



TKM Maestro Limited & another v Bank of Africa (K) Limited & another (Environment & Land Case E231 of 2023) [2023] KEELC 21407 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E231 OF 2023
JA MOGENI, J
NOVEMBER 2, 2023**

BETWEEN

TKM MAESTRO LIMITED 1ST PLAINTIFF

DR. STEVE TONY NYARANGI MONDA 2ND PLAINTIFF

AND

BANK OF AFRICA (K) LIMITED 1ST DEFENDANT

**JOSEPH NG'ANG'A KARIUKI T/A JOSRICK MERCHANTS
AUCTIONEERS 2ND DEFENDANT**

RULING

1. The matter for determination is the Plaintiffs' Notice of Motion Application dated 22/06/2023 brought under Article 159(2)(c) of *the Constitution* of Kenya, Section 1A, 1B, 3, 3A & 89 of the *Civil Procedure Act*, Orders 40 & 51 of the Civil Procedure Rules 2010, Section 96 and 97 of the *Land Act*, Section 21 of the *Auctioneers Act*, Rules 15 and 16 of the Auctioneers Rules 1997 and all enabling sections of the law. The Plaintiffs are seeking for orders that: -

1. Spent.
2. That this Honourable Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on 13/06/2023, payment of purchase price, transfer and/or any other dealings on L.R. No. 1160/709/1247 (IR. No. 201392) (original title 1160/709/1 IR. 201392), Nairobi by the Defendant/Respondent, their agents and or servants pending the hearing and determination of this Application Inter-Parties.
3. That this Honourable Court do grant a stay of the intended sale purported to emanate from the unlawful and or unprocedural Auction conducted on



13/06/2023, payment of purchase price, transfer and / or any other dealings on L.R. No. 1160/709/1247 (IR. No. 201392) (original title 1160/709/1 IR. 201392), Nairobi by the Defendant/Respondent, their agents and or servants pending the hearing and determination of this suit.

4. That the 2nd Defendant/ Respondent be compelled to produce the proceedings of the Auction conducted on 13/06/2023.
 5. That the costs of this application be in the cause.
1. The Application is premised on the grounds as stated in paragraph (1) – (10) on the face of the Application, the annexed Affidavit sworn by Dr. Steve Tony Nyarangi Monda on 22/06/2023. I do not need to reproduce them.
 2. The Application is opposed by the 1st Defendant/Respondent vide the Replying Affidavit sworn by Janet Kimuny on 18/07/2023. The 1st Defendant also filed a Notice of Preliminary Objection dated 29/06/2023. The 1st Defendant seeks to have the Plaintiff's Application and the entire suit struck out with costs to the 1st Defendant on the following grounds:
 1. The court lacks jurisdiction to hear the matter.
 2. The Application offends the doctrine of exhaustion.
 3. Unsubstantiated claims and abuse of the court process.
 4. Directions were given on 20/07/2023 that the Application be canvassed by way of written submissions. By the time of writing this Ruling, it is only the Plaintiff who had duly submitted and I have considered them. and I have considered. The Plaintiff's written submissions in response to the notice of preliminary objection are dated 31/08/2023. Analysis and Determination
 5. Having carefully read and considered the instant Application, the rival Affidavits, the Notice of Preliminary Objection and the written submissions filed by the plaintiff, I find that the following issues stand out for determination;
 - a. Whether this Court has jurisdiction to determine the Plaintiff's suit; and if so,
 - b. Whether the Plaintiff's Application dated 22/06/2023 is merited.

Whether this Court has jurisdiction to handle the matter

6. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. When the issue of a court's jurisdiction to hear and determine a matter is raised, the court seized of the matter is then obliged to decide the issue right away on the material before it. It must first deal with it as jurisdiction of a court is everything as was held in the case of the Owners of the Motor Vessel Lillian 'S' Vs. Caltex Kenya Limited (1989) KLR 1.
7. The 1st Defendant seeks to strike out this application and the entire suit on two main grounds; that this court lacks jurisdiction and that the application offend the doctrine of exhaustion.
8. On lack of jurisdiction, the 1st Defendant asserted that jurisdiction of the ELC Court flows from Article 162 of *the Constitution* of Kenya and Section 13 of the *Environment and Land Court Act*. That the *Environment and Land Court Act* as read together with Article 162 (2) (d) of *the Constitution* of Kenya does not confer jurisdiction to the ELC to deal with matters



