



**Kenya Farmers Association Limited v Barclays Bank of Kenya Limited & another (Environment & Land Case 228 of 2015) [2023] KEELC 16187 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16187 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 228 OF 2015  
FM NJOROGE, J  
MARCH 8, 2023**

**BETWEEN**

**KENYA FARMERS ASSOCIATION LIMITED ..... PLAINTIFF**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH M GIKONYO T/A GARAM INVESTMENTS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the 1<sup>st</sup> defendant/applicant's notice of motion dated 11/10/2022 which seeks the following orders:
  - a. That this suit be struck out.
  - b. That the Plaintiff do pay the costs of this application and the suit.
2. The application is supported by the affidavit sworn by Boniface Muthinja the Corporate Recoveries Officer of the 1<sup>st</sup> defendant herein. He deposed that the suit is challenging the 1<sup>st</sup> defendant's exercise of statutory power of sale, breach of induplum rule and the actual amount outstanding; that the suit does not relate to the environment, use and occupation of and title to land as contemplated under article 162 (2) (b) of *the Constitution* of Kenya; that the suit does not fall within the jurisdiction of this court as contemplated under section 13 (2) of the *Environment and Land Court Act*, 2011; that the dispute before this court is purely commercial; that the plaintiff's suit is an attempt to use this honourable court, though without jurisdiction to avoid performance of its contractual obligations; that it is in the interest of justice that the plaintiff's suit be struck out as prayed.



## Response

3. The plaintiff filed its replying affidavit dated 6/12/2022 in response to the application. It deposed that the suit was filed on 27/08/2015 in the High Court at Nakuru and later through the court registry staff, it was cancelled and registered afresh as ELC 228 of 2015.
4. It stated that it was informed by the court registry staff that the said change was on the basis of administrative directions issued to them. It added that the Defendant has also been comfortable with the said position all along. It further deposed that jurisprudence relating to court's jurisdiction on matters legal charges on land has been changing over the years as in the present suit. He deposed that section 150 of the [Land Registration Act](#) was amended in 2016 removing this court's exclusive jurisdiction over the matter.
5. The Plaintiff deposed that during the pendency of this suit the Court of Appeal pronounced itself on the matter and held that it is the High Court that has jurisdiction. He however deposed that jurisprudence is still divided over the issue. He deposed that the instant suit is a matter which may fall within the dual jurisdiction of both High Court and Environment & Land Court.
6. The Plaintiff deposed that should the court be inclined that the High Court has jurisdiction over the matter, he prays that the same be transferred to the High Court as opposed to striking out of the suit. He added that the court on 20/09/2022, the Defence counsel made an application for transfer of the matter to the High Court where the court directed that he files a formal application. That he instead filed the instant application seeking to strike out the suit.
7. He deposed that it would be in the interest of justice for this court to either proceed with the matter or transfer it to the High Court.

## Submissions

8. The Defendants filed their submissions dated 5/12/2022 on the same day where they gave a brief background of the case and submitted that the suit does not relate to environment, the use and occupation of and title to land. They relied on article 162 (2) (b) of [the Constitution](#) of Kenya and section 13 (2) of the [Environment and Land Court Act](#), 2011.
9. They argued that the dispute is purely commercial and it follows that this Honourable court lacks jurisdiction to hear and determine it. The defendants cited numerous authorities in support of their case including the Court of Appeal case of Cooperative Bank of Kenya Limited V Patrick Kangethe Njuguna & 5 others and the Supreme Court case of [Albert Chaurembo Mumba & 7 others V Maurice Munyao & 148 others](#) [2019] eKLR.
10. The defendants submitted that a court without jurisdiction cannot transfer a suit and that this court ought to strike out the suit as prayed.
11. The Plaintiff on the other hand filed its submissions dated 24/01/2023 on the same day. It gave a brief background of the case and submitted that this matter could fall under the dual jurisdiction of both the High Court and ELC court. It submitted that the court should be inclined to transfer the matter back to the High Court as opposed to striking it out. It relied on the case of John Mwangi Karanja V Alfred Ndiangu [2011] eKLR. It submitted that it would be too drastic and punitive to strike out the suit given the fact that it was the court that moved the matter from High Court to ELC.
12. It further relied on section 56 of the [Land Registration Act](#) and sections 103, 104, 105 and 106 of the [Land Act](#), 2012. It submitted that litigation over matters relating to charges can only be lawfully heard



before the court vested with jurisdiction over disputes under the said Acts being the ELC court. It further relied on article 162 (2) (b) and section 13 (20) (d) (e) of the Environment and [Land Act](#) and the case of [Lydia Nyambura Mbugua V Diamond Trust Bank K. Ltd & another](#) [2018] eKLR and submitted that this court has jurisdiction to hear and determine the matter.

