



Gakaria v National Housing Corporation & 2 others (Civil Suit E386 of 2022) [2023] KEELC 412 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E386 OF 2022
JO MBOYA, J
FEBRUARY 2, 2023**

BETWEEN

JOSEPH NJOGU GAKARIA PLAINTIFF

AND

NATIONAL HOUSING CORPORATION 1ST RESPONDENT

KEYSIAN AUCTIONEERS 2ND RESPONDENT

PATRICK NJUNGE 3RD RESPONDENT

RULING

1. The Plaintiff/Applicant herein commenced the instant suit vide Plaintiff dated the 16th of November 2022 and in respect of which same sought various reliefs, whose details are contained and enumerated at the foot of the named Plaintiff.
2. The nature of the reliefs sought at the foot of the Plaintiff herein would be critical and essential in enabling the court to ascertain, discern and or decipher whether or not the court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject suit.
3. Consequently and in the premises, it is therefore imperative that the reliefs at the foot thereof be reproduced. In this regard, the same are reproduced as hereunder:
 - i. A declaration that the Notice and Notification of Sale dated 18th October 2022 served upon the Plaintiff by the 2nd Defendant/Auctioneers under instructions from the 1st Defendant are defective and invalid and are as such, null and void.
 - ii. A declaration that the 1st Defendant's statutory power of sale in respect of L.R. No. Muguga/Muguga/1620 measuring 0.235ha and situated in Kamuguga within Kiambu County has not arisen.



- iii. A declaration that in the circumstances, the intended sale of L.R. No. Muguga/Muguga/1620 measuring 0.235ha and situated in Kamuguga within Kiambu County, pursuant to the said Notification of Sale is illegal, null and void.
 - iv. Pending the hearing and determination of this suit, an injunction do issue restraining the Defendant by itself, its officers, servants, agents or otherwise howsoever from selling the property known as L.R. No. Muguga/Muguga/1620 measuring 0.235ha and situated in Kamuguga within Kiambu County by public auction or otherwise on 27th January 2023 as advertised or at any other time thereafter; from disposing of, alienating, transferring and/or otherwise howsoever interfering with the Plaintiff's interest in the said property.
 - v. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the Plaintiff.
 - vi. Interest on (iv) and (v) above.
 - vii. Any such or other further Order as this Honourable Court may deem appropriate in all circumstances of the suit and the Counter-claim.
4. Contemporaneously with the filing of the Plaint, the Plaintiff/Applicant lodged and mounted a Notice of Motion Application dated the 16th of November 2022 and in respect of which same sought for the following reliefs:
- i. This Application be certified as urgent and be heard ex-parte in the first instance.
 - ii. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees and or servants from selling by public auction, entering, taking possession of or in any way interfering with the current ownership of Title number L.R. No. Muguga/Muguga/1620 situated in Kamuguga area, Kiambu County(hereinafter the "suit property") pending the inter-partes hearing and determination of this suit.
 - iii. That a declaration be issued, that the Notification for sale issued to the Plaintiff/Applicant by the 2nd Defendant/Respondent is a nullity for being defective and for failure on the part of the 1st Defendant/Respondent to follow the laid process as required by Section 90(2) (b) of the Land Act No.6 of 2012.
 - iv. That a declaration be issued, that the issue of 45 days Auctioneer's Notice to sell, served upon the Plaintiff/Applicant is a nullity, the 1st Defendant/Respondent has never issued and/or served upon the Plaintiff/Applicant a 40 days' Notice to Sell as required by Section 96(2) of the Land Act No. 6 of 2012.
 - v. Any other order that this Honourable Court may deem fit.
 - vi. The costs of this Application be awarded to the Plaintiff/Applicant.
5. The instant Application is anchored and premised on the various albeit numerous grounds which have been enumerated at the foot of the Application and besides the Application is supported by the affidavit of the Plaintiff/Applicant sworn on the 16th of November 2022.
6. Suffice it to point out that the instant Application was duly served upon the Defendants/Respondents, culminating into an appearance being entered by and on behalf of the 1st Defendant/Respondent. For clarity, the rest of the Respondents have neither entered appearance nor filed any responses.



