



Bismal Investments Limited v African Banking Corporation Limited & 2 others (Environment & Land Case E072 of 2023) [2023] KEELC 20424 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E072 OF 2023**

**JO MBOYA, J
OCTOBER 5, 2023**

BETWEEN

BISMAL INVESTMENTS LIMITED PLAINTIFF

AND

AFRICAN BANKING CORPORATION LIMITED 1ST DEFENDANT

DENIS KIRUI T/A SADDABRI AUCTIONEERS 2ND DEFENDANT

WESTMINISTER LIMITED 3RD DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant has approached the Honorable court vide Application dated the 5th September 2023; and in respect of which same has sought for the following reliefs;
 - i.Spent.
 - ii.Spent.
 - iii.Spent.
 - iv. That, pending the hearing and determination of the main suit in this cause, this Honourable Court be pleased to issue an Interlocutory injunction against the Defendants jointly and severally by themselves, their servants, agents, or any other person acting in their interest or under their instructions from evicting, demolishing, harassing, selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing of or otherwise completing by conveyance the transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90 of the Land Act, 2012, leasing, letting, charging or otherwise interfering with



Apartment A3 Block A, which forms part of all that parcel of land known as Land Reference Number 1/313, situated at Richmond Court Kilimani, Nairobi.

- v. That costs of this Application be provided for.
2. The instant Application is anchored and premised on various albeit numerous grounds totaling 17 in number, which have been enumerated at the foot of the Application. Additionally, the Application is supported by the affidavit of one George Kamau Muhoho, who contends to be a Director of the Applicant herein.
 3. Upon being served with the pleadings and in particular, the subject Application, the 1st and 2nd Respondents herein filed a Notice of Preliminary objection dated the 18th September 2023. Similarly, the 1st and 2nd Respondents also filed a Replying affidavit sworn by one Kajuju Marete on the 19th September 2023.
 4. Instructively, the Application dated the 5th September 2023; came up for hearing on the 20th September 2023, whereupon the court ordered and directed that the named Application, as well as the Notice of Preliminary objection be canvassed and or ventilated by way of written submissions, to be filed and/ or exchanged within set timelines.
 5. For the sake of completeness, it is appropriate to mention and state that Learned counsel for the Applicant thereafter filed written submissions dated the 25th September 2023; whereas the 1st and 2nd Defendants, filed their written submissions dated the 26th September 2023. Both submissions are on record.

Parties' Submissions:

a. Applicant's Submissions:

6. The Applicant herein filed written submissions dated the 25th September 2023; wherein same raised, canvassed and highlighted two (2) pertinent issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that dispute before the Honorable court relates to whether or not the 1st Respondent issued and served the requisite statutory notices as envisaged Section 90(2) and 96(2) of the *Land Act*, 2012 (2016), upon the Applicant herein, who had guaranteed the Banking facility offered in favor of the named borrower.
8. Additionally, Learned counsel has submitted that the alternate issue for determination also touches on and or concerns whether the 1st Respondent carried out and/or undertook the requisite statutory valuation in terms of Section 97 of the *Land Act*, 2012 or whether the intended sale constitutes an under valuation of the suit property and thus bound to expose the Applicant to undue prejudice and irreparable loss, as pertains to the suit property.
9. Furthermore, Learned counsel for the Applicant has also contended that the impugned exercise of statutory power of sale by the 1st Respondent, is being carried out and/or undertaken even though the borrower, who was guaranteed by the Applicant has since intimated to, and appraised the 1st Respondent of the various measures and/or arrangements put in place to facilitate the liquidation of the balance of the banking facility amounting to Kes.98, 364, 016.72/= only.
10. Premised on the foregoing, Learned counsel for the Applicant has thus submitted that the issues at the foot of the current suit and by extension, the Application beforehand, fall within the Jurisdiction and competence of the Environment and Land Court.