13. In conclusion it submitted that other judicial decisions ousting the ELC jurisdiction in disputes involving charges to land and exercise of chargee's statutory power of sale are contrary to [the constitution](#).

### Analysis and Determination

14. This court has considered the Application, and the issue that arises for determination is whether this court has jurisdiction to determine this suit or whether it should strike it out.

15. In [Republic v Karisa Chengo & 2 others](#) [2017] eKLR, the Supreme Court held 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.”

16. This court's jurisdiction 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). Article 162(2)(b) of [the Constitution](#) provides as follows:

“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.”

17. It is not in dispute that the plaintiff took out a loan facility with the 1<sup>st</sup> defendant vide a charge over the suit property. The 1<sup>st</sup> Defendant is now seeking to exercise its statutory power of sale of the charged property as a result of default of the repayment of the loan by the plaintiff.

18. The substratum of the suit therefore relates to the legal charge 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 settled by the Court of Appeal in the case of Co-operative Bank of Kenya Limited vs. 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.
37. 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.
38. 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...
40. 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.
41. 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.

42. 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.”
19. I have considered the plaint in the present matter. It addresses matters of accounting on an extensive scale, and includes orders seeking recalculations and refunds in respect of the credit facilities offered by the 1<sup>st</sup> defendant. The Court of Appeal in the above case, whose decision is binding on this court consequently held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents or accounts, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute as in the instant case. In view of that observation, this court finds that it lacks jurisdiction to hear and determine the suit.
20. In the case of *Albert Chaurembo Mumba & 7 others vs. 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 above position was also followed by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited vs. 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 complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied...”
21. Having established that it lacks the requisite jurisdiction, it remains with no other option but to immediately down its tools. From the decisions of the Supreme Court and the Court of Appeal earlier cited, it may appear that this suit having been filed in a court without the requisite jurisdiction is not transferrable to the High Court. In the instant case, however, the Plaintiff contends that striking out the suit would amount to a more punitive action and it instead urged this court to have the matter transferred to the High Court if it finds that it lacks the requisite jurisdiction.
22. I have perused the court record and established that indeed the Defendants had orally requested to have this matter transferred to the High Court but instead they later filed the instant application. I would agree with the Plaintiff in such circumstances where the opposite party had already conceded that the matter could be so transferred that transferring the matter to the High Court instead of striking it out is the better option. In that case and in the interests of justice the act of downing of the court’s tools in respect of the merits of the dispute before it should not be deemed to divest it of the inherent power to order transfer and the taking of administrative steps to have the suit placed before the High Court which has power to hear and determine the matter. Striking out the matter would not settle the dispute herein and would render the past exertions of the judicial system and the parties earlier rendered to be a total waste and refer every one back to the start. This court takes cue from the fact that numerous matters were effectively transferred once the ELC and the ELRC were established by Article



165 of *the Constitution* of Kenya 2010. Besides, the Kangethe case (supra) is only a recent decision of the year 2017 by the Court of Appeal yet the present suit was filed in 2015. This matter should be therefore distinguished from a matter in which the parties willfully or by sheer negligence filed their claim in a court totally devoid of jurisdiction for the foregoing reasons. On my part I find that no greater injustice can be visited upon the parties at this point than by wrongfully ascribing them past prescience regarding the latter day findings of the Court of Appeal on matters jurisdiction regarding charges and mortgages, and consequently striking out their suit on the basis of considerations that had not been clarified by the higher echelon courts before it was filed. It is this approach that would reduce tedium within the system for every stakeholder involved in this dispute.

23. Consequently, I hereby order that this matter is hereby transferred to the High Court Nakuru for hearing and final disposal. The Deputy Registrar of this court shall ensure that the file record is placed before the Presiding Judge of the High Court Nakuru for a mention for directions to the parties as his Lordship's diary may accommodate the matter.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8<sup>TH</sup> DAY OF MARCH 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