7. Nevertheless, when the subject matter came up for Hearing of the Application on the 7th of December 2022, counsel for the 1st Defendant indicated that same had neither filed nor served any Response to the Application. In this regard, counsel sought for time to file and serve the requisite responses.
8. Pursuant to and in line with the request by counsel for the 1st Defendant/Respondent, the court proceeded to and granted latitude for purposes of filing and serving the requisite responses.
9. On the other hand, the court proceeded to and issued various directions, inter-alia pertaining to the filing and exchange of written submissions by the parties.
10. Be that as it may, on the 24th of January 2023, the matter came up for Mention for purposes of confirming whether the parties had complied with the directions hitherto issued on the 7th of December 2022. For clarity, during the scheduled Mention, counsel for the 1st Defendant intimated to the court that same had filed a Replying Affidavit sworn on the 15th of December 2022.
11. Other than the foregoing, it transpired that none of the parties, the Plaintiff/Applicant inclusive, had filed their written submissions, either within the set time lines or at all.
12. Despite the failure by the parties to comply with and abide by the directions of the court, the court proceeded to and directed that the Ruling in respect of the instant matter shall be delivered on the 2nd of February 2023 and liberty was granted to either party to file written submissions, if deemed expedient.
13. Suffice it to point out that counsel for the Plaintiff/Applicant thereafter proceeded to and filed written submissions dated the 26th of January 2023, whereas counsel for the 1st Defendant has not filed any written submissions at all.
14. Apart from the foregoing, it is important to mention one more thing. In this regard, it is appropriate to state and underscore that despite the contention and representation by counsel for the 1st Defendant that same had filed a Replying Affidavit, none was evident in the CTS of the court.
15. Furthermore, efforts by the court assistant to liaise with the Advocate for the 1st Defendant/Respondent with a view to obtaining a copy of the Replying Affidavit, if any, did not generate any positive response or outcome.
16. In addition, it is also imperative to mention that the court assistant also reached out to counsel for the Plaintiff/Applicant to obtain a copy of the Replying Affidavit, if any, that was duly served on same. However, the counsel for the Plaintiff/Applicant was adamant and indicated to the court assistant that it was her business to avail any document served upon her to the court.
17. To the contrary, learned counsel for the Plaintiff/Applicant referred the court assistant to follow up the issue of (sic) the Replying Affidavit with the Counsel for the 1st Defendant/Respondent and not herself.
18. Premised on the foregoing, I must state that no Replying Affidavit was obtainable from the courts system and hence the obtaining position is to the effect that the Application has not been controverted vide any Replying Affidavit.
19. Notwithstanding the foregoing, it is common knowledge that even when an Application is not controverted, the Honourable court is still duty bound to evaluate the named Application and calibrate upon same on the basis of the applicable law.
20. Consequently, I shall endeavor to analyze and evaluate the instant Application in the manner alluded to herein before.