relating to legal charges as the jurisdiction of this Court is limited to disputes relating to the environment and the use and occupation of, and title to land. That the suit as filed seeks to allegedly challenge the 1st Defendant's right in exercise of their statutory power of sale and not to the use and occupation or title and title to land and therefore do not fall within the purview of the ELC. The 1st Defendant submitted that any dispute relating to charged property can only be dealt with by the High Court pursuant to Article 165 of *the Constitution* of Kenya. The 1st Defendant relied on the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* 2019] eKLR, *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Niuguna & 5 others* [2017] eKLR, *Attorney General & 2 others v Okiya Omtata Okioti & 14 others* /2020] eKLR, *Republic v Karisa Chango & Another* (2017) eKLR, *Stella Kavutha Muthoka & another v Kenya Women Microfinance Bank Ltd* [2021] eKLR and lastly, the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* 1989] eKLR.

9. On doctrine of exhaustion, according to the 1st Defendant, the prayers sought ought to be before the Auctioneer's Licensing Board, pursuant to Section 4 of the *Auctioneers Act*, 1996. Therefore, the Applicants have not exhausted the process available to them. They rely on the case of *Republic v Kenya Revenue Authority Ex Parte Stole Industries Limited* 2019] eKLR.
10. On the other hand, as to whether this court lacks jurisdiction, the Plaintiff's advocate submitted that the issues to be determined by this Court are whether statutory notices had been issued to the Plaintiffs/Applicants prior to the attempted statutory sale and secondly, whether the unlawful and unprocedural auction conducted by the Defendants/Respondent on 13/06/2023 dealings on LR No. 1160/709/1247 (IR No. 201392) (Original Title 1160/709/1 IR 201392) have any relation to use, occupation and title to land. That upon a close cursory look at the said issues, it goes without a say that the dispute falls within the jurisdiction of this Honourable Court, as the Applicants bone of contention is that the suit property has been undervalued, which relates to or constitute use or occupation of land and thus brings the dispute within Article 162 (2) (b) and Section 13 of the *Environment and Land Court Act*. More specifically, counsel submits that Section 13 (d) of the *Environment and Land Court Act* confers jurisdiction to this Court to hear and determine disputes "relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land."
11. Further, Counsel submitted that Black's Law Dictionary, 10th edition defines a "chose in action" as a proprietary right in personam such as a debt owed by another person, a share in a joint-stock company or a claim for damages in tort or the right to bring an action to recover a debt, money or thing. The definition given in the dictionary based on the case of *Torkington V Magee* [1902] 2 KB was that the legal expression "choses in action" was used to describe all personal rights of property which can only be claimed or enforced by action and not by taking physical possession.
12. The Plaintiff submitted that William R. Anson in *Principles of the Law of Contract* 362 n. (b) (Arthur L. Corbin ed., 3d Am. ed. 1919) expounded that by "rights of property" the court meant to include under the term choses in action rights under a contract and rights of action arising from breach of contract. Based on this definition they submit that the Plaintiffs' claim qualifies as a chose in action under Section 13 of the ELC Act and it would be the ELC and not the High Court to try cases relating to rights under contracts for the sale of land and rights of action arising from breaches of contracts over land.
13. It is therefore their submission that the Preliminary Objection does not satisfy the test of what constitutes a preliminary objection and under this limb, the Plaintiff urged the Court to



dismiss the Preliminary Objection dated 29/06/2023 as it does not meet the threshold of what constitutes to a preliminary objection with costs.

