



**Transfleet Limited & another v Middle East Bank Kenya Limited  
& 3 others; Singh (Interested Party) (Environment and Land Case  
E018 of 2024) [2024] KEELC 6513 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6513 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E018 OF 2024**

**JA MOGENI, J  
OCTOBER 8, 2024**

**BETWEEN**

**TRANSFLEET LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**KINGORANI INVESTMENTS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MIDDLE EAST BANK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENTS ..... 2<sup>ND</sup> RESPONDENT**

**AKBER ABDULLAH KASSAM ESMAIL ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR, NAIROBI ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**JAMES GITAU SINGH ..... INTERESTED PARTY**

**RULING**

1. For determinations by this Honorable Court are a case of four (4) Multiple applications brought by different parties and issues but over the same subject matter and to some extend the same subject parties. The said applications are dated 23/01/2024, 21/02/2024, 25/07/2024 and 15/05/2024.
2. The main suit was filed by the Plaintiffs/Applicants vide a Plaint dated 23/01/2024 alongside the Notice of Motion Application.
- 3) This Honorable court has decided to critically assess each of the three (3) applications separately and the issues raised while dissecting the issues and the prayers sought under each of them. In the long run it has framed salient common emerging from each of the application and cutting across as areas of convergence where upon an informed just and fair decision will be arrived at.



4. Upon service, each of the Respondents filed their replies accordingly. The Honourable Court will be dealing with each of the applications distinctly but deliver a single Ruling thereof.

#### **1st Application dated 23/01/2024**

5. The Application was brought under Section 44A (3) of the Banking (Amendment) Act, *Guidelines on Corporate Governance- Central Bank Prudential Guidelines*, Article 159 (2) (c ) of the *Constitution* of Kenya, Section 1A, 1B, 3, 3A & 89 of the *Civil Procedure Act*, Orders 40 & 51 of the *Civil Procedure Rules 2010*, Section 96 and 97 of the *Land Act*, Section 21 of the *Auctioneers Act*, Rules 15 and 16 of the *Auctioneers Rules 1997* Section 4 & 5 (1) of the *Administrative Act* and all other enabling Provisions of the law.
  1. Spent
  2. That this Honourable Court do grant a stay on the receiving of payments or any purchase price. or on any disposal, transfer, alienation, and or any other dealings on Land Reference Number 214/293. Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents their agents, employees and or servants pending the hearing and determination of this application inter parties
6. That this Honourable Court do grant a stay on the receiving of payments or any purchase price, or on any disposal, transfer, alienation, and or any other dealings on Land Reference Number 214/293, Orchard Close, Off Muthaiga Road, Muthaiga Nairobi County registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Respondents their agents and or servants pending the hearing of this suit
7. That this Honorable Court do grant an injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant/respondents and the interested party whether jointly or whether by themselves, their agents, employees, and servants from trespassing on, alienating, disposing, transferring or otherwise interfering or dealing with Land Reference Number 214/293, Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant pending the hearing and determination of this Application Inter-Parties.
8. That the Honourable Court do grant an injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents and the Interested Party whether jointly or whether by themselves their agents, employees and servants from trespassing on, alienating, disposing, transferring or otherwise interfering or dealing with those parcels of land being Land Reference Number 214/260 and Land Reference Number 214/324 pending the hearing and determination of this Application Inter-Parties.
9. That the Honourable Court do grant an injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents and the Interested Party whether jointly or whether by themselves their agents, employees and servants from trespassing on, alienating, disposing, transferring or otherwise interfering or dealing with Land Reference Number 214/293, Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant pending the hearing and determination of this suit.
10. That the Honourable Court do grant an injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents and the Interested Party whether jointly or whether by themselves their agents, employees and servants from trespassing on, alienating, disposing, transferring or otherwise interfering or dealing with those parcels of land being Land Reference Number 214/260 and Land Reference Number 214/324 pending the hearing and determination of this suit.



