



**Sidian Bank Ltd v Olitunya & 4 others (Environment & Land Case 397 of 2017) [2023] KEELC 21369 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21369 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 397 OF 2017  
LC KOMINGOI, J  
NOVEMBER 9, 2023**

**BETWEEN**

**SIDIAN BANK LTD ..... PLAINTIFF**

**AND**

**ALICE OLWALO OLITUNYA ..... 1<sup>ST</sup> DEFENDANT**

**ZENITH PHARMACEUTICALS ..... 2<sup>ND</sup> DEFENDANT**

**GREGORY KIVUVA MUINDE ..... 3<sup>RD</sup> DEFENDANT**

**JANET MUNYIVA NZOMO ..... 4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR KAJIADO ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Coming up for determination is a Preliminary Objection made orally in court by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the jurisdiction of this court to continue hearing this suit.
2. The objection was canvassed by way of written submissions

**The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants' submissions**

3. In the submissions dated 14<sup>th</sup> May 2023, counsel submitted that following the Notice of discontinuance of suit filed by the Plaintiff on 17<sup>th</sup> December 2018 and consequently withdrawal of the suit against the 1<sup>st</sup> and 5<sup>th</sup> Defendants by consent on 21<sup>st</sup> May 2019 the subject matter of the case changed and the only issue for determination was recovery of debt against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants which was beyond jurisdiction of this court. Counsel submitted that this was also evident from the Plaintiff's Further Amended Plaintiff dated 20<sup>th</sup> March 2019.



4. To support the issue of jurisdiction, counsel made reference to the following authorities: Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR as well as Article 162(2) of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act*.
5. Counsel submitted that the issue of recovery of debt and enforcement of personal guarantees was within the unlimited original jurisdiction of the High Court as provided under Article 165(3) of *the Constitution*. To support this position, counsel made reference to the following case laws: *Kisimani Holdings Limited & Another v Fidelity Bank Limited* [2013] eKLR, *Co-operative Bank of Kenya Limited v Patrick Kangeche Njuguna & 5 others* [2017] eKLR and *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR.
6. As such, counsel asked court to strike out the suit for it to be filed in the appropriate court with jurisdiction because it did not have capacity to transfer the suit for lack of jurisdiction citing: *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, *Stella Kavutha Mutboka & another v Kenya Women Microfinance Bank Ltd* [2021] eKLR, *Tata Chemicals Magadi Limited v County Governor, Kajiado County & another; National Environmental Management Authority & another (Interested Parties) (2020)* eKLR and *Phoenix of East Africa Assurance Co. Ltd v S M Thiga T/A Newspaper Service (2019)* eKLR.

#### **The Plaintiff’s Submissions**

7. In their submissions dated 7<sup>th</sup> July 2023, counsel submitted that the court had jurisdiction to continue hearing the suit because the suit originated from the contract entered between them and the Defendant’s where the 2<sup>nd</sup> Defendant charged the suit property as security for repayment of the financial advances by the Plaintiff. Reference was made to Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Ltd & Another [2018], *Mathew Namusei Chabasi vs Cooperative Bank Ltd & Another* [2021] eKLR which held that issues relating to charges, the rights and obligations that arise in such instruments, are proprietary issues that squarely fall within the ELC jurisdiction. Counsel thus pointed that the predominant issue was not the charge, but use of a fraudulent title to the suit property to secure financial services.
8. Counsel submitted that whereas the suit against the 1<sup>st</sup> and 5<sup>th</sup> Defendants was withdrawn the hearing of the main suit had already commenced where two Plaintiff witnesses had testified. However, PW2 was yet to be cross-examined. Counsel indicated that the Plaintiff had only two more witnesses to call to close its case and the Defence only had one witness to call. As such, the suit had proceeded substantially and the objection was only a delay tactic from the Defendants’. And should the court find that it was not clothed with jurisdiction to continue hearing the suit, then it should not strike it out but transfer it to the High Court because when the suit commenced. Reference was made to the Supreme Court case of Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 others [2019] eKLR which held: “... However, as it was well elucidated in the case of Kagenyi v Musiramo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it...”
9. Therefore, in the interests of justice, the suit should be transferred and not struck out because the court had jurisdiction to determine it as was held in John Mwangi Karanja cs Alfred Ndiangui [2011] eKLR.