14. As to whether the application offends the doctrine of exhaustion, the Plaintiff submitted that the issue herein is not about the institution of proceedings against the 2nd Defendant in the Auctioneer's Licensing Board, but if the Defendants in an attempt to dispose the Plaintiff of their property followed the law. As such, they submit that the suit herein is properly before the court.
15. The dispute in this case is the sale and purchase of the suit property to a third party vide public auction on 13/06/2023. The Plaintiff contends that the public auction was unlawful as they were not notified. The Plaintiffs are challenging the legality of the public auction. The public auction was in relation to land known as LR No. 1160/709/1247 (IR No. 201392) (Original Title 1160/709/1 IR 201392). The same was sold on 13/06/2023 therein the interest in the land was transferred to a third party. Therefore, it is my considered view that this Court has the jurisdiction to hear and determine this matter as pertains to the sale and transfer of interest in land vide public auction.
16. This Court derives its jurisdiction from Section 13 of the Environment and Land Act. I am specifically guided by Section 13(2)(d) of the Environment and Land Act which provides that this Court shall have power to hear and determine disputes: "relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land."
17. Further, it is my humble view that Counsel for the 1st Defendant has misinterpreted the Plaintiff's suit. The 1st Defendant asserts that the jurisdictional dichotomy on which court ought to hear disputes where charged property was concerned was laid to rest in Co-operative Bank of Kenya Limited (supra). In the matter, the court talks about 'use' of land; which does not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.
18. The plaintiff is not challenging the charge or the terms thereof. His issue is that at all material times to this suit, the Defendants irregularly disposed of the 2nd Plaintiff's suit property which had been initially been used by the 1st Plaintiff to secure a loan facility from the 1st Defendant. That unless and until this suit is heard and the prayers sought therein are granted, the Defendants will continue to illegally dispose the suit property to third parties. The predominant issue in this matter therefore is not the loan facility or the statutory power of sale.
19. To my mind, the Plaintiff's main issue is that the property was sold by public auction without proper notice and that the sale was undervalued. His issue is dispossession and nothing to do with the loan facility or default thereof. He has no issue with the issuance of the statutory notice. He only says he was entitled to receive a new letter of instruction and notice before the fresh public auction was set seeing that the first auction was compromised. The sale of land herein has no nexus to mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. The issue here is that the suit property was sold allegedly without due notice as required by the law and that it was undervalued. So, in this matter, this court is left to determine whether or not the auction was lawfully staged. The court will not go into details that are not within its jurisdiction.



20. With regard to the doctrine of exhaustion, I have considered the provisions of Section 4 of the *Auctioneers Act*. It provides as follows:

PARAGRAPH 4.

Object and functions of the Board

1. The object and purpose for which the Board is established is to exercise general supervision and control over the business and practice of auctioneers.
 2. Without prejudice to the generality of subsection (1), the Board shall —
 - a. license and regulate the business and practice of auctioneers;
 - b. (b) supervise and discipline licensed auctioneers;
 - c. to carry out training programmes for licensed auctioneers.
21. It is evident that the 2nd Plaintiff is not challenging the licence and/or discipline of the 2nd Defendant. The suit challenges the validity and lawfulness of the public auction. Therefore, the dispute herein does not fall within the purview of the Auctioneer's Licensing Board's functions and objectives. The plaintiff has not raised any complaints against the auctioneers of misconduct which expression includes disgraceful or dishonorable conduct. The doctrine of exhaustion does not apply in this matter.
22. In the end, I am of the view that this Court has jurisdiction to hear and determine this suit hence the preliminary objection dated 29/06/2023 is devoid of merit and is hereby dismissed.

Whether the Plaintiff's Application dated 22/06/2023 is merited

23. The Applicant has sought the Court to stay the intended sale purported to emanate from the unlawful and/or unprocedural auction conducted on 13/06/2023, payment of purchase price, transfer and/or any other dealings on the suit property by the Defendant/Respondent, their agents and/or servants pending the determination of this application and suit.
24. The pleadings before me in this matter show that the Plaintiffs have a contractual duty to either repay the entire outstanding sums now due to the 1st Defendant, failure whereof, as has happened, the 1st Defendant is entitled to sell the security. So, in this application, we are not concerned with the 1st Defendant's rights to realize its security. Rather, the duty of the Court is to look at the process adopted by the Auctioneer, question the same and establish whether the same was done in accordance with the law. The Applicants herein now challenged the outcome of the said public auction on the basis that it was neither lawful nor procedural.
25. The Plaintiff/Applicant's argument centers on the purported sale of the suit property by the 2nd Defendant, which took place through a disputed auction on 13/06/2023. According to information presented by the 1st Defendant/Respondent, the Plaintiffs/Applicants have come to understand that the property was supposedly sold to an unidentified third party for Kshs. 40,130,000/-. This sale occurred despite the 1st Defendant/Respondent's awareness that there was an interested buyer willing to acquire the property for a significantly higher sum of Kshs. 57,000,000. Evidently, the property was undervalued during the sale process.