11. That the 2<sup>nd</sup> Defendant be compelled to produce the full proceedings of the Auction conducted on 16<sup>th</sup> January 2024 of Land Reference Number 214/293, Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant.
12. That the Honourable Court do issue an Order directing that the auction of 16<sup>th</sup> January 2024 was unlawful, un-procedural and irregular.
13. That the Honourable Court do hereby issue and order the Certificate of Sale issued to the Interested Party by the 2<sup>nd</sup> Defendant is void *ab initio* and cancelled.
14. That the Honourable Court do issue an Order directing the 4<sup>th</sup> Defendant to cancel any title document conferring ownership of Land Reference Number 214/293, Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County to the Interested Party.
15. That the Honourable Court do issue an Order directing the 4<sup>th</sup> Defendant to cancel any title document conferring ownership of Land Reference Number 214/260 and Land Reference Number 214/324 Orchard Close, Off Muthaiga Road, Muthaiga, Nairobi County to the Interested Party or any person claiming ownership.
16. That the Honourable Court do hold that the Charge dated 21<sup>st</sup> June 2021 is not valid and incapable of enforcement.
17. That an order of Costs of the application together with interest thereon at such rate and for such period of time this Honourable Court may deem fit do issue.
18. Any other such relief as this Honourable court may deem appropriate.
19. The application is based on the fifty (50) grounds on its face and is supported by the affidavit of James Abiam Mugoya Isabirye, director to 1<sup>st</sup> plaintiff, sworn on the 23/01/2024 inter alia deposing that the plaintiffs have at all material times been the registered owners of the said parcels of land; that the 1<sup>st</sup> and 2<sup>nd</sup> defendants unprocedurally in breach of the Letter of Offer dated 8/02/2021 illegally conducted a sale by auction of Land Reference Number 214/293, Orchard Close, Off Muthaiga Road which property is registered in the name of the 2<sup>nd</sup> Plaintiff/Applicant.
20. That there was an outstanding debt of Kesh 196,145,897.06 with the 1<sup>st</sup> defendant where there 1<sup>st</sup> plaintiff states that the 1<sup>st</sup> defendant induced the 1<sup>st</sup> plaintiff to execute a Letter of Offer dated 8/02/2021 and the charge dated 23/06/2021 over the outstanding debt which had become non-performing. The executed Letter of Offer additionally included an overdraft facility of Kesh 92,550,000 and other properties namely Land Reference Number 214/293, registered in the name of the 2<sup>nd</sup> plaintiff/applicant and LR 214/260 and LR No, 214/324 as security were added.
21. It is the plaintiff's contention that the charge dated 23/06/2021 had irregularities although the 1<sup>st</sup> plaintiff/applicant regularly effected payments of the loan facility but it went into arrears and statutory notices were issued for non-performance. As a result the 1<sup>st</sup> plaintiff/applicant and 1<sup>st</sup> defendant engaged in negotiations that led to the 1<sup>st</sup> plaintiff/applicant to effect payment of Kshs. 141,113,557.83 including interest as stated in the 1<sup>st</sup> defendant's letter dated 24/08/2023 in which the 1<sup>st</sup> defendant acknowledged the payment.
22. The plaintiff also states that through the letter dated 24/08/2023, the 1<sup>st</sup> defendant admitted that the Statutory Notices dated 1/11/2021 and 10/02/2022 had been overtaken by events and had expired. At the same time that the 1<sup>st</sup> defendant admitted to have suspended the debt recovery process which



made the plaintiff to believe that engaging in the negotiation meant the 1<sup>st</sup> defendant would not move to realize any of the securities contrary to the terms of the Letter of Offer.

23. That the plaintiff informed the 1<sup>st</sup> defendant on or about 18/10/2023 that it was to conclude a sale in respect of a property owned by its affiliate company, Transfleet EPZ Limited and the proceeds would be used to settle any arrears. However, on 16/01/2024 the plaintiff was informed of the arbitrary auction of the suit property LR 214/293 through the 2<sup>nd</sup> defendant. Yet neither the 1<sup>st</sup> plaintiff/applicant nor 2<sup>nd</sup> plaintiff as registered proprietor/charger was notified of the auction. That neither did the 1<sup>st</sup> and 2<sup>nd</sup> defendants issue a statutory notice of sale as provided for in Section 90, 96(2) and 96(3) of the [Land Act](#); Rule 15 (b) (c) and (d) [Auctioneers Rules](#) prejudicing the plaintiffs rights to redeem the charged suit property.
24. The 1<sup>st</sup> plaintiff contends that the sale of the 2<sup>nd</sup> plaintiff/applicant's property without issuance of notice of sale to the 2<sup>nd</sup> plaintiff was prejudicial since the property is registered in its name and also that the 1<sup>st</sup> defendant failed to exhaust the mechanisms availed in the letter of offer dated 8/02/2021.
25. That the 1<sup>st</sup> plaintiff was informed via email on 16/01/2024 of the sale by auction at a sum of Kshs 152,000,000 and that a 10% deposit was allegedly paid by multiple parties via multiple modes of payment and not by the alleged highest bidder.
26. The plaintiff itemized particulars of irregularity for the sale by auction and particulars of fraud by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and particulars of loss on the part of the plaintiffs.
27. The 1<sup>st</sup>, 2<sup>nd</sup> defendants and the Interested Party filed replying affidavits to Application dated 23/01/2024 similarly the plaintiffs filed a response to the replying affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and to the one for the Interested Party.

