



**Nzai v Maitha & 2 others (Environment & Land Case E019 of 2024)  
[2024] KEELC 6394 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E019 OF 2024  
EK MAKORI, J  
OCTOBER 2, 2024**

**BETWEEN**

**FRANCIS KATANA NZAI ..... PLAINTIFF**

**AND**

**DANIEL MASHA MAITHA ..... 1<sup>ST</sup> DEFENDANT**

**AMBER TECHNICAL WORKS GENERAL CONTRACTORS 2<sup>ND</sup> DEFENDANT**

**LETSHEGO KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff instituted the suit herein by way of plaint seeking the following reliefs:
  - a. A permanent injunction restraining the 3<sup>rd</sup> Defendant by itself, its Agents, Servants, representatives, assigns, or any person or entity claiming under it from interfering, selling by Public auction, disposing of, alienating, transferring, or adversely dealing with the Plaintiff suit property known as Ngomeni Squatter Settlement Scheme/1824 situated at Ngomeni Area within Gongoni Location of Magarini Sub-County within Kilifi County.
  - b. A declaration that the parcel of land known as Ngomeni Squatter Settlement Scheme/1824, situated at Ngomeni Area within Gongoni Location of Magarini Sub-County within Kilifi County, is the property of the Plaintiff.
  - c. A declaration that the processing of the loan facility advanced to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant and the preparation and execution of the Charge over parcel of land known as Ngomeni Squatter Settlement Scheme/1824 situated at Ngomeni Area within Gongoni Location of Magarini Sub-County within Kilifi County as security of the loan facility was fraudulent, illegal, null and void.



- d. An Order directing and compelling the 2<sup>nd</sup> Defendant to execute and furnish to the 3<sup>rd</sup> Defendant a different security for the loan facility advanced to him. A further Order directing and compelling the 2<sup>nd</sup> Defendant to repay and service the outstanding loan owing from him to the 3<sup>rd</sup> Defendant and a further Order to issue that the 3<sup>rd</sup> Defendant do Discharge and release the Original Title Deed for the parcel of land known as Ngomeni Squatter Settlement Scheme/1824 situated at Ngomeni Area within Gongoni Location of Magarini Sub-County within Kilifi County to the Plaintiff.
  - e. Costs of the suit.
  - f. Any other or such relief that the Court shall deem fit to grant.
2. Along with the plaint, Plaintiff contemporaneously filed a Notice of Motion Application dated 15<sup>th</sup> February 2024 under urgency, principally seeking injunctive orders restraining the sale, transfer, disposition, or other adverse dealing of the property title No. Ngomeni Squatter Settlement Scheme/1824 (hereinafter referred to as the “suit property”) by the Defendants. The plaintiff also sought orders to deposit the original title for the suit property in court, and the investigation of the Charge dated 30<sup>th</sup> October 2019 registered over the suit property.
  3. The 3<sup>rd</sup> Defendant filed a Reply Affidavit sworn by Rita Njora on 4<sup>th</sup> of April 2024, challenging the merit of the Plaintiff’s application and a Notice of Preliminary Objection dated 4<sup>th</sup> of April 2024, challenging the competence of the entire suit. The 1<sup>st</sup> Defendant supports this position; in particular, the Objection raises questions:
    - a. That the Court lacks jurisdiction to hear and determine the matter in reference to Article 162 (2) (b). The suit and the application cannot be salvaged by transfer to the High Court since this court lacks jurisdiction to handle the matter, including Transfer.
    - b. That the suit and the application are, therefore, incurably defective and bad in law.
  4. In its wisdom, the Court directed that the Preliminary Objection and the Application be heard simultaneously. The Court further directed that parties canvass the same through written submissions. They complied.
  5. From the materials and submissions placed before me, the issues that fall for the determination of this Court are whether – this Court has jurisdiction to hear the application for an injunction and the suit, whether in the event the Court finds it has jurisdiction, whether a temporary injunction should issue and who should bear the costs of the two applications.
  6. Let me start with the question of jurisdiction. The third Defendant avers that Pursuant to Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* No. 19 of 2011, which established the Environment and Land Court and elucidated the court’s jurisdiction under Section 13 of the *Act*. Such disputes must relate to the environment, land use and occupation, and land title.
  7. The 3<sup>rd</sup> Defendant is of the view that the dominant issues emanating from the plaint that falls for determination, in this case, relate to the legality and validity of the charge registered over the Plaintiff’s suit property, accounting of the loan arrears owed by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant, and legality of the supposed intended sale of the suit property by the 3<sup>rd</sup> Defendant to recover the said loan arrears with the supposed collusion of the other Defendants. The Plaintiff’s main grievance is his inability to sell the suit property to a prospective buyer because a charge is registered on it securing loan facilities advanced by the third Defendant to the 2<sup>nd</sup> Defendant. Paragraph 8.