SUBMISSIONS BY THE PARTIES

a. APPLICANT'S SUBMISSIONS

21. The Applicant herein filed written submissions dated the 26th of January 2023, and same has raised and amplified four issues for consideration and determination by the court.
22. Firstly, learned counsel for the Applicant has submitted that this Honourable court is seized and possessed of the requisite Jurisdiction to entertain and adjudicate upon the subject dispute.
23. To vindicate the submissions that this Honourable court is seized and vested with the requisite jurisdiction to adjudicate upon and entertain the subject suit, learned counsel has taken it upon herself to distinguish the decision of the Court of Appeal vide Cooperative Bank Limited versus Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR.
24. Furthermore, learned counsel has submitted that the dispute that was addressed and dealt with by the Court of Appeal in the case of Cooperative Bank Ltd versus Patrick Kang'ethe Njuguna & 5 Others (2017) (supra) related to the disputed amount of money that was owed to the bank by the chargor/borrower.
25. In addition, learned counsel has submitted that the substratum of the dispute that was dealt with in the Cooperative Bank Ltd versus Patrick Kang'ethe Njuguna & 5 Others (2017) (supra) was therefore an issue of accounts, which was a commercial dispute and which issue is contrary to and distinct from the instant one.
26. On the other hand, learned counsel has further submitted that the issue before hand merely relates to the exercise of the statutory power of sale prior to and before issuance and service of the requisite statutory notices in line with the provisions of Section 90(2) and 96(2) of the Land Act, 2012 (2016).
27. Based on the foregoing submissions, learned counsel has therefore contended that the issues before this Honourable court are separate and distinct from the issues that were dealt with by the Court of Appeal in the Cooperative Bank Ltd vs Patrick Kang'ethe Njuguna & 5 Others (2017) (supra).
28. In view of the foregoing, learned counsel has surmised that this Honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject matter at hand.
29. To vindicate her submissions, learned counsel has invited the court to take cognizance of the holding in the case of Peter Kiama Maina vs industrial Commercial Development Corporation & Another Thika ELC No. 11 of 2020 (2020) eKLR and Lydia Nyambura Mbugua vs Diamond Trust Bank (K) Ltd & Another (2018) eKLR, respectively.
30. Secondly, learned counsel has submitted that it was incumbent upon the 1st Defendant/Respondent to issue and serve the requisite statutory notices as envisaged by and in accordance with the provisions of the Land Act 2012.
31. Nevertheless, counsel has added that despite the express statutory requirement to issue and serve the named statutory notices, the 1st Defendant herein failed and neglected to comply.
32. As a result of the failure or neglect by the 1st Defendant to issue and serve both the primary and statutory notices as envisaged under the law, learned counsel has therefore contended that the Plaintiff/Applicant has established and demonstrated the existence of a prima facie case with probability of success at the trial.



33. In respect of the submissions that the Plaintiff/Applicant has established and demonstrated a prima facie case, learned counsel for the Applicant has cited and relied on inter-alia, the holding in the case of Mrao Ltd vs First American Bank of Kenya & 2 Others (2003) eKLR and Nguruman Ltd vs Jan Bonde Nielsen & 2 Others (2014) eKLR, respectively.
34. Thirdly, learned counsel has submitted that the subject dispute touches on and concerns the suit property which is landed in nature. In any event, counsel has added that the suit property lawfully belongs to and is registered in the name of the Plaintiff/Applicant, save for the fact that same is charged in favor of the 1st Defendant/Respondent.
35. Consequently and in the premises, learned counsel has submitted that if the court does not grant the orders of injunction as sought, then the 1st Defendant will proceed to and dispose of the suit property and thereby alienating same.
36. Furthermore, learned counsel added that if the suit property were to be sold and disposed of, same would be placed beyond the reach of the Plaintiff/Applicant and hence the Applicant would suffer irreparable loss.
37. Finally, learned counsel has submitted that the balance of convenience tilts in favor of the Plaintiff/Applicant and by extension in preserving the suit property, pending the hearing and determination of the suit herein.
38. In respect of the submissions, pertaining to the incidence of balance of convenience, learned counsel has invited the court to take note of the holding in the case of Pius Kipchirchir Kogo versus Frank Kimeli Tenani (2018)eKLR.
39. In a nutshell, learned counsel for the Plaintiff/Applicant has impressed upon the court to find and hold that the Applicant has established and demonstrated a prima facie case and thus same is entitled to the reliefs sought at the foot of the instant application.

b. 1ST RESPONDENT'S CASE

40. It is imperative to restate and reiterate that despite the representations that were made to the court by counsel for the 1st Respondent, no Replying Affidavit was ever lodged vide the CTS System of the Honourable court. For clarity, none was obtainable.
41. Additionally, learned counsel for the 1st Respondent did not file any written submissions pertaining to and concerning the subject Application.
42. In the premises, it suffices to state and underscore that the only submissions that were filed and which formed part of the record of the court, are the submissions by counsel for the Plaintiff/Applicant.

