



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA NO. E21 OF 2021**

**GEORGE MULAMA WAMUKOYA.....APPELLANT**

**VERSUS**

**SIPROSE ATIENO MULAMA.....1<sup>ST</sup> RESPONDENT**

**MOHAMED CHITUWI SHABAN.....2<sup>ND</sup> RESPONDENT**

**FAMILY BANK LIMITED.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court*

*at Mumias (Hon. T. A Odera, Senior Principal Magistrate) delivered on 25<sup>th</sup> May 2021*

*in Mumias MELC No. 37 of 2019 George Mulama Wamukoya v Siprose Atieno Mulama & 2 others)*

**RULING**

1. The appellant filed this appeal on 24<sup>th</sup> June 2021. Together with the appeal, the appellant filed an application by way of Notice of Motion dated 24<sup>th</sup> June 2021 seeking “a conservatory order preserving the property known as N/Wanga/Matungu/1801 pending hearing and determination of the appeal”.
2. The 3<sup>rd</sup> respondent reacted to the application by filing Notice of preliminary objection dated 12<sup>th</sup> July 2021. The grounds of the objection are that this court lacks jurisdiction to hear and determine the application and that the application is incompetent, fatally defective and ought to be struck out.
3. The preliminary objection was canvassed through written submissions. The 3<sup>rd</sup> respondent argued that the preliminary objection raises a pure point of law and is thus a valid preliminary objection. Further, that the dispute before the court concerns a charge as well as exercise of statutory power of sale and does not fall within the jurisdiction of the court as provided under **Section 13** of the **Environment and Land Court Act, 2011**. Reliance was placed on the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR**. Consequently, it was argued while citing the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** that the application is a nullity for being filed in a court without jurisdiction.
4. In response, the appellant argued that the objection is not a valid preliminary objection since there are disputed facts and that from the material before it, this court is not able to determine the issues that were before the subordinate court. He relied *inter alia* on the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR**. He further argued that under Article 162 of the Constitution of Kenya, **Sections 13** and **26 (3) and (4)** of the **Environment and Land Court Act, 2011** as well as **Section 9 (a)** of the **Magistrates' Court Act, 2015**, this court has exclusive jurisdiction to hear and determine appeals from decisions of magistrates' courts made under **Section 26 (3) and (4)** of the **Environment and Land Court Act, 2011**.
5. Regarding the case of **Co-operative Bank of Kenya Limited** (supra), the appellant argued that the said case predominantly concerned accounts as opposed to validity of the charge. Relying on the case of **Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] eKLR** and **Section 150** of the **Land Act** as well as **Section 101** of the **Land Registration Act**, the appellant argued that the appeal is properly before this court.
6. I have carefully considered the preliminary objection and the parties' submissions. The law relating to preliminary objections is settled. A familiar reference point is the often-cited decision of the Court of Appeal for East Africa in **Mukisa Biscuit Manufacturing Co. Ltd vs**

**West End Distributors Ltd (1969) EA 696** where Law JA stated as follows:

*So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.*

7. Thus, for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Any objection whose determination rests on disputed facts is not a valid preliminary objection.

8. As drawn, the objection is against Notice of Motion dated 24<sup>th</sup> June 2021 and is raised on the ground that this court lack's jurisdiction since the dispute before the court concerns a charge as well as exercise of statutory power of sale. From the onset, it must be noted that Notice of Motion dated 24<sup>th</sup> June 2021 was filed in this appeal. In the Memorandum of Appeal, the appellant indicated this appeal as "*Being an Appeal from the Judgment of Honourable Teresia A. Odera, C.M, delivered on 25<sup>th</sup> May 2021 in Mumias M.E.LC. NO. 37 OF 2019 the parties being GEORGE MULAMA WAMUKOYA VS SIPROSE ATIENO MULAMA, MOHAMED CHITUWI SHABAN & FAMILY BANK LIMITED*".

9. As at the time when the preliminary objection was filed, there was nothing on record to show details of the pleadings that the parties filed in the subordinate court. In fact, the record of appeal is yet to be filed even now. It is therefore not possible for this court, at this point in time, to ascertain the nature of the dispute before the subordinate court. Even the judgment appealed from has not been exhibited. The 3<sup>rd</sup> respondent's contention that the dispute before the court concerns a charge as well as exercise of statutory power of sale is not supported by the material on record.

10. Nevertheless, from the heading of the memorandum of appeal, it is apparent that this appeal is against a judgment and decree passed by the subordinate court in exercise of its environment and land jurisdiction pursuant to **Section 9 (a)** of the **Magistrates' Courts Act, 2015** as read with **Section 26** of the **Environment and Land Court Act, 2011**. The case number in the subordinate court is indicative of a civil matter filed pursuant to the subordinate court's environment and land jurisdiction. In terms of **Section 26 (4)** of the **Environment and Land Court Act, 2011**, appeals from decisions of the designated magistrate's courts lie with this court. The appellant cannot therefore be faulted for filing this appeal and the ensuing Notice of Motion dated 24<sup>th</sup> June 2021 in this court since jurisdiction has been expressly granted to the court by **Section 26 (4)** of the **Environment and Land Court Act, 2011**.

11. In view of the foregoing discourse, I do not find merit in notice of preliminary objection dated 12<sup>th</sup> July 2021. I dismiss it with costs to the appellant.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF FEBRUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**MS KHATESHI HOLDING BRIEF FOR MR KISAKA FOR THE APPELLANT**

**NO APPEARANCE FOR THE 1ST RESPONDENT**

**NO APPEARANCE FOR THE 2ND RESPONDENT**

**MR KOMBWAYO HOLDING BRIEF FOR MR MBOGO FOR THE 3RD RESPONDENT**

**COURT ASSISTANT: E. JUMA**