8. The 3<sup>rd</sup> Defendant asserts that It is common ground that the Plaintiff herein is the registered owner of the suit property. None of the parties in the suit have further contested the Plaintiff's use and occupation of the suit property. Suffice it to say that none of the above highlighted critical issues related to this Court's specialized jurisdiction to determine the issue of the use and occupation of, and title to, the land in question.
9. The 3<sup>rd</sup> Defendant opines that the dispute herein springs from utilizing the Plaintiff's suit property as collateral in the loan agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The suit is a commercial dispute that falls under the unlimited original jurisdiction of the High Court in civil matters pursuant to Article 165(3)(a) of the Constitution of Kenya.
10. The 3<sup>rd</sup> Defendant relies on the decisions 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), Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR and Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR.
11. The 3<sup>rd</sup> Defendant urges the Court to down tools, seeing that it has no jurisdiction – Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1. And that the entire suit ought to be struck out with costs and not transferred as held in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR.
12. The Plaintiff believes that the suit falls within the purview of this Court. He is claiming his parcel of land back after discovering that it is on the verge of being sold or auctioned for recovery of a loan to which he was not a party. He never permitted the 1<sup>st</sup> Defendant to place the title as a security. It was fraud between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant.
13. The Plaintiff contends that he was not party to the said transaction and processing of the loan and did not sign any agreement to that effect. In extension, the purported charge which was executed, with the signature appended thereon, does not belong to the Plaintiff, and the Passport photo image affixed to it belongs to an unknown person whose image was an imposter purported to be the Plaintiff.
14. The Plaintiff states that the authorities cited by the 3<sup>rd</sup> Defendants that the Environment and Land Court has jurisdiction to deal with disputes connected to the “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, are not in pari materia to the claim by the Plaintiff. The ELC has jurisdiction to entertain the suit because Plaintiff is being deprived of the ownership and use of his land by fraudulent means, which he never participated in and was never informed of by the 1<sup>st</sup> Defendant, who was the architect of all the mess.
15. Jurisdiction is everything when raised; the Court should deal with it immediately. See Nyarangi JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR:

“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.”
16. The jurisdiction question is whether the ELC or the High Court is vested with jurisdiction on matters relating to charges. That question has been with us since the ELC was constituted in 2012.



17. 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.”

18. 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.”

19. 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).

20. 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 v 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.”

21. The Superior Court adopted the same stance 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.”



22. Looking at the Plaintiff's claim in the plaint and the application, he says he realized that his title had been placed as security by the 1<sup>st</sup> Defendant to obtain a loan. The charging documents, he says, bear identification, signature, and a photograph that are not his. He says he was duped to give out his title to the 1<sup>st</sup> Defendant and now wants it back. We are not dealing with land use or ownership – but the charging document. It will be pretty early to state that the charge document was fraudulently procured. There is nothing from investigation agencies to suggest that. The fraudulent scheme to sell his land has not materialized. If it does, he will raise the issue of alleged fraud in creating the charge over his land in the appropriate Court.
23. To my mind, this matter falls within the realm of the High Court or, better still, subject to pecuniary jurisdiction, the Magistrates Court. I allow the Preliminary Objection in its entirety, striking out the entire suit and application with costs to the Defendants.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 2ND DAY OF OCTOBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr.Omwancha, for the Plaintiff

Mr. Shujaa, for the 1st Defendant

Mr.Juma for the 3rd Defendant

Happy: Court Assistant