ISSUES FOR DETERMINATION

43. Having reviewed and evaluated the Application dated the 26th of November 2022, as well as the Supporting Affidavit thereto and having taken into account the elaborate written submissions filed by counsel for the Applicant, the following issues do arise and are thus germane for determination:
 - i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to adjudicate upon and entertain the subject suit?
 - ii. Whether the Applicant has met the threshold to warrant the grant of the orders sought on the face of the instant Application?



ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Honourable court is seized and possessed of the requisite Jurisdiction to adjudicate upon and entertain the subject suit?

44. From the introductory aspect of the instant Ruling, the court pointed out that the 1st Defendant/ Respondent has neither filed a Replying Affidavit nor Grounds of Opposition. Consequently, it is common ground that no issue has been raised by the 1st Defendant/Respondent pertaining to and concerning the jurisdiction of the court.
45. Nevertheless and given the significance of jurisdiction of any matter in dispute, the court pointed out to the advocate for the parties herein on the 7th of December 2022 that the pleadings filed, touched on and concerned the exercise of the statutory powers of sale by the chargee and on the face of it, there was no issue pertaining to a claim of ownership to Title or Right to occupy and use.
46. Premised on the foregoing, the court therefore alerted the advocates for the respective Parties that same would be called upon to address the court and canvass the issue on jurisdiction more particularly, in the decision of the Court of Appeal in the case of Cooperative Bank Ltd v Patrick Kang³the Njuguna & 5 Others (2017)eKLR.
47. Suffice it to point out that indeed counsel for the Plaintiff/Applicant has touched on and canvassed the issue of the jurisdiction of the court vide her written submissions filed on the 26th of January, 2023.
48. Be that as it may, it is imperative to underscore that jurisdiction is such a critical and integral concern and whenever a court discerns that her jurisdiction to deal with a particular matter in dispute is not certain and better still doubted, then the Honourable court must address the question of jurisdiction at the onset.
49. In this respect, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited versus Simeon Muruchi Thiga t/a Newspaper Service [2019] eKLR where the Court stated as hereunder:
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
50. Additionally, the importance of Jurisdiction was emphasized and underscored in the case of Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] where the Court stated as hereunder:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.”

