



**Njoroge & another v Modyn Credit Limited (Environment and Land Appeal E017 of 2023) [2024] KEELC 6315 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6315 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E017 OF 2023  
BM EBOSO, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**JAMES MWAURA NJOROGE ..... 1<sup>ST</sup> APPELLANT**

**CATHERINE NG'ENDO NG'ANG'A ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MOLYN CREDIT LIMITED ..... RESPONDENT**

**RULING**

1. Falling for determination in this ruling is the respondent's preliminary objection dated 15/1/2024, through which the respondent objects to this appeal and urges that it be struck out on the following verbatim grounds:
  - a. The lower court matter, the subject of this appeal, was a mortgage/charge dispute as pleaded in the plaint dated 7th December, 2022 at Paragraphs 5, 6, 10, 11, 13 and 15 (found at page 3 - 6 of the Record of Appeal filed herein on 3rd May, 2023).
  - b. The appeal herein also raises issues relating to a mortgage/charge dispute as indicated in ground No 4 of the memorandum of appeal filed herein and dated 7th March, 2023.
  - c. This court lacks jurisdiction over mortgage/charge disputes.
  - d. This appeal is thus bad in law, incompetent, a non-starter and an abuse of court process.
2. The preliminary objection was canvassed through written submissions dated 11/9/2024, filed by M/s Wamiti Njagi & Associates. The two appellants did not file written submissions. They did not attend the hearing to respond to the preliminary objection. The e-portal reveals that on 9/8/2024, the respondent uploaded an affidavit of service dated 2/8/2024 indicating that on 30/7/2024, they served on the appellants' advocates a hearing notice relating to the preliminary objection.



3. The court has considered the preliminary objection and the written submissions tendered in support of the preliminary objection. The gist of the respondent's preliminary objection is that this court lacks jurisdiction to entertain this appeal. The respondent contends that the dispute in the suit giving rise to this appeal was a mortgage/charge dispute, adding that this court does not have jurisdiction to entertain the appeal.
4. The respondent cited the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* (2017)eKLR. They also relied on the Supreme Court of Kenya decision in *Albert Chaurembo Mumbo & & Others v Maurice Munyao & 148 Others* (2019) eKLR in which the Supreme Court of Kenya emphasized that a suit filed before a court that does not have jurisdiction cannot be transferred to another court.
5. The court has considered the preliminary objection and the submissions tendered. The single issue to be determined in this ruling is whether this court is seized of jurisdiction to entertain this appeal.
6. I have looked at the plaint dated 7/12/2022 which contained the appellants' claim in the suit that gave rise to this appeal. The two appellants pleaded that they took a loan of Kshs 2,200,000 from the respondent and secured the loan through a charge against title number Muguga/Kanyariri/712. The appellants went to the trial court to injunct the respondent against exercising the chargee's statutory power of sale.
7. It is clear from the above pleadings that there was no contestation about the fact that the 1st appellant was the registered proprietor of the suit land. It is also clear that the dominant issue in the trial court was whether the respondent was entitled to enforce the charge by exercising the chargee's statutory power of sale against the chargor.
8. The Court of Appeal has been categorical that questions as to whether the chargees statutory power of sale has crystallized fall outside the jurisdiction of the Environment & Land Court. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, the Court of Appeal held that:

“25. The respective jurisdictions of the ELC and the High Court are well spelt out by our Constitution. With regard to the ELC, Article 162(2)& (3) of [the Constitution](#) requires inter alia, that;

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

- a. ...
- b. The environment and the use and occupation of, and title to, land. Emphasis added.”

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 ....
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."

9. For the above reasons, this court agrees with the respondent that the Environment and Land Court does not have jurisdiction to entertain this appeal. The result is that the preliminary objection dated 15/1/2024 is upheld. Consequently, the appeal is struck out. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF SEPTEMBER 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Mr Wamiti Njagi for the Respondent

Appellant - absent

Court Assistant: Melita