## Analysis and Determination

10. I have considered the Preliminary Objection, rival submissions, the authorities cited. The issue for determination is:
  - i. Whether the Preliminary Objection raised by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant that this court does not have jurisdiction to continue hearing the case is merited.
11. It is well-established that a preliminary objection should be raised based on a legal issue rather than disputed facts, as was ingrained in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. This legal principle was also articulated by the Supreme Court of Kenya in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others [2015]* eKLR as follows:
  - (15) Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
12. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> argue that this court lost its jurisdiction once the matter against the 1<sup>st</sup> and 5<sup>th</sup> Defendants was withdrawn which meant the only prayer for consideration was on the issue of recovery of debt which is in the High Court’s jurisdiction. The Plaintiff contested this objection by stating that the crux of the suit was the property charged by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> against the loan facility advanced by the Plaintiff.
13. To determine if the objection of jurisdiction raised by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is merited and can be determined on the face of the pleadings, this court has perused the Further Amended Plaint dated 20<sup>th</sup> March 2019 and finds the following pleaded facts:
  - “ 6. At all material times, the Plaintiff was registered as the first charge against that property known as Title Number Kajiado/Kaputiei North/24052 registered in the name of Alice Olwalo Litunya, the 1<sup>st</sup> Defendant herein.
  7. .... Sometime in the year 2014, the 2<sup>nd</sup> Defendant herein, through its Directors, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein made an application for a loan facility to the Plaintiff bank and two letters of offer were subsequently issued to the 2<sup>nd</sup> Defendant.
  9. ... that in contemplation of the creation of a charge over the suit property, the 1<sup>st</sup> Defendant and one or both of the 2<sup>nd</sup> Defendant’s directors surrendered the original title for the property to the Plaintiff.
  11. ... on 4<sup>th</sup> December 2014, the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants executed a charge instrument in favour of the Plaintiff Bank.
  12. ... on 5<sup>th</sup> December 2014, the Plaintiff through their advocates ... in conjunction with a director of the 2<sup>nd</sup> Defendant lodged the duly executed charge instrument for assessment at the Kajiado District land Registry...
  14. ... the 2<sup>nd</sup> Defendant variously defaulted in repayment of the loan amount... causing the Plaintiff to issue a demand letter for the payment of the outstanding amount.



16. ... on 8<sup>th</sup> August 2016, the Plaintiff sent a 40 days notice to sell to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants...
18. ... in August 2016 the Plaintiff decided to conduct an official search on the property to ensure that their interest was duly covered, but the Plaintiff was surprised to find that the search results indicated that the property was free from any encumbrance.
20. ... upon perusal of the registry file, the advocates informed the Plaintiff that the 1<sup>st</sup> Defendant had filed a deed of indemnity dated 21<sup>st</sup> October 2015 indicating that they had been unable to procure an official search over the property due to the fact that the property's register of green card in the registry was missing.
21. ... the 1<sup>st</sup> Defendant falsely declared that she had never charged the suit property as security, mortgage or charge to any person.
27. ... the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to disclose to the Plaintiff that the register reconstructed by the 5<sup>th</sup> Defendant did not show the charge registered in favour of the Plaintiff ... hence prejudicing the Plaintiff's interest in the suit property.
28. ... as a consequence of the actions of the Defendants the Plaintiff continues to suffer immense financial loss.
39. The Plaintiff thus prays for:
  - d. A permanent injunction restraining the Defendants ... from interfering, transferring, selling, developing ... with the suit property known as Title Number Kajiado/Kaputiei North/24052 in any manner whatsoever without the consent of the Plaintiff as charge.
40. In the alternative...
  - (a) A declaration that the 2<sup>nd</sup> Defendant is bound by the charge document as a contract to repay the loan ...”

14. The parties have submitted on the legal provisions that grant this court jurisdiction as well as several case laws on the issue of jurisdiction and this court shall not belabour the same. At this juncture, without delving into the substantive aspects of the case, it is discerned from the pleadings, as demonstrated by the above excerpt, that the dispute originates from Land Title Number Kajiado/Kaputiei North/24052, which was used as collateral for a loan extended to the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants. Consequently, the withdrawal of the 1st and 5th Defendants does not affect the underlying cause of action in the lawsuit.

15. Therefore, this court affirms its jurisdiction to proceed with the case and render a final verdict.

16. The preliminary objection is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023.**

**L. KOMINGOI**



**JUDGE.**