### **The Application – 2nd Defendant's Application**

28. The 2<sup>nd</sup> defendant's application is brought under Article 50(1) and Article 159(2) of the [Constitution](#), Kenya 2010, Section 1A, 1B, & 3A of the [Civil Procedure Act](#), Order 50 Rule 6 of the [Civil Procedure Rules](#) and all other enabling laws seeking the following orders:
  1. Spent
  2. That this Honorable Court be pleased to extend the time set by the Court on 15<sup>th</sup> February, 2024 for filing of the 2<sup>nd</sup> defendant's Replying Affidavit and response to the Plaintiffs' Application dated 23/01/2024
  3. That this Honorable Court be pleased to make any such further order(s) and issue any other relief it may deem just to grant in the interest of justice
  4. That costs of this application be in the cause.
29. The application is premised on the ten (10) ground on the face of the application the gist of it being that the applicant is seeking extension of time to allow them to file their replying affidavit to the plaintiffs' application dated 23/01/2024. The applicant contends that they have been served with further affidavits by the plaintiffs and that they require more time. The reason being that the advocate for the 2<sup>nd</sup> defendant was caught up with time since he had to travel to Kisii to attend to a sick mother.

### **Third Application - 3rd Defendant**

30. The 3<sup>rd</sup> Application is brought under [Environmental and Land Court Act](#) Section 19(1) and (2); Order 1 Rule 10(2), Order 2 rule 15, Rule 14 of the [Civil Procedure Rules 2010](#), Section 1A, 1B & 3A of the



*Civil Procedure Act*, Article 159 of the *Constitution* of Kenya 2010 and all enabling provisions of the law seeking the following orders:

1. This Honorable Court be pleased to strike out and or dismiss the suit against the Third Defendant.
  2. This Honorable Court be pleased to strike out the name of the Third Defendant from suit
  3. This Honorable Court do issue such other orders and directions as it may deem fit and just to grant, and
  4. The costs of this application and of this suit as against the Third Defendant be borne by the Plaintiffs
31. The grounds upon which the application are based are:
- a. That the Plaint, as drawn and filed, fails to disclose any or reasonable cause of action as against the Third Defendant;
  - b. That this suit is simply malicious, personal, spiteful and is a poor attempt by the Plaintiffs to harass the Third Defendant, and is hence an abuse of the process of this Honourable Court;
  - c. That the Third Defendant is acknowledged in the Plaint as the Director and Advocate of a disclosed principal, namely the First Defendant, and is not personally liable to the Plaintiffs;
  - d. That the Third Defendant is not a necessary party in the determination of the dispute between the Plaintiffs and the First Defendant, as the Third Defendant is not a party to any of the transactions that form the basis of the present suit;
  - e. That the joinder of the Third Defendant as a party in the suit shall not aid the Court in arriving at a just decision nor will his absence hinder the Court's ability to deliver a fair and informed decision;
  - f. That the Plaint as drawn seeks redress for alleged wrongs committed by the First and Second Defendants, which are legal persons with limited liability under the law, and capable of being sued in their own capacity and the inclusion herein of the Third Defendant, an agent and or officer of the First Defendant, is unsustainable and unwarranted;
  - g. That the Plaint as drawn and filed is framed and calculated at prejudicing the Third Defendant, the suit as against him being scandalous and or vexatious;
  - h. That the inclusion of the Third Defendant as a party is embarrassing and will delay a fair trial of this suit;
  - i. That the filing and prosecution of this suit against the Third Defendant is otherwise an abuse of the process of the Honourable Court;
  - j. That the claims against the Third Defendant are neither justiciable nor actionable in law;
  - k. That it is therefore in the interest of justice that the orders sought in the instant Application are granted to protect the Third Defendant from the unjustified claims, and to relieve him from the burden of this litigation.
  - l. That the claim against the Defendant herein is bad in law and is fatally incurable and should be struck out in limine with costs to the Third Defendant; and



- m. That it is therefore in the interest of justice that the reliefs sought in the instant Application are granted to protect the Third Defendant from unjustified claims.

