



REPUBLIC OF KENYA



**Lusiola v Lusiola & 2 others (Environment & Land Case E045 of 2023)  
[2023] KEELC 21210 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E045 OF 2023  
LA OMOLLO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**BEATRICE JEPKEMOI KIPTANUI LUSIOLA ..... PLAINTIFF**

**AND**

**MICHAEL IMBUSI LUSIOLA ..... 1<sup>ST</sup> DEFENDANT**

**STANBIC BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**GARAM INVESTMENTS LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect to the 1<sup>st</sup> Defendant's Preliminary Objection dated 20<sup>th</sup> June, 2023. The Preliminary Objection is that this court lacks the jurisdiction to hear and determine this suit and that that the jurisdiction lies with the High Court Commercial division.

**Factual Background.**

2. The Plaintiff commenced this suit vide a plaint dated 7<sup>th</sup> June, 2023. In the plaint, she prays for judgment against the Defendant for:
  - a. A permanent injunction restraining the Defendants, servants, agents or assigns from disposing, selling, transferring, alienating and/or advertising for sale or otherwise purporting to exercise a statutory power of sale over all that piece of land known as Land Parcel No. site no 128 Villa no 6280 IR No 139336 On LR NO 420/226 and 430/134 offered as security for loan.
  - b. A declaration that the transaction between 1<sup>st</sup> and 2<sup>nd</sup> Defendants creating the Legal Charge over Land Parcel site no 128. Villa no 6280 IR No 139336 On Lr No 420/226 and 430/134 was illegal, incomplete. Ineffective thus null and void due to fraudulent spousal consent used



to procure the loan title over the suit property and/or a declaration that the suit property is a matrimonial property incapable of being charged and sold by the Defendants without the spousal consent of the Plaintiff herein and that the Defendants actions of charging the suit property without spousal consent thus illegally and unlawful and the same is null and void.

- c. A declaration that the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant in collusion with the 3<sup>rd</sup> Defendant acted illegally, unlawfully and an injunction restraining further dealings in the land by the Defendants without the consent of the Plaintiff.
  - d. An order that the Lease be registered in the names Deane Consortium Limited as originally purchased by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - e. Costs and interest.
  - f. Any other or further relief which this Honourable Court may deem fit to grant.
3. The 1<sup>st</sup> Defendant filed his statement of defence dated 20<sup>th</sup> June, 2023 on 29<sup>th</sup> June, 2023 wherein he denied the Plaintiff's allegations in the plaint.
  4. On 12<sup>th</sup> July, 2023, the court gave directions that the Preliminary Objection shall be canvassed by way of written submissions.

#### **Issues for Determination.**

5. The Plaintiff filed her submissions on 4<sup>th</sup> August, 2023. In her submissions she gives a summary of the circumstances giving rise to this suit , as set out in the plaint.
6. She identifies the following issues for determination:
  - a. Whether the jurisdiction of this matter belongs to the commercial division.
  - b. Whether the court should strike the matter out for want of jurisdiction.
7. On the first issue , the Plaintiff relies on Article 162(2)(b) of the Constitution of Kenya as well as Section 13 of the Environment and Land Court Act and submits that this suit relates private land.
8. It is her submissions that the suit property was owned by her and her husband, that her husband took a loan and secured the loan using the suit property, that her husband stopped making payment towards the loan and put her interest in the suit property at risk
9. She submits that her rights towards the ownership of the suit property has been violated by her husband and further submits that she worked very hard towards its acquisition. She cites the judicial decision of Suzzane Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR.
10. The Plaintiff further relies on the Supreme Court of Kenya Application No. 2 of 2011 Samuel Kamau Macharia v KCB & others [2012] eKLR wherein it was held that a court's jurisdiction flows from the constitution, legislation or both
11. She submits that section 13 of the Environment and Land Court Act gives this court the powers to deal with matters in relation to the environment use, occupation and title to land. She argues that this is a matter challenging ownership and use of property that has been illegally charged and being auctioned without her knowledge.
12. She submits that this matter does not challenge the accounts of the loan facilities but that she wants the court to find that the suit property belongs to the two directors who are husband and wife. She further