51. Without belaboring the point, it is plain and obvious that it is the duty of each and every court before whom a dispute is mounted to ascertain and authenticate whether same is seized of the requisite jurisdiction to entertain and adjudicate the subject dispute.
52. In addition, there is no gainsaying that where a court is devoid and bereft of jurisdiction, then any proceedings and resultant orders, if any, made by the court shall amount to a nullity and this will be of no consequence.
53. Given the foregoing observations and taking into account the issues raised herein, it is thus critical and paramount that I proceed to ascertain and authenticate whether indeed the nature of the dispute beforehand falls within the jurisdiction of this Honourable court.
54. Be that as it may, it is now imperative to ascertain and discern ; what then is the dispute before the court. In this regard, it is evident and apparent both from the Plaintiff and the contents of the instant Application that the gravamen of the Plaintiff’s complaint is that the 1st Defendant has neither issued nor served the requisite statutory notices upon himself, either as required under the law or at all.
55. On the other hand, the Applicant’s complaint also touches on and concerns the legality or otherwise of the impugned exercise of the statutory power of sale by the 1st Defendant/Respondent.
56. Informed by the foregoing complaints, the Applicant has thus sought to impress upon the court that the intended exercise of the statutory power of sale is therefore illegal, null and void and ought to be averted, restrained and/or prohibited.
57. My understanding of the Plaintiff/Applicant’s case is to the effect that same is challenging the propriety, validity and legality of the impugned exercise of the statutory power of sale by the 1st Defendant/Respondent.
58. Consequently and in the premises, the question that does arise is whether a suit challenging and impeaching the exercise of the chargee’s statutory power of sale by law falls within the jurisdiction of the Environment and Land Court or otherwise.
59. As pertains to whether such a jurisdiction belongs to the Environment and Land Court, the Court of Appeal vide the case of Cooperative Bank of Kenya Ltd versus Patrick Kang’ethe Njuguna & 5 Others (2017)eKLR, stated as hereunder:
 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.
60. Furthermore, the Honourable Court of Appeal proceeded and observed as hereunder:
39. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the ELC Act. The said section provides that;
2. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...
40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.
41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.
61. My reading of the foregoing decision informs me that issues pertaining to the propriety, validity and legality of the exercise of the statutory power of sale by a chargee or better still the determination as to whether the intended sale is legal, falls outside of the jurisdiction of the Environment and Land Court.
62. Additionally, the question as to whether the Environment and land Court is seized of the requisite competence and jurisdiction to deal with a dispute pertaining to the exercise of statutory power of sale by the bank/chargee, was re-visited by the Court of Appeal in the case of *Diamond Trust Bank Kenya Limited v Fatma Hassan Hadi* (Civil Appeal 18 of 2020) [2022] KECA 769 (KLR) (24 June 2022) (Judgment).
63. For coherence, the Honourable Court of Appeal observed as hereunder:
29. The Court went on to say that “in addition, the cause of action herein was not the validity of the charge, but a question of accounts.” The other contention on jurisdiction in Co-operative



Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (above) that was rejected by this Court was the contention that the dispute fell under ELC on account of Section 13(2)(d) of the ELC Act which provides that the ELC has power to hear and determine disputes “relating to...land and contracts, choses in action or other instruments granting any enforceable interests in land”. In that regard, the Court expressed that the jurisdiction of the ELC to deal with disputes relating to contracts should be understood within the context of the court’s jurisdiction to deal with disputes connected to “use” of land; that such contracts ought to be incidental to the “use” of land and do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

30. The holding by the learned Judge in the present case that “a charge is an instrument granting and enforceable interest in land meaning therefore that this court has jurisdiction to hear disputes relating to charges” therefore flies in the face of the decision of this Court in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (above). Recently, this Court in P.J. Dave Flowers Limited vs Limuru Hills Limited, Malindi Civil Appeal No. 123 of 2019 in affirming that the ELC had, in the circumstances of that case, jurisdiction to entertain the dispute noted that the appellant therein “clearly had an interest in the suit premises as a purchaser” and had therefore acquired interest that conferred jurisdiction on the ELC to hear and determine the matter.
31. In the present case, although the respondent is not privy to the instrument of legal charge, there is no doubt that what the respondent is seeking before the ELC, is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (above), is a commercial matter for adjudication before the High Court. In our view therefore, the Judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.
64. If there was (sic) any scintilla of doubt left by the decision in the case of Cooperative Bank Ltd v Patrick Kangethe Njuguna & 5 Other (2017) (supra) same was clarified in the latter decision.
65. In my humble view, the dispute like the one beforehand which touches on and concerns impeachment of the right of exercise of the statutory power of sale does not fall within the Jurisdiction of the Environment and Land Court, in light of the named Decisions by the Honourable Court of Appeal.
66. Before departing from the issue herein, I must state that I am aware of extreme reservations that are held by a couple of Judges of the Environment and Land Court pertaining to the ratio decidendi elucidated in the decision of Cooperative Bank Ltd v Patrick Kangethe Njuguna & 5 Other (2017) (supra).
67. Furthermore, it is appropriate to recall that the decision in the case of Diamond Trust Bank Kenya Limited v Fatma Hassan Hadi (Civil Appeal 18 of 2020) [2022] KECA 769 (KLR) (24 June 2022), arose from and concerned one aspect of the reservation entertained and nurtured by a segment of the Judges of the Environment and Land Court.
68. Other than the foregoing, I must point out that my attention was drawn to the Ruling in respect of Peter Kiama Maina versus Industrial Commercial Development Corporation & Another, Thika ELC Case No. 11 of 2020 (2021)eKLR, where the learned judge held as hereunder;