#### **Fourth Application – 1st Defendant’s Application**

32. The 4<sup>th</sup> Application is made under Article 165 (3) of the Constitution, Order 2 rule 15 of the Civil Procedure Rules and the inherent powers of the Constitution on the following grounds:
1. This Honourable Court does not have any jurisdiction to hear and determine this suit or any of the alleged causes actions pleaded therein;
  2. Under Article 165(3)(a) of the Constitution it is the High Court of Kenya which has the exclusive and unlimited jurisdiction to consider the alleged causes of actions pleaded in the Plaint and or to grant reliefs sought by the Plaintiffs in respect thereof;
  3. And in particular:
    - i. This Honourable Court does not have any jurisdiction to determine the amount due and owing by the Plaintiffs on the security of a charge;
    - ii. This Honourable Court does not have any jurisdiction to determine whether the amount due and owing by the First Plaintiff to the First Defendant is in breach of Section 44A of the Banking Act or that this Section is void as it offends the provisions of the Constitution;
    - iii. Nor does this Honourable Court have jurisdiction to determine whether the First Defendant has duly exercised its statutory power of sale under the charge in its favour nor whether it has given due statutory notices;
    - iv. Nor does this Honourable Court have any jurisdiction to determine whether the Second Defendant had held a public auction in accordance with the provisions of The Auctioneers Act; and
  4. This suit is otherwise an abuse of the process of this Honourable Court.
33. All applications are opposed the respondents filed replying affidavits to the applications. For the 1<sup>st</sup> application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 1/03/2024, the 2<sup>nd</sup> defendant filed a replying affidavit sworn on 5/03/2024 stating that the auction was conducted within the laid down law and Auctioneers’ Rules. The 3<sup>rd</sup> defendant filed a chamber summons in response and Grounds of Opposition dated 13/02/2024 and stated that there is no law requiring issuance of repeated service of statutory notices and that the auction was conducted in adherence to the both the Land Act Section 97(2) and the Auctioneers Rules and Regulations.
34. The 3<sup>rd</sup> defendant states that the plaint does not articulate any cause of action against the 3<sup>rd</sup> defendant and therefore the suit against the 3<sup>rd</sup> defendant should be dismissed.
35. The plaintiffs filed a response to the 2<sup>nd</sup> defendant’s notice of motion dated 27/02/2024, sworn on 5/03/2024 by James Abian Mugoya Isabiriye and further affidavits sworn on 20/03/2024. The gist of the responses was that the application by the 2<sup>nd</sup> defendant was an attempt to adjourn this court’s ruling and that the application does not provided good enough reasons for extension of time and violate Section 1B of the Civil Procedure Rules.
36. In response to the application of the 3<sup>rd</sup> defendant the plaintiffs contend that the 3<sup>rd</sup> defendant wants this suit struck out yet the rules to strike out a suit are clearly laid out in Order 2 Rule 15. That the



action being so draconian can only be done in situations of plain facts. As it were the facts need to be proved through a hearing. It is the plaintiffs' contention that the Plaintiffs have aptly demonstrated that the plaint as drafted is neither scandalous nor vexatious and the 3<sup>rd</sup> Defendant's application should be declined for the sole reason that it is frivolous and solely geared towards preventing the expeditious hearing of the suit on its merit and defeating the ends of justice.