26. The Plaintiffs/Applicants argue that the 2nd Defendant/Respondent had a legal obligation to issue them with a new letter of instruction, provide a notification of the sale, and a 45-day notice, which would require the Plaintiffs/Applicants to settle the outstanding amount. Failing that, the property should have been advertised for sale, followed by an auction 14 days after the advertisement if payments were not received. To the best of their knowledge, the 2nd Defendant/Respondent failed to inform them about the auction date, time, and location, the terms of the property's sale, and its reserve price. Moreover, the Defendants/ Respondents did not conduct a recent property valuation, despite the common knowledge that property values generally appreciate over time.
27. The Plaintiff asserts that the 1st Defendant/Respondent initiated the exercise of their legal authority to auction the suit property and scheduled the auction for 29/03/2022. They acknowledge that they unintentionally and unexpectedly defaulted on the loan repayment in line with the loan/settlement agreement, and they promptly informed the 1st Defendant/Respondent about this situation. They even made efforts to find a buyer for the property and presented a proposed sale agreement, which was rejected. When the 2nd Plaintiff requested a copy of the property's title while actively searching for a buyer, they were informed through a letter dated 19/06/2023 that the 2nd Defendant/Respondent had conducted the disputed auction of the subject property on 13/06/2023.
28. On their part, in her replying affidavit, the 1st Defendant alleges that the Applicant failed to disclose crucial information regarding the dispute between the parties, particularly the events leading up to the filing of this suit and application, and that they concealed pertinent facts. The 1st Defendant also disclosed the terms of the credit facilities between the bank and the Plaintiffs and highlighted the continued default by the Plaintiffs, as explained in paragraphs 8 and 9.
29. The 1st Defendant argues that despite the clear terms of the credit facility and the option for restructuring by the bank, the 1st Plaintiff failed to adhere to the terms and defaulted. In response, the bank initiated a series of legal notices, starting with a 90-day Statutory Notice on 6/06/2019, followed by a 40-day Statutory Notice on 19/09/2019, and demand notices to the directors of the 1st Plaintiff's Guarantors on 8/09/2021. On 7/10/2021, the bank's advocates informed the Plaintiffs that the loan was in arrears, amounting to Kshs. 344,438,604.25, with Kshs. 62,242,278.18 payable by 5/10/2021.
30. Despite these actions, the Plaintiffs continued to neglect their accounts, prompting the bank to instruct the 2nd Defendant, Josrick Merchants Auctioneers, to begin the process of selling the property. The previous court proceedings were concluded through a settlement deed dated 14/06/2022 between the bank and the 1st & 2nd Plaintiffs.
31. According to the 1st Defendant, the settlement deed's Clause 1.5 detailed events of default, allowing the bank to recover the advanced funds immediately in case of any breach of the letter of offer or the settlement deed. Clause 1.5.2 granted the bank the right to exercise its statutory power of sale regarding the subject property. Despite these agreed terms, the Plaintiffs defaulted again and only deposited a total of Kshs. 3,403,500.00 after the execution of the settlement deed on 14/06/2022.
32. Regarding the auction on 13/06/2023, the 1st Defendant states that the 2nd Defendant served the Plaintiffs with a 45-day redemption notice on 17/01/2022. Given the continuous default by the Plaintiffs, instructions were given to the 2nd Defendant to proceed with the auction process, as evidenced by an advertisement in the Daily Nation on 29/05/2023. The



Plaintiffs failed to settle the outstanding amount owed to the bank, resulting in the sale of the property for Kshs. 40,130,000 to Eric Njiiri Marigu, who has already paid Kshs. 10,032,500, constituting 25% of the deposit price.

