



Mwangi & another v Kenya Women Microfinance Ltd & 3 others (Environment & Land Case E005 of 2022) [2022] KEELC 14569 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E005 OF 2022**

**YM ANGIMA, J
NOVEMBER 3, 2022**

BETWEEN

GEORGE GABRIEL KIGURU MWANGI 1ST PLAINTIFF

JANE NDATA KIGURU 2ND PLAINTIFF

AND

KENYA WOMEN MICROFINANCE LTD 1ST DEFENDANT

ALICE NYOKABI MUKORA 2ND DEFENDANT

PIUS WARUIRU MUKURIA 3RD DEFENDANT

STANLEY MUTUKU KIOKO 4TH DEFENDANT

RULING

A. Introduction

1. By a plaint dated April 6, 2022 the plaintiffs sought the following reliefs against the defendants:
 - a. A declaration that the purported auction of the suit properties being LR No Nyandarua/Mawingo/3029, Nyandarua/Mawingo/3030, Nyandarua/Mawingo/3031 and Nyandarua/Mawingo/3032 and subsequent transfer of the same by the 1st defendant to the 2nd, 3rd and 4th defendants was malicious, fraudulent, unlawful, illegal, unprocedural and hence null and void.
 - b. An order of cancellation of title to the suit properties issued in the name of the 2nd, 3rd and 4th defendants and the same does revert to the 1st plaintiff.
 - c. An order for permanent injunction restraining the defendants jointly and or severally either through their agents, servants, representatives or assigns however from, selling, transferring, leasing, developing, destroying any building, removing any moveables, or in any way dealing with Parcel LR No Nyandarua/Mawingo/3029, Nyandarua/Mawingo/3030, Nyandarua/



Mawingo/3031 and Nyandarua/Mawingo/3032 in any manner detrimental to the interest of the plaintiffs.

- d. In the alternative, an order directing the 1st defendant to compensate the 1st plaintiff the market price of the land parcels being LR No Nyandarua/Mawingo/3029, Nyandarua/Mawingo/3030, Nyandarua/Mawingo/3031 and Nyandarua/Mawingo/3032
2. The plaintiffs pleaded that the 1st plaintiff was at all material times the proprietor of the suit properties and that sometime in 2015 the 1st plaintiff offered the suit properties as security for repayment of a loan of kshs 9,000,000/= advanced to them by the 1st defendant. it was pleaded that the 1st defendant, nevertheless, decided to register a charge of Kshs 4,000,000/= only leaving a loan of Kshs 5,000,000/= as unsecured. They pleaded further that a chattels' mortgage was also registered over motor vehicle KBZ 092C owned by one Charles Mwangi Kiguru who was their guarantor.
3. It was the plaintiffs' case that sometime in 2017 the 1st defendant fraudulently, illegally and irregularly and without following due process auctioned the suit properties to the 2 – 4 defendants without issuing the requisite demand and statutory notices. The plaintiffs contended that at the time of the purported auction they were dutifully servicing the loan facility and that they were not in default at all. The plaintiffs further contended that the suit properties had been sold at a gross undervalue. The plaintiffs listed several particulars of fraud, illegality and irregularity in their plaint.

B. The 1st defendant's notice of preliminary objection

4. The record shows that upon filing a memorandum of appearance on May 17, 2022 the 1st defendant filed a notice of preliminary objection dated May 13, 2022 challenging the jurisdiction of the court to entertain the suit. it was contended that under article 162 of the Constitution of Kenya, 2010 as read with section 13 of the *Environment and Land Court Act*, 2011 the court's jurisdiction was confined to disputes relating to the environment and the use and occupation of, and title to, land. It was further contended that the law does not confer jurisdiction upon the court to deal with matters relating to legal charges and chattel's mortgages. The 1st defendant therefore contended that the proper forum for adjudication of the dispute was the High Court.

C. Directions On Submissions

5. When the matter came up for directions on May 18, 2022 it was directed that the preliminary objection shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the 1st defendant filed its submissions on July 5, 2022 whereas the plaintiffs filed their submissions on July 4, 2022.