11. Additionally, Learned counsel has contended that the Jurisdiction of the Environment and Land Court to deal with matters including the one beforehand, is well underscored by dint of Section 13(2) and (3) of the [Environment and Land Court Act](#); and hence it is this court and not the High court, which is seized of the requisite Jurisdiction to adjudicate upon the dispute beforehand.
12. At any rate, Learned counsel for the Applicant has thereafter summarized the crux of the dispute before the court in terms of paragraph 13 of his written submissions dated the 25th September 2023.
13. For good measure, Learned counsel for the Applicant has contended thus;
 13. The dispute herein pertains to the process of realising the suit property as security guarantee and, at the root of the process, which requires the issuance of requisite statutory notices under the [Land Act](#), is title to the suit property. Where the requirements for issuing statutory notices are not complied with as stipulated in Sections 90 and 96 of the [Land Act](#), the implication is that the exercise of statutory power of sale of charged property unlawfully divests a chargor of title to the property. In such a case, a dispute that ensues can only be resolved by the application of the provisions of the [Land Act](#) and the [Land Registration Act](#), NO.3 of 2012 Under both Acts, the only court empowered to deal with disputes arising under them as the court of first instance is the Environment and Land Court.
14. Finally and as pertains to the question of Jurisdiction, Learned counsel for the Applicant has submitted that the decision of the Court of Appeal in the case of Co-operative Bank of Kenya Ltd vs Patrick Kang'ethe Njuguna (2017)eKLR, is not applicable and/or relevant to the circumstance of the instant matter.
15. Further and in any event, Learned counsel has contended that the named decision is distinguishable insofar as the dominant issue herein and which the Court has been called upon to determine, relates to compliance with Section 90 and 96 of the Act; and not accounting.
16. Secondly, Learned counsel has submitted that the Applicant herein was neither issued nor served with the requisite statutory notices in terms of Section 90(2) and 96(2) of the [Land Act](#), 2012 (2016). Consequently and in this regard, counsel for the Applicant has contended that in the absence of service of the requisite notices, the intended exercise of the statutory power of sale is illegal and thus invalid.
17. Arising from the contention that the Applicant was never served with the requisite statutory notices, Learned counsel for the Applicant has therefore submitted that the Applicant has thus established and demonstrated a prima facie case with probabilities of success.
18. To buttress the submissions pertaining to and concerning proof of a prima facie case, Learned counsel for the Applicant has cited and relied on the decision in the case of Mroa Ltd vs First American Bank Ltd & 2 Others (2003)eKLR and Nguruman Ltd vs Jan Bonde Nielsen (2014)eKLR, respectively.
19. Lastly, learned counsel for the Applicant has submitted that the Applicant herein shall be disposed to suffer irreparable loss, unless the orders sought are granted. In this regard, counsel has pointed out that the Applicant shall be bound to lose the named property which is situated in a location (sic) not comparable to any other location.



20. Whilst espousing the issue of irreparable loss, the Applicant herein has contended in paragraph 20 of his submissions as hereunder;

[20] Based on the above Pius case (supra), it is submitted on behalf of the Applicant that the suit property is situated in a location not comparable to any other location, even if the Applicant were to be compensated for the legal injuries that may arise due to the sale of property. The loss of the suit property, in relation to its current location, will not be adequately compensated through an award of damages if the intended sale is allowed to proceed.

21. Arising from the foregoing, Learned counsel for the Applicant has therefore implored the court to find and hold that the Environment and Land court is indeed sized of the requisite Jurisdiction and competence; and similarly, that the Applicant has established a basis to warrant the grant of the orders sought.

b. Respondents' Submissions:

22. The 1st and 2nd Respondents have filed their written submissions dated the 26th September 2023 and same have similarly raised and canvassed two issues for determination by the court.
23. First and foremost, Learned counsel for the named Respondents has submitted that the issue for determination before the court touches on and/or concerns whether the 1st Respondent duly issued and served the requisite statutory notices in terms of Section 90(2) and 96(2) of the Land Act, 2012 (2016) or otherwise.
24. Furthermore, Learned counsel for the 1st Respondent has further contended that the other limb of the dispute also touches on the issue of the statutory valuation in terms of Section 97 of the Land Act, 2012(2016); and taking into account the fact that the suit property was charged to and in favor of the 1st Respondent as security by the Applicant herein.
25. In a nutshell, Learned counsel for the 1st and 2nd Respondents has summed up the dispute/cause of action to be one that touches on the exercise of the 1st Respondent's statutory power of sale; as opposed to the issue of ownership or use of the suit property.
26. Based on the foregoing, Learned counsel for the 1st and 2nd Respondent has therefore submitted that this Honorable court is devoid and bereft of the requisite Jurisdiction to adjudicate upon and entertain the subject matter. In this regard, counsel for the 1st and 2nd Respondents has thus implored the court to find and hold that the Applicant herein is non-suited.
27. To buttress the foregoing submissions, Learned counsel for the 1st and 2nd Respondents has cited and relied on inter-alia the case of Republic vs Karisa Chengo & 2 Others (2017)eKLR, Co-operative Bank of Kenya Ltd vs Patrick Kang'ethe Njuguna & Others (2017)eKLR and Diamond Trust bank Ltd vs Fatma Hasan Hadi, Mombasa Civil Appeal No. 18 of 2020 (UR).
28. Secondly, Learned counsel for the 1st and 2nd Respondents has also submitted that the 1st Respondent herein duly issued and served the requisite statutory notices upon the Applicant herein vide certificate of postage, bearing the Applicants last known address, namely, Post Office Box Number 44526 -00100, Nairobi. In this respect, Learned counsel for the Applicant has invited the court to take cognizance of annexure "KM-9" which is the statutory notice in terms of Section 90(2) of the Land Act, 2012.



29. Similarly, Learned counsel for the 1st and 2nd Respondents has referred to the certificate of postage relative to both the primary and the secondary notices; and which bear the Applicant's last known postal address.
30. Furthermore, Learned counsel for the 1st and 2nd Respondents has also adverted to and submitted that the Applicant was similarly issued and served with the notification of sale in accordance with Rule 15(d) of the Auctioneers Rules, (1997). In this respect, counsel has drawn the attention of the court to annexures "KM-11".
31. In view of the foregoing, Learned counsel for the 1st and 2nd Respondents has thus contended that the Applicant was duly served with the requisite notices and hence the exercise of the statutory power of sale is lawful and legitimate.
32. Consequently and in view of the foregoing, it has been contended that the Applicant herein has approached the court on the basis of gross concealment and/or non-disclosure of material facts. In this regard, counsel has therefore contended that the Applicant herein does not deserve to partake of and or benefit from the Equitable discretion of the court.
33. Lastly, Learned counsel for the 1st and 2nd Respondents has also submitted that the suit property having been offered as security to the 1st Respondent, same thus became a commodity for sale with a known and ascertainable monetary value.
34. To the extent that the suit property was offered as a security to underpin the banking facility disbursed by the 1st Respondent to the borrower, Learned counsel for the 1st and 2nd Respondents has thus submitted that in the event that the Applicant succeeds in the suit before the court, the Applicant can be duly compensated and indemnified in monetary terms.
35. Simply put, Learned counsel for the 1st and 2nd Respondents has thus contended that the Applicant has thus failed to establish and demonstrate that same shall be disposed to suffer irreparable loss, either as known to law or at all.
36. In a nutshell, the 1st and 2nd Respondents have thus implored the court to find and hold that the court herein is divested of the requisite Jurisdiction and competence to entertain and adjudicate upon the subject dispute.

Issues For Determination:

37. Having reviewed the Pleadings, Application and the Response filed by and on behalf of the respective Parties; and upon taking into consideration the written submissions filed, the pertinent issue that emerge and which thus requires determination is; whether or not this Honorable court is seized of the requisite Jurisdiction to entertain the subject dispute.