33. The 1st Defendant emphasizes that granting the orders sought in this application would prejudice third parties not involved in this case. The bank, despite providing numerous opportunities for the Plaintiffs to settle their debt, asserts its right to exercise its statutory power of sale. The 1st and 2nd Plaintiffs admitted their indebtedness and default in the repayment of the credit facilities as per the terms of the settlement deed, and this is not disputed in the Applicants' pleadings.
34. Furthermore, the 1st Defendant states that the 1st Plaintiff presently owes the bank Kshs. 333,269,965.97 as of 11/07/2023, which remains outstanding even after the sale of the subject property, with interest continuing to accrue.
35. The Applicant has filed the case on 22/06/2023 which is 7 days or so after the purported auction. He contended that he became aware of the public auction through a letter ref: JK/302233/Jun 23/fl dated 19/06/2023 from the 1st Defendant. The Plaintiff/Applicant does not deny being in default and owing monies to the 1st Defendant. The 1st Plaintiff admits that he used the suit property to secure a loan facility from the 1st defendant. The Applicant is only challenging the fact that the auction was not procedurally done and also denies receipt of statutory notices from the 2nd Defendant prior to the statutory sale. The Applicant asserts that he was not aware of that the public auction would take place on 14/06/2023. He contends that he only found out about the auction when he received a letter from the 1st Defendant who informed him that the suit property was sold for Kshs. 40,130,000.00. The 2nd Plaintiff even admits that he had a buyer who was willing to purchase the property for Kshs. 57,000,000. He even adduced a draft sale agreement in support of his allegations.
36. From the documents before this Court, I note that the suit property was advertised for sale by public auction in the Daily Nation on 25/05/2023 by the 2nd Defendant, and the auction was slated to take place on 13/06/2023 at 11am at the Auctioneer's office, Utalii House, Utalii Lane, 3rd Floor, South wing room 304. The auction was attended to by the 1st Defendant's representative Janet Kimuyu, the Auctioneer himself and three other people. This is seen on the public auction attendance register. That the highest bidder paid Kshs. 10,032,500.00 being 25% deposit and agreed to pay the balance of the purchase price within 90 days. However, I note that there is no evidence before me demonstrating that the highest bidder, M/S Eric Njiiri Murigu indeed paid the 25% deposit as is alleged. There is no memorandum of sale, certificate of sale or a sale agreement for sale by auction adduced in evidence.
37. The issues the Plaintiff/Applicant is raising cannot be fully effectuated upon at this interlocutory stage and the court must refrain from purporting to do so. The evidence before me is simply not suitable for a full and proper adjudication of all the issues in dispute in the suit and should be taken through a full trial.
38. There are inconsistent narratives concerning the auction. The 1st Defendant contends that the Plaintiff was served the notices as required by the law and the 2nd Plaintiff denies being served with any notices. He contended that the Defendants were statutorily required to issue the Plaintiff/ Applicants with a new letter of instruction, notification of sale, a 45- day notice requiring the Plaintiff/ Applicants to clear the amount owed. This is not reconcilable. Therefore, there is no way that the Court can determine, at this stage, whether the public auction was lawfully staged.



39. In the case of John P. O. Mutere & Another v Kenya Commercial Bank Ltd, HCCC No. 3125 Of 1995 the court held as follows;

“Once a power of sale has arisen a mortgagee has the right to exercise it.

The Court has no power to prevent the exercise of that power if it is properly exercised.” Emphasis added

40. I understand the court to be saying that where the power of sale had not been exercised properly, the court has the power to intervene, as may be deemed appropriate.

41. I appreciate the bold pronouncement by the Court of Appeal in Mbuthia v Jimba Credit Finance Corporation & Another [1985] KLR 1, at page 6, as follows;

“Next there was the consideration of the scope of the equity of redemption. It is now clear that the English notions apply, that the equity is lost on the completion of a valid agreement for a valid sale. It is not allowed to continue until conveyance nor until registration.”

42. Once again, there has got to be a valid agreement for a valid sale.

43. At the heart of the Applicants’ case is the question as to the validity of the sale.

44. If the court were to allow the sale to be completed, through the transfer thereof, the suit property may be put beyond the reach of the court whilst the substantive suit was still pending.

45. In the event that the trial court were to hold that the sale was not valid, yet the suit property had already been transferred, that could give rise to more legal complications.

46. In my considered view, justice demands that the status quo currently prevailing be maintained until the suit is determined. Simply put is that there is no transfer to be done every part maintains its position and do nothing regarding the suit property until the main suit is heard and determined.

47. I am alive to the fact that the third party and highest bidder, M/S Eric Njiiri Murigu is not a party to this suit. Therefore, considering that the 25% deposit of the purchase price was allegedly paid for on 13/06/2023, the continued delay in resolving the issues may be prejudicial to him.

48. Accordingly, it is imperative that the substantive suit be set down for hearing as soon as parties comply with all the pre-trial procedures which I will shortly issues.

49. Finally, I order that the costs of the application shall be in the cause, so that the party who wins the substantive case, will also be awarded the costs of this application.

It is so ordered.

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

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MOGENI J.

JUDGE

In the virtual presence of: -



Mr. Wachira for the 1st and 2nd for Plaintiffs/Applicants

Mr. Githinji for 1st Defendant/Respondent

No appearance for the 2nd Defendant

Ms. Caroline Sagina: Court Assistant.

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MOGENI J

JUDGE

