



**Omondi v Housing Finance Corporation & 3 others (Environment & Land
Case E013 of 2023) [2024] KEELC 3528 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E013 OF 2023
LC KOMINGOI, J
APRIL 11, 2024**

BETWEEN

DORCAS APONDI W OMONDI PLAINTIFF

AND

HOUSING FINANCE CORPORATION 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

DAVID KIPTOCH JUMA 3RD DEFENDANT

WILLIAM KIARIE KIMONDO 4TH DEFENDANT

RULING

1. This is the Notice of Motion application dated 27th July 2023, brought under; (Section 3 a & b of the [procedure Act](#), Order 40 of the [Civil Procedure Order Rules](#), the [Constitution](#) of Kenya 2010 & all other enabling provisions of the Law.)
2. It seeks Orders;
 - i. Spent
 - ii. Spent.
 - iii. That an order stay be and is hereby issued stopping the transfer of Kajiado/Kaputiei North/27443 through auction conducted on 13th July 2023, or any other related sale until the hearing of the suit herein.
 - iv. That an order compelling the production of the Plaintiff's accounts to court be and is hereby issued by the court.
 - v. That the costs for the application be in the cause.



3. The grounds are on the face of the application and are set out in paragraphs 1 to 18.
4. It is supported by the affidavit of Dorcas Apondi W. Omondi the Plaintiff/Applicant, sworn on 27th July 2023. The Plaintiff/Applicant's claim is that she sought a loan facility of Kshs. 5,000,000 from the 1st Defendant/Respondent on or about 24th February 2022 to be repaid within 54 months, its maturity period being 25th August 2026. Having delayed in making the loan repayment for four months, the 2nd Defendant/Respondent served her through the WhatsApp messenger with a 45 days' notice on 27th April 2023. She engaged the 3rd Defendant who was a Manager of the 1st Defendant seeking additional time to make repayments which he orally agreed to. She later found out that the property had been sold off at a throw away price through a private arrangement on 13th July 2023 despite a Notice for sale by Public auction having been placed in the local dailies. The Plaintiff/Applicant avers that the sale was done unprocedurally, irregularly, in an unprofessional manner and in breach of the 1st Defendant/Respondent's fiduciary duty because she was still remitting payments.
5. The 1st, 2nd and 3rd Defendants/Respondents in the Replying Affidavit sworn by Hedaya Malesi (an Advocate at the 1st Defendant's legal department) deponed that this Court did not have jurisdiction to determine the suit which was about repayment of a bank facility secured by a legal charge and even if it did have jurisdiction, the reliefs sought could not be granted at an interlocutory stage.
6. The deponent further states that indeed the 1st Defendant granted the Plaintiff a loan facility of Kshs. 5,000,000 as per the letter of offer dated 1st December 2021 and the 1st Defendant registered a charge on the suit property of 9th February 2022 in its favour. The Plaintiff continuously defaulted in her contractual obligations of repayment of the loan and the 1st Defendant decided to exercise its Statutory Power of Sale in accordance with Section 90 of the *Land Act* by serving the Plaintiff by way of registered post with a three (3) months Statutory Notice dated 28th October 2022. In compliance with Section 96 of the *Land Act*, the Plaintiff was once again issued with a forty (40) days notice dated 2nd February 2023 of intention to sell. Once again this notice was served by way of registered post through the address indicated on the charge document. The Defendants deponed that if the Plaintiff changed her address or business location she was obligated to notify the 1st Defendant in writing and there had been no communication to that effect. The tenants of the suit property were also served with the notice as confirmed by the sworn Affidavit dated 22nd February 2023. A redemption notice dated 16th May 2023 was also served by the 2nd Defendant to the Plaintiff indicating that the suit property was due for sale on 13th July 2023 by public auction and the intended sale was also advertised in the newspapers on 19th June 2023 and 3rd July 2023. Prior to the sale a valuation of the suit property was undertaken on 3rd May 2023 and the property sold to the 4th Defendant for Kshs. 6,100,000 which was within the forced sale value of the suit property and he was consequently issued a Memorandum of Sale. As such the sale was procedurally done and the 4th defendant was protected by Section 99 of the *Land Act*. It is further deponed that the Plaintiff's only remedy would be in damages should the Plaintiff prove it.
7. The 4th Defendant did not enter appearance and or file any defence.
8. This application was canvassed by way of written submissions.