37. On the 4<sup>th</sup> Application the plaintiffs opposed the application vide the Plaintiff's Replying Affidavit sworn by the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff deponed that this court's jurisdiction to handle environment and land matters is donated to it not only by Article 162 (2) (b) of the Constitution but also the Environment and Land Court Act.
38. The court gave directions for filing of submissions and all parties did file their submissions which I have considered. I must confess that the parties spent a considerable amount of time to write their submissions. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs even filed I will start by addressing the issue of jurisdiction first.
39. As already stated this suit was commenced by way of a Plaint dated 23/01/2023 together with an Application for prohibitory orders of injunction of even date. The record shows that on 24/01/2024 this court issued status quo orders pending the hearing and determination of the injunctive application by the plaintiffs.
40. I have noted from my perusal of the documents filed that this matter is a classic case of what is referred to as a mixed grill case where we have a duly registered legal charge and at the same time plaintiffs are claiming fraud and illegality in issuance of statutory notices and tenancy issues have also been thrown in. I have come across cases that have a similar disposition for example in the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd [2018]eKLR, Justice Munyao Sila was of the view that such matters could be dealt with by this Court particularly checking on the predominant features and the substratum of the subject matter. The demarcation on this issue has subsequently been clarified by the Court of Appeal.
41. From the instant suit, I do note that the initial issue will be the subsisting legal charge and the subsequent statutory power of sale. Whether the 1<sup>st</sup> Defendant acted fraudulently in creating the said legal charge before the creation of the same will be secondary. Therefore, in my view, the High Court will be the appropriate forum to ventilate the issues raised herein based on judicial precedents – see Angote J. in Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another [2021] eKLR quoted with approval in Keter v Ecobank Kenya Limited (Civil Case 16 of 2018) [2022] KEHC 13352 (KLR) (28 September 2022) (Ruling) where he stated:
- “The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the charge. In Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another [2021] eKLR the court held; 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.”
42. Therefore, from the pleadings before this court, the issue to be determined is whether the 1<sup>st</sup> Defendant issued to the Plaintiffs the requisite statutory notices as contemplated by the Land Act in relation to the charged properties.



43. According to the application filed by the 1<sup>st</sup> Defendant, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute, and that the suit having been filed in a court without jurisdiction, the Plaintiff's suit should be struck out with costs.

44. The issue of jurisdiction is long settled through the Court of Appeal case of *Lillian "S" vs. Caltex Kenya Limited* [1989]eKLR. In this case, it is the Court of Appeal requirement that a Court or Tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction. The court held as thus in this case:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

45. At the same time, the apex court of the land the Supreme Court held in *Republic v Karisa Chengo & 2 Others* [2017] eKLR, as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

46. Now the jurisdiction of the Environment and Land Court emanates from the provisions of Article 162(2) (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act* (the ELC Act) and it provides that:

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

(b) the environment and the use and occupation of, and title to, land.”



47. Parliament enacted the *Environment and Land Court Act* in compliance with the provisions of Article 162(3). Section 13 of the *Environment and Land Court Act* provides as follows:

- “(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*.”

48. the *Constitution* in Article 165(5) divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the *Constitution*. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of the High Court in great detail in the case of *Republic v Karisa Chengo & 2 Others* [*supra*] in which it held as follows:

- “(52) In addition to the above, we note that pursuant to Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act*... From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa...”

49. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs have not denied that as security for a loan facility, they executed a charge over parcels of land known as LR No. 214/293, LR 214/260 and LR 214/324. Infact at paragraph 7 of the Supporting Affidavit, the 1<sup>st</sup> plaintiff admits that the charge was executed between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant on 23/06/2021 and that following a letter of offer dated 8/02/2021 parcels LR 214/260 and LR 214/324 were added as part of the securities. The Plaintiffs have confirmed in the Plaintiff that the 1<sup>st</sup> Defendant is seeking to exercise its statutory power of sale of the charged properties. The Plaintiffs have contended in the Plaintiff that the suit properties should not have been advertised for sale because they did not receive the requisite statutory notices.



50. The substratum of the suit therefore relates to the legal charges and the exercise of the statutory power of sale by the 1<sup>st</sup> Defendant. The Plaintiffs are challenging the legality of the charge documents and are also alleging fraud in the manner in which the 1<sup>st</sup> Defendant has dealt with the suit properties.
51. 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 charge. This issue has since been settled 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:

“ 35. Accordingly, for land use to occur, the land had to be utilized for the purpose for which the surface of the land, air above it or ground below it was adapted. Therefore, to the law, land use entailed 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 was adapted. Neither the *cujus* doctrine nor article 260 of the *Constitution* whether expressly or by implication recognized charging land as connoting land use.

36. By definition, a charge was an interest in land securing the payment of money or money’s worth or the fulfillment of any condition. As such, it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money’s worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that the chargee was assured of the repayment of the money he had advanced the chargor.

