 as security. A charge and a further charge were created to secure the repayment of the loan. It was part of the agreement that, in the event of default, the respondent had the right to sell the property and recover the loan arrears by exercising a statutory power of sale. It is acknowledged that the applicant fell into arrears, as shown in the statement of accounts. The respondent initiated the recovery process by issuing the relevant notices of sale. The valuation of the suit property was conducted.

12. In its detailed ruling on the jurisdiction issue, from paragraphs 9 to 16, the court stated:

“The jurisdiction question here is whether the ELC or the High Court is vested with jurisdiction on matters relating to charges, which is the predominant question in the plaint and the application. That question has been with us since the ELC was constituted in 2012.

Defining what land use means vis-a-vis the jurisdiction of the ELC, the Superior Court in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR said:

“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.

36. 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.

37. 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.



38. 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.”

On the ELC's jurisdiction, Section 13 [2] [d] of the ELC Act, this is what the Court of Appeal in the Kang'ethe Case [supra] proceeded to state:

“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.”

To my mind, the Court of Appeal, whose decisions are binding on this Court, provides that the ELC has no jurisdiction to deal with mortgages, charges, collection of dues, and rents—the same falls within the civil jurisdiction of the High Court. [underlined for emphasis].

This Court has in the past taken the same view - see *Kinuthia v Kanyi & another* [Environment & Land Case E007 of 2023] [2024] KEELC 1625 [KLR] [20 March 2024] [Ruling]. The position is further elaborated by this Court in the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd [HFC] & another* [2021] eKLR, Ombwayo J, having analyzed the averments in the plaint in a matter before him, stated as follows:

“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 vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR where the court held as follows.....”

Significantly, he proceeded to state:

“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.”

Angote J. was of the same view in *Thomas Mutuku Kasue v Housing Finance Company Ltd [HFC] & Another* [2021] eKLR, where the Court held:

“The Court of Appeal whose decision is binding this court has held that where the predominant issues in suit involve 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 charge, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

The Superior Court adopted the same stance recently in *Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others* [Civil Appeal E055 of 2022] [2024] KECA 410 [KLR] [26 April 2024] [Judgment]:

“We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [supra] where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” [by a tenant or licensee] as in this case, of a chargor’s land. In view of the foregoing, we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents’ suit as pleaded.”

Looking at the plaint, the plaintiff in this suit will seek to impeach the statutory power of sale the 1st respondent is due to exercise and demands the supply of all documents relating to the charge and the taking of accounts concerning the loan in question. There is no dispute about the ownership of the suit property, that it was placed as security, and that the loan is due for repayment. That is a matter within the purview of the High Court. I down tools.

13. Based on the above discussion, it is evident that this matter concerns a charge instrument and the exercise of statutory powers of sale, nothing beyond that. It is a commercial matter. It should be reckoned in the High Court. I step back once again.
14. Consequently, the PO dated February 26, 2025, succeeds to the extent that the current suit is hereby struck out with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 3RD DAY OF JULY 2025.

E. K. MAKORI
JUDGE



In the Presence of:

Mr. Ngonze, for the Plaintiff

Mr. Kitila, for the Defendants

Happy: Court Assistant