“The 1st Defendant/ Respondent has relied in the Court of Appeal decision in the case of Cooperative Bank of Kenya -v-Patrick Kangethe Njuguna (2017) wherein the Court of Appeal held that the High Court was the only one seized with the Jurisdiction to deal with accounting problems. The Court notes that the Plaintiff/ Applicant has brought



forth the issue of charging of exorbitant interests. To this end, as per the decision in the above stated case, the Court finds and holds that it does not have jurisdiction to deal with the said prayers on whether or not exorbitant interests were charged. However on the issue of whether the Auctioneer's 45 Days Redemption Notice and Auctioneer's Notification of Sale upon the Plaintiff/Applicant was a nullity in law, the issue of valuation and the permanent injunction sought, it is the Court's considered view that the said prayers fall within the jurisdiction of the Environment & Land Court. The [Land Act](#) & [Land Registration Act](#) also provide for the Jurisdiction of the Environment & Land Court as the two Acts address the land transactions and dispositions of land. The process through which a chargee can exercise its statutory power of sale is found in the said Acts and therefore the Jurisdiction of the Environment and Land Court (ELC) in dealing with the same is justified. See the case of Lydia Nyambura Mbugua ...vs...Diamond Trust Bank Kenya Limited & another [2018] eKLR where the Court held that:-

“It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the [Land Act](#) and [Land Registration Act](#). This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the [Land Act](#) and [Land Registration Act](#), (formerly in the Registered [Land Act](#) now repealed) and these statutes provide that the court with jurisdiction is the ELC..

If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the [Land Act](#) and [Land Registration Act](#), and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

69. Quite clearly, the concerned learned judge was indeed grappling with aspects of the decision in the case of Cooperative Bank of Kenya Ltd versus Patrick Kangethe Njuguna & 5 Others (2017) eKLR.
70. I must admit, that I entertain my own reservations, arising from and anchored on the import and tenor of the various provisions of the [Environment and Land Court Act](#) 2011 and the [Land Act](#), 2012 (2016). For clarity, the provisions of Section 150 of the [Land Act](#), 2012(2016), appear to be succinct and apt.
71. At any rate, it is not lost on this court that the issues pertaining to interests and the requisite notices are indeed provided for vide Sections 88, 90 and 96 of the [Land Act](#), 2012, which Statute, vests determination of disputes, actions and proceedings concerning land under this Act in the Environment and Land Court.
72. For coherence, the provisions of Section 150 of the [Land Act](#), 2012(2016), provides as hereunder;

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the [Environment and Land Court Act](#) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.



73. Be that as it may, it is imperative to recall the import and tenor of the Doctrine of stare decisis. For clarity, the named doctrine underscores the importance of observing, obeying and abiding by the decision of a superior court.
74. Perhaps, it is appropriate to restate and reiterate the holding in the case of *Dodhia v National Grindlays Bank Ltd* (1970) EA 195, where the court of appeal for Eastern Africa underscored the importance of the doctrine of stare decisis.
75. Notwithstanding the discourse contained vide the preceding paragraphs, I come to the conclusion that the dispute before this honourable court which concerns the exercise of the charges statutory power of sale, does not belong to and fall within the jurisdiction before this court.
76. For the umpteenth time, I beg to reiterate and underscore that as long as the two cited decision of the court of appeal have not been reviewed by a Five-Judge bench or better still by the Apex Court, namely, the Supreme court of Kenya, same reflect the obtaining jurisdictional position on matters pertaining to charges, mortgages and the exercise of statutory power of sale.