The Plaintiff's/Applicant's Submissions

9. By the time of writing this ruling, Counsel for the Plaintiff/ Applicant had not filed any submissions.



The 1st, 2nd & 3rd Defendant's/Respondent's Submissions

10. Counsel submitted that this court was not clothed with jurisdiction to determine the application/ the suit. This is because it was in contention that there was a charge over the suit property and the dispute was whether the Chargee's realisation of the security was done procedurally which was in essence a commercial dispute as held by the Court of Appeal in Cooperative Bank of Kenya Ltd and Patrick Kang'ethe Njuguna & 5 others (2017) eKLR. Further the suit property having been sold in exercise of the 1st Defendant's power of sale through a public auction extinguished the Plaintiff's equity of redemption citing Harischandra Bhovanbhai Jobanputra & another v Paramount Universal Bank Ltd & 3 others [2019] eKLR and was protected by Section 99 (3) and (4) of the Land Act. Thus the Plaintiff's only remedy was in damages as was held in Joyce Wairimu Karanja v James Mburu Ngure & 3 others [2018] eKLR and Kamulu Academy Ltd & another v British American Insurance (K) Ltd & 2 others [2018] eKLR. Therefore, the application should be dismissed with costs.

Analysis and determination

11. I have considered the application, the written submissions, the affidavit in support and the response thereto and the authorities cited. The issues for determination are:
- i. Whether the application is merited;
 - ii. Who should bear the costs of this application?
12. This application seeks to have the transfer of suit property Kajiado/Kaputiei North/27443 which was sold through a public auction on 13th July 2023 stopped and the Plaintiff's accounts be produced in court. The 1st, 2nd and 3rd Defendants contested to this application on grounds that this court does not have jurisdiction to determine this issue and even if it had, the prayers sought could not be addressed at an interlocutory stage. Further that the 1st Defendant adhered to the stipulated statutory demand notices and procedures in carrying out the statutory power of sale.
13. I will first address the issue of jurisdiction because without it I should not make any other move in determining this suit. The Supreme Court of Kenya in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR held: "(68) ...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..." This Court derives its jurisdiction from Article 162(2)(b) of the Constitution, Section 150 of the Land Act and Section 4 of the Environment and Land Court Act
14. I have perused the pleadings filed and it is not in contention that the dispute emanates from a loan agreement between the Plaintiff and the 1st Defendant. Following default in payment, the 1st Defendant invoked its statutory power of sale. The Plaintiff has thus sought relief from this court stop/rescind the sale and compel the 1st Defendant to render her Accounts among other prayers.
15. The Court of Appeal went to great lengths to expound on jurisdiction of the Environment and Land Court and High Court in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR where the High Court's jurisdiction to determine questions of charges was probed. It held:

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- “28. ...In order to affirm or reject this assertion, it is perhaps pertinent to ascertain the real cause of action herein while also revisiting the definition of land, land use and Charges...
35. 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...
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...

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.

42. 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;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant's objection on jurisdiction was rightly dismissed."

16. Guided by the above authority, I hereby down my tools for lack of jurisdiction to determine the dispute between a borrower and a lender. The Plaintiff can file the suit at the High Court which is the proper court clothed with jurisdiction to determine the reliefs sought.
17. The Notice of Motion and the entire suit are therefore struck out with costs to the 1st, 2nd and 3rd defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH APRIL 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE:

N/A for the Plaintiff/Applicant.

Mr. Mutua for the 1st, 2nd and 3rd Defendants/Respondents.

N/A for the 4th Defendant/Respondent.

Court Assistant – Mutisya.