D. Analysis And Determination

6. It is evident that the gist of the 1st defendant's preliminary objection is that the court has no jurisdiction to entertain the suit hence the same ought to be struck out. The 1st defendant submitted that both under article 162 (2) (b) of the *Constitution of Kenya* and section 13 of the *Environment and Land Court Act 2011* the court's jurisdiction was circumscribed and limited only to disputes relating to the environment and the use and occupation of, and title to land. It was further submitted that the instant suit was not about the use, occupation or title to land but about the borrower's exercise of its statutory power of sale under a charge. The 1st defendant relied upon the following authorities in support of its submissions.
 - a. *Stella Muthoka & another v Kenya Women Microfinance Bank Ltd* [2021] eKLR (Angote J).



- b. [*Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others*](#) [2017] eKLR (Court of Appeal of Kenya).
7. The plaintiffs, on the other hand, submitted that the 1st defendant’s preliminary objection was not a proper preliminary objection as known to law since it did not raise a pure point of law as enunciated in the case of [*Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*](#) [1969] EA 696. The plaintiffs further submitted that their suit was about the “illegal transfer” of their titles and cancellation of those titles. it was contended that such a claim falls squarely within the purview of this court under article 162 (2) (b) of the [*Constitution of Kenya*](#) and section 13 of the [*Environment and Land Court Act*](#) since it concerned title to land.
8. The plaintiffs further submitted that the Court of Appeal case of *Co-operative Bank of Kenya v Patrick Kangethe Njuguna (Supra)* (the Co-operative Bank of Kenya case) was distinguishable from the instant suit in that the dispute there concerned accounting issues which could only be handled by the High Court. The plaintiffs consequently urged the court to overrule the preliminary objection and hold that it had jurisdiction to entertain the suit. The plaintiffs relied upon the following authorities in support of their submissions:
- a. [*Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd & another*](#) [2018] eKLR (Munyao Sila J).
- b. [*Alphonse Yankulije v One Twiga Road Limited & 2 others*](#) [2019] eKLR (CK Yaro J).
9. Article 162 (2) of the [*Constitution of Kenya*](#) stipulates as follows:
- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-
- (a) employment and labour relations; and
- (b) the environment and the use and occupation of, and title to, land.”
10. On the other hand, section 13 of the [*Environment and Land Court Act*](#), 2011 confers jurisdiction upon the court in the following terms:
- “1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the [*Constitution*](#) and with the provisions of this act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under article 162(2)(b) of the [*Constitution*](#), the court shall have power to hear and determine disputes:-
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



- (e) any other dispute relating to environment and land;
- 3. Nothing in this act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution.
- 4. In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.
- 5. Deleted by Act No 12 of 2012, Sch.
- 6. Deleted by Act No 12 of 2012, Sch.
- 7. In exercise of its jurisdiction under this act, the court shall have power to make any order and grant any relief as the court deems fit and just, including:-
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.”

11. The court has perused the plaintiffs’ claim in this suit and the plaint reveals the following:

- a. That there was a financial or commercial transaction between the plaintiffs and the 1st defendant in 2015.
- b. That the 1st defendant granted the plaintiffs a loan facility of Kshs 9,000,000/= on the security of, *inter alia*, a legal charge over the suit properties and a chattel’s mortgage.
- c. That the plaintiffs believed that a sum of Kshs 5,000,000/= was unsecured, or not secured by the legal charge.
- d. That the plaintiffs believed that they did not default in servicing the loan facility.
- e. That the plaintiffs believed that the 1st defendant was not justified in realizing the securities since they were not in default and the requisite statutory notices had not been served in advance or at all.
- f. That the plaintiffs believed that the 1st defendant’s exercise, or purported exercise, of its power of sale was fraudulent, illegal and irregular hence the sale of the suit properties should be nullified and the suit properties restored to the 1st plaintiff or in the alternative compensation be made for the loss of the properties.