ISSUE NUMBER 3:

Whether the Applicant has met the threshold to warrant the grant of the orders sought on the face of the instant application.

77. It is common ground that the subject application seeks for inter-alia orders for temporary injunction to restrain and prohibit the 1st Defendant from exercising her statutory powers of sale over and in respect of the suit property.
78. On the other hand, there is no gainsaying that the reason which has been quoted and relied upon relates to lack of service of the requisite statutory notices as envisaged vide the provisions of Sections 90 and 96 of the *Land Act*, 2012 (2016).
79. Suffice it to point out that the Plaintiff/Applicant has contended that the 1st Defendant neither issued nor served the primary statutory notice in terms Section 90(2), nor the secondary notice in terms of Section 96(2) of the *Land Act*, 2012 (2016).
80. Even though the Plaintiff/Applicant has raised and espoused the named issues, the 1st Defendant/ Respondent has not found it fit or appropriate to controvert the named issues.
81. To my mind, the failure to issue and serve the requisite statutory notices, as envisaged as stipulated under the provisions of the *Land Act*, 2012(2016), would certainly invalidate the exercise of the statutory power of sale.
82. Consequently and in the premises, it would have been my finding and holding that the Plaintiff/ Applicant herein has raised and established a prima facie case with probability of success at the trial.
83. However, it is not lost on this court, that the question of jurisdiction has an impact on whether or not there exists a prima facie case. Put differently, one cannot be able to argue that same has a prima facie case, on the named facts, if the complaint has been raised before a forum that is devoid of jurisdiction.
84. To this end, it is imperative to recall the words of wisdom that were enunciated in the decision in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) stated and observed as hereunder:



85. For clarity, the reverend Judge said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

86. In my understanding, the Plaintiff/Applicant is endeavoring to put something (read the case of want of service of the statutory notices) on a forum which does not have jurisdiction. Clearly, it is tantamount to putting something on nothing and the net result is that the something shall come tumbling down.

87. In a nutshell, I am afraid that a prima facie case cannot certainly be established under the circumstances where the forum which has been approached is divested of the requisite Jurisdiction.

88. In respect of whether, the sale, alienation and disposal of the suit property shall occasion irreparable loss, it is important to recall that at the time when the suit property was pledged as security, same was duly valued and hence, same has a monetary value.

89. In any event, it is common knowledge that by the time the Plaintiff/Applicant availed the suit property as security, same no doubt appreciated and understood that in the event of default by the Borrower, that the suit property will be sold and disposed of.

90. In this regard, I am not persuaded that the sale and disposal of the suit property in exercise of statutory power of sale, would occasion irreparable loss, either as alleged or at all.

91. Be that as it may, I had hitherto found and held that this court is divested of the requisite jurisdiction by dint of the various decisions of the court of appeal, which are certainly binding on this court.

92. In view of the foregoing consideration, I do not think that it is in appropriate and worthy to proceed further and endeavor to analyze the incidence of balance of convenience and (sic), in whose favour same lies.

FINAL DISPOSITION

93. From the foregoing analysis, I have come to the conclusion that the question and issue pertaining to the propriety or otherwise of the exercise of a chargee’ statutory power of sale, does not fall within the Jurisdiction of this honourable court.

94. Consequently and being of the foregoing persuasion, I find and hold that the subject suit and the attendant application dated the 16th November 2022, were placed and filed before the wrong forum.

95. In a nutshell, the Plaintiff’s suit together with the named Application be and are hereby struck out, albeit with no orders as to costs.

96. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;



Benson - Court Assistant.

Ms. Njoki for the Plaintiff/Applicant.

N/A for the 1st Defendant/Respondent.

N/A for the 2nd and 3rd Defendant/Respondent.

