



Kisekem Limited v National Bank of Kenya Limited (Land Case E014 of 2023) [2024] KEELC 5233 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
LAND CASE E014 OF 2023
JM ONYANGO, J
JULY 10, 2024**

BETWEEN

KISEKEM LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. Coming up for determination before me is the Defendant’s Preliminary Objection dated 17th October, 2023 challenging the jurisdiction of this court to determine the present suit and the Notice of Motion dated 2nd October, 2023. In the said PO, the Defendant stated that the present suit principally revolves around the Defendant’s exercise of its statutory power of sale hence it is a commercial dispute. The Defendant stated that it would rely on Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna and 5 Others (2017) eKLR and that it shall pray that the Plaintiff’s Notice of Motion dated 2nd October, 2023 and the Plaintiff’s entire suit borne in the Plaint also dated 2nd October, 2023 be dismissed with costs.

Submissions

2. The PO first came up for hearing on 18th October, 2023 when the Court directed that the same be canvassed by way of written submissions. The Defendant complied and filed its submissions on 6th November, 2023. Counsel submitted that jurisdiction is everything, without which a court must down its tools as was determined in Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989). Counsel reiterated that the P.O was challenging the jurisdiction of the court to determine the Notice of Motion Application as well as the entire suit herein on grounds that, the substratum of the suit revolves around the exercise of the Bank’s statutory power of sale, and thus the ELC is not the appropriate forum to determine the matter. Counsel relied on Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna and 5 Others (Supra), where it was held that:



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..."
3. Counsel similarly cited *Jeruto Tapkili & Another vs Agricultural Finance Corporation & 2 Others* (2018) eKLR and *Elias Muturi Njiru vs Nawiri Sacco Society & Another* (2022) eKLR. Counsel then pointed out that the dominant issue is contravention of the lending agreement between the bank and the Plaintiff, charge of excess interests (contravention of the in duplum rule), as well as failure to issue the statutory notice prior to exercise of the statutory power of sale. Counsel opined that in consideration of the issues presented by the Plaintiff, the ELC is not the appropriate court to determine the matter. Counsel submitted that this court does not have jurisdiction in the instant suit and ought to down its tools. Counsel cited the case of *Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another* (2012) eKLR in support of his contention that a suit is instituted before a court having no jurisdiction cannot be transferred to a court with proper jurisdiction as it is a nullity in law. Counsel urged that the Plaintiff's Notice of Motion dated 2nd October, 2023 and the Notice of Motion Application of even date be dismissed with costs to the Defendant.

Analysis and Determination

4. I have perused the court file and checked on the CTS online filing platform and did not see any submissions filed by the Plaintiff on the PO. However, this court is well aware that submissions are not evidence, they may be heard or dispensed with because the main basis of a decision in a case, is the claim properly laid, evidence fully presented and the law applicable. See *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* (2014) eKLR, where the Court of Appeal held that:-

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
5. By way of a brief background, the Plaintiff filed this suit vide Plaint dated 2nd October, 2023. The Plaintiff was seeking inter alia injunctive orders restraining the Defendant from advertising, selling or otherwise disposing of LR No. Eldoret Municipality/block 6/231 (the suit property) in exercise of its statutory power of sale. The Plaintiff also prayed for a declaration that the intended public auction and forced sale of the suit property was null and void for want of procedure and further that the Defendant's Statutory Power of Sale had not arisen or at all. The Plaintiff also filed a Notice of Motion Application of the same date, seeking temporary injunctive orders restraining the Defendant from inter alia advertising, selling or disposing of the suit property. On 5th October, 2023 the Court issued



temporary injunctive orders pending hearing and determination of the Application. On 17th October, 2023 however, in response to the Application, the Defendant filed the instant PO challenging the court's jurisdiction to determine not only the Application, but the entire suit as well. The Defendant's argument is that this court was established under Article 162(2)(b) of *the Constitution* of Kenya as an Environment and Land Court, yet the dispute is commercial in nature.

6. The only issue that arises for determination herein is whether this court has jurisdiction to deal with the suit herein as well as the Application dated 2nd October, 2023.
7. 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 PO 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. On the question of what constitutes a preliminary objection, the case of *Mukisa Biscuits Manufacturing Ltd vs 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”.

8. 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”.

9. The Defendant 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' vs 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.”

10. 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 vs 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.”

11. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs 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.”

12. 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 ELC 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.”

13. 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 vs Redhill Heights Investments Limited & Another* (2016) ECLR where Ngugi J held as follows:-

23. 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.

24. 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.”

14. 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 vs Diamond Trust Bank Kenya Limited & Another* [2018] eCLR the Munyao J further explained the predominant purpose test as follows: -

25. 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 necessarily 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.”

15. 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 vs Patrick Kangethe Njuguna & 5 others* (2017) eCLR, the court of Appeal by defined the term “use” in following words:-

32. As for land use, the Black’s Law Dictionary, 9th 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.”



16. The Court of Appeal in the Cooperative Bank of Kenya Case (Supra) went further to define the term “use of land”, holding that:-
34. 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.
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 charger.
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.”
17. The Court of Appeal therefore also seems to have adopted the Predominant Purpose Test in determining whether the ELC 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 PO 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.

18. From averments contained in the Plaintiff and the Notice of Motion, the dispute herein arose out of a Charge through which the Defendant advanced a loan of KShs.1, 500,000/- using the suit property as security for the loan. The Plaintiff further averred that as at 29th October, 2002 it had not defaulted on the loan, however due to matters beyond its control, the suit land was invaded and sold to third parties. As a result, the Plaintiff was litigating in court culminating in Eldoret Civil Appeal No. 240 of 2019, where the Defendant is an interested party. It is not clear whether the Plaintiff has been servicing the loan post 29th October, 2002 but it appears from a copy of the Plaintiff in Nakuru HCCC No. 42 of 2003 annexed to the Plaintiff's List of Documents that the Plaintiff herein failed to service the loan from that date. The Defendant then decided to exercise its statutory power of sale and advertised the land for sale by way of public auction.
19. 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 friend 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. The Plaintiff's other complaint is that the Defendant changed the interest rates on the loan without informing the Plaintiff. The Plaintiff averred at paragraph 10 of the Plaintiff that it was charged interest in excess in contravention of the in duplum rule.
20. These appear to be the dominant issues in the current dispute before this court, and not the Charge, which was the instrument conferring interest in the suit property to the Defendant as security for the due performance of the Plaintiff's obligations thereunder. The overcharging of interest and failure to serve a statutory notice has nothing to do with the environment, or the use and occupation of land, or title to land.
21. 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 the amount of interest charged on the loan and the alleged failure by the Defendant to serve the statutory notice prior to the advertisement. Even the particulars of fraud set out in the Plaintiff are centred around these two issues. As to whether the charge itself is a contract under Section 13 of the ELC 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:-
 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.”

22. 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 Plaintiff and the Notice of Motion filed herein, both dated 2nd October, 2023 are dismissed. As costs follow the event and the Defendant has succeeded in its PO, the Plaintiff shall bear the costs of the Application as well as the suit herein.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 10TH DAY OF JULY 2024.

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Mburu for Mr. Gachie for the Plaintiff

Mr. Airo for Mr. Mwangi for the Defendant

Court Assistant: Brian