12. The court is of the opinion that the transaction between the plaintiffs and the 1st defendant on the one hand, and between the 1st defendant and the rest of the defendants, on the other hand, must be considered holistically. The sale of the suit properties cannot be considered in isolation and without reference to the underlying charge. The charge cannot be considered in isolation from the loan facility. The court is of the opinion that the gist of the plaintiffs' grievance is that the 1st defendant had improperly and irregularly sold the suit properties in exercise, or purported exercise, of its statutory power of sale. The properties were not sold by a land grabber or fraudster but by a financier exercising or purporting to exercise its power of sale under a charge. The charge cannot simply be wished away as the genesis of the plaintiffs' grievances.
13. The plaintiffs contended that they were not in default at all by the time the suit properties were auctioned. The 1st defendant may be of a contrary view on the issue of default. Some calculation or accounting may have to be done to determine whether or not there was any default by the plaintiffs. The issue of whether or not the loan facility was fully secured or partly secured has nothing to do with the use, occupation or title to land. The manner of the exercise of the chargees' power of sale does not fall within the purview of section 13 of the *Environment and Land Court Act*.
14. The court is of the opinion that the provisions of article 162 (2) (b) of the Constitution and section 13 of the *Environment and Land Court Act* were exhaustively considered by the Court of Appeal in the Co-operative Bank of Kenya case. In that case, the Respondents had filed a suit before the High Court challenging the bank's intended exercise of its statutory power of sale. The bank was of the view that the respondents had defaulted on the loan facility hence it threatened to realize the security. The respondents contended that the money demanded by the bank was actually higher than what was genuinely due. They also contended that the intended sale was unlawful since the bank had not served them with the mandatory statutory notices as required by law hence they sought an interim injunction against the bank to forestall the intended sale.
15. In opposing the said application, the bank raised a preliminary objection to the effect that the High Court had no jurisdiction to entertain the matter under article 162 (2) and (3) of the Constitution, section 150 of the *Land Act*, 2012 and section 13 (2) of the *Environment and Land Court Act*, 2011. The bank contended that the proper court competent to entertain the matter was the Environment and Land Court. The High Court overruled the preliminary objection and proceeded to entertain the matter.
16. Being aggrieved by the said decision the bank appealed to the Court of Appeal. The appellate court considered the matter at length and upheld the findings of the High Court that it had jurisdiction to entertain the matter. The Court of Appeal held that the creation of a charge over a parcel of land does not constitute use, or occupation of land and neither does it constitute an issue of title to land. The Court of Appeal held, *inter alia*, that:

“ 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor article 260 whether expressly or by implication recognized charging land as connoting land use.

36. By definition, a charge is an interest in land securing the payment of money's worth or the fulfilment of any condition (see section 2 of the *Land Act*). As



such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.

37. Further, section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitutes land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be 'using' his land simply by virtue of having a floating charge/disposition over the property.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of article 162 of the Constitution fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.”

17. It is pertinent to note that in paragraph 42 of the judgment the court concluded the issue of jurisdiction as follows:

“While exclusive, the jurisdiction of the Environment and Land Court is limited to the areas specified under article 162 of the *Constitution*, section 13 of the *Environment and Land Court Act* and section 150 of the *Land Act*, none of which concerns determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions...”

18. The court is of the opinion that there is no way the plaintiffs would be able to successfully prosecute their claim without putting reliance upon the charge documents and the underlying financial transaction. The court is of the opinion that the predominant issue in the instant suit is the 1st defendant's alleged wrongful, irregular or illegal exercise of its statutory power of sale under the charge instruments. It has nothing to do with the use, occupation or title to land within the meaning of article 162 (2) (b) of the *Constitution of Kenya* and section 13 (1) of the *Environment and Land Court Act*, 2011.

19. The court is further of the opinion that nature of the dispute in the Co-operative Bank of Kenya case is similar to the nature of the dispute in the instant suit. The predominant issue in both cases is essentially the same. The only difference, which is not material, is that whereas in the Co-operative Bank of Kenya case the borrowers went to court before the sale of the charged properties, the borrowers in the instant



suit have approved the court after the sale. Accordingly, the ratio decidendi in the Court of Appeal case would still apply to the instant suit.

E. Conclusion and Disposal

17. The upshot of the foregoing is that the court finds merit in the 1st defendant's preliminary objection on the jurisdiction of the court to entertain the suit. Accordingly, the notice of preliminary objection dated May 13, 2022 is hereby upheld and the plaintiff's suit is hereby struck out with no order as to costs. The plaintiffs shall, however, be at liberty to seek relief before an appropriate forum.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 3RD DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Olili holding brief for Mr. Okiro for the Plaintiffs

Mr. Kigata for the 1st Defendant

N/A for the 2nd – 4th Defendants

C/A - Carol

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Y. M. ANGIMA

JUDGE