Analysis And Determination

Issue Number 1 - Whether this court is seized of the requisite Jurisdiction to entertain the subject suit

38. The suit beforehand has been filed and/or mounted by the Plaintiff/Applicant and in respect of which the Plaintiff/Applicant contends inter-alia that the 1st Respondent is keen and desirous to alienate the suit property in exercise of her statutory power of sale, albeit without service of the requisite statutory notices.



39. In particular, the Plaintiff/Applicant has contended that the 1st Respondent herein has neither issued nor served the primary notice under Section 90(2) and 96(2) of the [Land Act](#), 2012(2016). Consequently, in the absence of service of the said Notices, the Applicant thus contends that the intended sale is therefore illegal and thus invalid.
40. Other than the question of lack of service of the statutory notices, the Applicant herein has also contended that the 1st Respondent also failed to carryout and/or undertake appropriate statutory valuation in terms of Section 97 of the [Land Act](#); and hence, the Applicant is disposed to suffer loss on account of under valuation of the suit property.
41. Other than the foregoing, the other complaint discernable from the pleadings before the court touches on and/or relates to the contention that the 1st Respondent is keen to dispose of the suit property, even though the borrower has since intimated to and appraised the 1st Respondent of the arrangements in place to facilitate the liquidation/ settlement of the banking facility which currently stands in the sum of Kes.98, 364, 016.72/= only.
42. Arising from the complaints contained and/or espoused in the body of the Plaint and by extension the supporting affidavit, what comes out clearly is that the dispute before the court touches on and/or concerns the propriety and or validity of the exercise of statutory power of sale by the 1st Respondent.
43. Instructively, the Applicant herein contends that the impugned exercise of the statutory power of sale is wrought with and fraught of illegality, whilst on the other hand, the 1st Respondent contends that the exercise statutory power of sale is lawful and in accordance of the provisions of the [Land Act](#), 2012.
44. From the foregoing analysis, there is no doubt that what this court is called upon to interrogate and determine is whether the intended exercise statutory power of sale is lawful or otherwise. Consequently, prior to and/or before undertaking the interrogation, it is thus incumbent upon this court to ascertain its Jurisdictional competence.
45. Importantly, there is no gainsaying that prior to and or before undertaking a determination of the dispute on merits, it behooves a court of law to first and foremost appraise itself on the question of Jurisdiction; and to confirm that same is duly conferred/vested with Jurisdiction.
46. Simply put, Jurisdiction of a court is a threshold question and must be determined at the onset and where a court of law is divested of Jurisdiction, then same must down his/her tools at the earliest, without continuation with the proceedings, in whatsoever, manner.
47. To underscore the significance of Jurisdiction, it is appropriate to recall and reiterate the dictum of the Court of Appeal in the case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989] eKLR, 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.”
48. Most recently, the significance of Jurisdiction and its implications on the competence of a court to entertain a dispute and/or grant orders of whatsoever nature, was adverted to and elaborated upon in



the case of Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR, where the court held thus;

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.
49. Furthermore, there is no gainsaying that the Jurisdiction of a court is derived from *the constitution*, the Parent statute or both. In this regard, a court of law must always endeavor to trace and track-down her Jurisdiction to the constitutive charter and not arrogate unto itself Jurisdiction by way of craft, innovation or otherwise. See S. K Macharia vs Kenya Commercial Bank & Others (2012)eKLR; paragraph 68, where the supreme court elaborated on the point.
50. Having taken cognizance of the foregoing decisions, it is now ripe and appropriate to revert to the dispute beforehand and to determine whether the Environment and Land court is indeed seized of the requisite Jurisdiction to entertain the dispute touching on the exercise of the statutory power of sale by the banking/financial institution.
51. Invariably, it is important to point out that the subject herein has attracted much debate and contestations. In one aspect, there is a school of thought that holds the position that the contents of the statutory notices and the process of service thereof, is provided for under the *Land Act*, 2012(2016) and thus by dint of Section 150 of the said Act; the court with Jurisdiction to interrogate the question of exercise of statutory power of sale is the Environment and Land court.
52. Nevertheless and despite the subsistence of the debate, there is no gainsaying that the Honorable Court of Appeal in the case of Cooperative Bank of Kenya vs Patrick Kang'ethe Njuguna & 5 Others (2017)eKLR, proclaimed the position and held that the Environment and Land court is divested of Jurisdiction in matters pertaining to exercise statutory power of sale.
53. For coherence, the Court of Appeal stated and held thus;
- “ 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.