- submits that the issue before this court is one of ownership and that it places the cause of action under the Environment and Land Court jurisdiction.
13. The Plaintiff relies on Section 6(1)(c) of the *Matrimonial Property Act*, 2105 as well as the decision in *BWM v JMC* [2018] eKLR and submits that the determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court.
  14. On the second issue for determination, the Plaintiff relies on Sections 1A and 1B of the *Civil Procedure Act* and submits that this matter has been filed in the right court. She further relies on Section 18 of the *Civil Procedure Act* which gives the High Court powers to transfer suits of civil nature. The Plaintiff argues that striking out this matter is not a remedy as this court can issue orders of transferring in to the High Court.
  15. In conclusion, the Plaintiff urges the court to look at the prayers sought and issues raised which are that the suit property belongs to two persons but one used it to defraud another. She urges the court to use the predominant purpose test to establish whether it has jurisdiction and order that the matter proceeds to hearing.
  16. The 1<sup>st</sup> Defendants filed his submissions on 17<sup>th</sup> July, 2023.
  17. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants intimated to court that they align themselves with the submissions of the 1<sup>st</sup> Defendant.
  18. The Defendants give a background of the suit and identify two issues for determination:
    - a. Whether this court has jurisdiction to hear and determine this suit.
    - b. Whether this court can transfer the suit to the High Court.
  19. They submit that the Plaintiff approached this this court upon becoming aware of the process by the bank process in respect of exercising its statutory power of sale.
  20. The Defendants argue that the Plaintiff's suit and application challenges the said right by disputing the charge in favour of the bank. They submit that the Plaintiff averred in her pleading that she had approached the bank and a payment proposal was reached at by the two parties.
  21. The Defendants rely on Section 13 of the *Environment and Land Court Act* as well as Article 162(2) (b) of the *Constitution* of Kenya that provide for this court's jurisdiction.
  22. They cited the judicial authorities in the Court of Appeal Case in *Cooperative Bank Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR and *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR. They submit that matters relating to charges, mortgages, collection of dues and rent fall exclusively within the High Court's jurisdiction.
  23. They submit that the Plaintiff has approached the wrong court and thus submit that this court lacks jurisdiction to hear and determine the suit.
  24. On the second issue for determination, the Defendants relied on a number of authorities including the Supreme court judicial authority in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR and submit that a suit filed before a court without jurisdiction could not be transferred to another court.
  25. They submit that jurisdiction cannot be conferred at the time of delivery of judgment as it does not operate retrospectively. They added that it follows that the suit having been filed in a court without the requisite jurisdiction, the same is not transferrable to the High Court.



26. In conclusion they urge the court to strike out the suit for want of jurisdiction.

### **Analysis and Determination.**

27. Upon perusal of the Preliminary Objection and Submissions filed in respect of this Application, it is my considered view that one issue is for determination:
- a. Whether or not this court has the requisite jurisdiction to hear and determine the suit.
28. On perusal of the prayers as contained in the plaint, it is clear that the Plaintiff seeks orders
- a. Restraining the defendants from disposing, selling or advertising for sale or exercising statutory power of sale over the suit property.
  - b. A declaration that the transaction leading to the creation of the charge over the suit parcel was illegal etc.
  - c. A declaration that the lease be registered in the name of Deane Consortium Limited as originally purchased.
29. The dominant issue, as can be seen from the plaint, is that there is an impending sale by the 3<sup>rd</sup> Defendant. The sale is on the instructions of the 2<sup>nd</sup> Defendant. The sale results from a loan of Kshs. 15,670,000 taken by the 1<sup>st</sup> Defendant from the 2<sup>nd</sup> Defendant in the year 2012. The suit property was charged as security for the said loan.
30. The question of ownership of the suit property as between the Plaintiff and the 1<sup>st</sup> Defendant, in my view, can be resolved at any time after that of non-payment of the loan secured by the suit property is addressed.
31. I also note from the plaint, at paragraph 9, that the Plaintiff avers that when she learnt of the non-payment of the loan and the fact that the suit property was security for the loan taken by her husband (the 1<sup>st</sup> Defendant), she visited the 2<sup>nd</sup> Defendant and was advised her to pay Kshs. 1.3 million and a payment proposal reached by them.
32. From the face of it, this suit has been necessitated by an impending sale of the plaintiff's home Villa 128 situated on LR No. 420/226. This is substantially a commercial dispute.
33. I am guided by the decision in *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna and five others* (2017) eKLR wherein the Court of Appeal found that the jurisdiction of the Environment and Land Court to determine disputes connected to "use" of land within the meaning of Article 162(2)(b) of the *Constitution* of Kenya, 2010 does not include mortgages, charges, collection of dues and rents and that these are within the Civil Jurisdiction of the High Court.

### **Disposition.**

34. In the result, I find that the 1<sup>st</sup> Defendant's Preliminary Objection dated 20<sup>th</sup> June, 2023 is merited. Consequently, the suit is hereby struck out.
35. Each party shall bear own costs.
36. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2<sup>ND</sup> DAY OF NOVEMBER 2023.**

**L. A. OMOLLO**



## **JUDGE**

In the presence of: -

Miss Wangari Mwaura for 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

Mr Mwondo for 1<sup>st</sup> Defendant/Respondent

Plaintiffs present to take ruling counsel is absent.

Court Assistant; Ms. Monica Wanjohi