Further, Section 2 of the *Land Act* recognized a charge as a disposition in land. A disposition was distinguishable from land use. While the former created the relationship, the latter was the utilization of the natural resources found on, above or below the land. Land use connoted the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land. Saying that creation of an interest or disposition amounted to use of the land, was akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constituted land use. The mere acquisition or conferment of an interest in land did not amount to use of that land. If that were the case, there would neither be 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.

Consequently, the assertion that a charge constituted use of land within the meaning of article 162 of the *Constitution* had to fail. In addition, the cause of action before the Court was not the validity of the charge, but a question of accounts...

To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the Environment and Land Court. However, under section 2 of the *Environment and Land Court Act*, an instrument was a writing or enactment which created or affected



legal or equitable rights and liabilities. For the purposes of the instant suit, that instrument was the charge. The cause of action 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. [Emphasis mine]

Furthermore, the jurisdiction of the Environment and Land Court to deal with disputes relating to contracts under section 13 of the *Environment and Land Court Act* ought to be understood within the context of the Court's jurisdiction to deal with disputes connected to 'use' of land. Such contracts, ought to be incidental to the 'use' of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.

While exclusive, the jurisdiction of the Environment and Land Court was limited to the areas specified under article 162 of the *Constitution*, section 13 of the *Environment and Land Court Act* and section 150 of the *Land Act*; none of which concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting matters was without doubt, as evidenced by article 165(3) of the *Constitution*. The Appellant's objection on jurisdiction was rightly dismissed."

51. Therefore, it is clear that the Court of Appeal, whose decision is binding on this court, in the *Co-operative Bank case (supra)* found that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, and the issuance of statutory notices in respect of charges, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute.
52. In the instant matter, we are primarily dealing with a legal charge and the subsequent statutory notice of sale, which is what the plaintiffs are challenging but which cannot be separated from the Interested Party's claim of purchase through a valid auction, which in my view can be challenged in the High Court by opposing the creation of that legal charge to the 2<sup>nd</sup> plaintiff's property and all allegations raised here can be ventilated there.
53. Given the foregoing I am of the convicted view that this Court lacks jurisdiction to proceed further to consider the claim as raised in the plaint and, in the same breath deal with the pending application for an injunction, I down my tools.
54. It has been the practice of this court, and the High Court, to transfer suits to the High Court and vice versa in instances where the court finds that it has no jurisdiction, the said practice has since been held to be illegal. In the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR, the Supreme Court held that a suit filed before a court without jurisdiction could not be transferred to another court. The Supreme court held as follows:

"(153) In that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of the *Constitution* leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and



Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) *supra*, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

(154) However, as it was well elucidated in the case of *Kagenyi v Musirambo & Another* [1968] EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.” [Emphasis mine].

55. The above position has been followed by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR where it was held as follows:

“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction...These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* [2013] eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* [1968] EA 43. The same



would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No. 6 of 2018 *Phoenix East Africa Assurance Co.ltd v. S.M. Thiga t/a Newspaper Services* is therefore a nullity as it was based on a nullity.”

56. In the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, Judge Oscar Angote, with the guidance of the above decisions of the Court of Appeal and the Supreme court, stated as follows:

“From the above decisions of the Supreme Court and the Court of Appeal, it follows that this suit having been filed in a court without the requisite jurisdiction is not transferrable to the High Court. The suit is therefore struck out with costs to the Defendants.”

57. Both the Supreme Court and the Court of Appeal have been emphatic that a claim which is filed before a court devoid of jurisdiction is a nullity *ab initio* and is not transferable to another court. Such a claim can only be withdrawn or struck out with costs. Having concluded that this court does not have jurisdiction to hear and determine the dispute herein, and the suit having been filed in a court without jurisdiction, I shall, which I hereby do, allow the 1<sup>st</sup> Defendant’s Application dated 15/05/2024 as follows:

- a. That the Plaintiffs’ suit is hereby struck out with costs.
- b. The Plaintiffs to pay the 1<sup>st</sup> Defendant costs of this Application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**MOGENI J  
JUDGE**

In the virtual presence of:

Mr. Esmail for 1<sup>st</sup> Defendant

Mr. Onyambu for 2<sup>nd</sup> Defendant

Mr. Esmail holding brief for Mr. Ochieng for 3<sup>rd</sup> Defendant

Mr. Isika for Ms. Wamithi for Plaintiff

Mr. Kamau for 4<sup>th</sup> Defendant/Respondent

Mr. Nedchemoiwa for Interested party

Caroline Sagina – Court Assistant