54. Most recently, the Jurisdictional question pertaining to which court has the competence to entertain and adjudicate upon the issue of exercise of statutory power of sale, was re-visited by the Court of Appeal in the case of Mombasa, Civil Appeal No. 18 of 2020, Diamond Trust Bank Kenya Limited versus Fatma Hassan Hadi (unreported), where the court stated as hereunder;

“In the present case, although the Respondent is not privy to the instrument of the 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 Kang’ethe 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.

55. If there was any doubt as to the extent and scope of jurisdiction of the Environment and Land court in handling matters pertaining to exercise of the statutory power of sale, then that doubt was clarified and eliminated by the decision in Diamond Trust Bank Ltd (supra). Simply put, the court of appeal was succinct that the Environment and Land court has no Jurisdiction to deal with disputes pertaining to the exercise of statutory power of sale.
56. Arising from the foregoing, there is no gainsaying that as things stand to date, the Environment and Land court is divested of jurisdiction to entertain the dispute like the one beforehand. Consequently, this court is not keen to arrogate unto himself Jurisdiction by way of craft and/or innovation or otherwise, by attempting to insubordinate the Court of Appeal.
57. Finally, it is not lost on this court that the decisions of the Court of Appeal are binding on this court, unless (there is a decision of the Supreme court, on the same point). Quiet clearly, the doctrine of stare decisis must be given its due respect, for the sake of clarity, consistency and predictability of the law; so as to avert instances of absurdity.
58. As concerns the significance of the doctrine of stare decisis, I can do no better, but to cite and reiterate the succinct position of the law as enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 Others Versus. Tarlochan Singh Rai & 4 Others Supreme Court Petition No. 4 of 2012, [2013] eKLR, where the court held thus;

“Adherence to precedent should be the rule and not the exception; the labour of judges would be increased almost to breaking-point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”



59. Before departing from the significance of the doctrine of stare decisis, it is perhaps appropriate to revisit the dictum in the case of *Dodhia versus National & Grindlays Bank Limited and Another* [1970] EA 195, Duffus, V.P. expounded the principle of stare decisis stating that;

“The adherence to the principle of judicial precedent or stare decisis of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State.”

60. It was necessary to address the question of stare decisis in extenso, because Learned counsel for the Applicant sought to invite this court to depart from and/ or distinguish the decision of the Court of appeal in *Cooperative Bank of Kenya vs Patrick Kang’ethe Njuguna & 5 Others* (2017)eKLR, by what respectfully, amounts to splitting hairs. Consequently, it was appropriate to reiterate the importance of the Doctrine of stare decisis, which I have done in terms of the preceding paragraphs.

61. In a nutshell, I come to the conclusion that the issues raised beforehand do not fall within the Jurisdiction and competence of the Environment and Land court. Consequently, this court must down its tools at the earliest.

Final Disposition:

62. Arising from the discourse herein before, there is no gainsaying that the Environment and Land Court is not seized of the requisite Jurisdiction to entertain and/or interrogate the dispute which colors the suit beforehand.

63. Consequently and in the absence of jurisdiction, the obvious and only recourse is to strike out the application dated the 5th September 2023; and the entire suit. Invariably, same are hereby struck out with costs to the 1st and 2nd Defendants/Respondents.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2023.

OGUTTU MBOYA,

JUDGE.

