



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 51 OF 2017**

**STELLA KAVUTHA MUTHOKA.....1<sup>ST</sup> PLAINTIFF**

**KENNY MUTHOKA MALUKI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA WOMEN MICROFINANCE BANK LTD.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 9<sup>th</sup> October, 2020, the Defendant/Applicant has sought for the following orders:

- a) The Plaintiff's suit be struck out with costs.***
- b) The court be at liberty to make any order in the interest of justice.***
- c) Costs of this application and the suit be borne by the Plaintiffs.***

2. The Application was supported by the Affidavit of the Defendant's Head of Legal Services who deponed that on 16<sup>th</sup> February 2017, the Plaintiff filed this suit seeking for a permanent injunction restraining the Defendant, its servants or agents from selling and/or auctioning the charged properties title numbers Kitui Municipality/Block III/290 and Kitui Municipality/Block I/90 and a declaration that the advertisement for sale of the suit property by public auction was unlawful, illegal and premature.

3. The Defendant's Head of Legal Services deponed that the Plaintiff further sought interlocutory orders of injunction pending hearing and determination of the suit vide an application filed under certificate of urgency on the same day and that vide a Ruling of this court dated 11<sup>th</sup> May, 2018, the court allowed the Application by restraining the Defendant from dealing with the suit properties in any manner pending the hearing of this suit.

4. It was deponed by the Defendant's Head of Legal Services that that the court must as a matter of right determine the present Application before the hearing commences as jurisdiction must be addressed before any further step is taken; that Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act does not confer jurisdiction on this court to hear any dispute relating to charged properties and that any dispute relating to charged property can only be dealt with by the High Court pursuant to Article 165 of the Constitution.

5. The Defendant's Head of Legal Services deponed that this court has no jurisdiction to transfer the suit to the High Court but to strike it out with costs; that 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 and that a matter before a court devoid of jurisdiction is dead on arrival and cannot be remedied as a court cannot confer jurisdiction to itself.

6. The Application was opposed vide the Plaintiff's Replying Affidavit sworn on 7<sup>th</sup> December, 2020 sworn by the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff deponed that this court's jurisdiction to handle environment and land matters is donated to it not only by Article 162 (2) (b) of the Constitution but also the Environment and Land Court Act.

7. It was deponed by the 2<sup>nd</sup> Plaintiff that on 18<sup>th</sup> February, 2020, the Defendant's counsel wrote to his advocate on record proposing to settle the matter; that it was inconceivable that the same Defendant was now taking an about turn by questioning the court's jurisdiction and that in the suit, he is seeking for a declaration that the Defendant is seeking to dispose of the suit properties in a manner that is inconsistent with Sections 90 (2) (b), 96 (2) and 97 (2) of the Land Act.

8. The 2<sup>nd</sup> Plaintiff deponed that it is true that he charged the suit properties to secure payment of a loan which was advanced to him by the

Defendant; that by advertising the suit properties for sale, the Defendant intended to illegally dispossess him of the suit properties and that under Section 13 of the Environment and Land Court Act, it is this court that has the requisite jurisdiction to handle the dispute.

9. The Plaintiff finally deponed that the Defendant has misapprehended the decision by the Court of Appeal in the case of ***Cooperative Bank of Kenya Limited vs. Patrick Kang'ethe and 5 others (2017) eKLR*** and that in that case, the jurisdiction of this court was not ousted.

10. The Defendant's counsel submitted that this court has no jurisdiction as the predominant issue herein is stopping the bank's right to exercise its statutory power of sale pursuant to a charge; that jurisdiction is everything and that this position has been restated in numerous cases by the Court of Appeal and the Supreme court.

11. Counsel relied on the cases ***Omondi & 210 others v Retirement Benefits Appeals Tribunal & 2 others [2020] eKLR***; ***Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR1***; ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR***, ***Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR and Republic v Karisa Chengo & 2 others [2017] eKLR*** which laid to rest the jurisdictional conundrum demarcating the constitutional boundaries between the High Court and courts of equal status.

12. The Defendant's advocate submitted that it is the pleadings that determine the jurisdiction of the court. Counsel relied on the case of Suzanne ***Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR*** in which the court held that "*Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case.*"

13. It was submitted by the Defendant's counsel that the Court of Appeal in the case of ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR*** dismissed an appeal where the Appellant contended that the High Court lacked jurisdiction to entertain the matter and that instead, jurisdiction over the matter lay with the Environment and Land Court.

14. While relying on the Supreme Court case of ***Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others [2019] eKLR***, the Defendant's counsel submitted that a suit filed before a court without jurisdiction cannot be transferred to another court. It was submitted that the ELC has no jurisdiction to deal with the dispute herein and that this court should strike out the suit with costs. The Plaintiff's advocate did not file submissions.

15. This suit was commenced by way of a Plaint dated 16<sup>th</sup> February, 2017 together with an Application for prohibitory orders of injunction dated 23<sup>rd</sup> August, 2017. The record shows that on 31<sup>st</sup> October, 2017, this court allowed the Plaintiff's Application for prohibitory injunctive orders pending the hearing and determination of the suit.

16. In the Plaint, the Plaintiffs averred that they approached the Defendant for a loan facility of Kshs. 70,000,000 in the year 2014; that they offered as security parcels of land known as Kitui Municipality/Block III/290 and Kitui Municipality Block 1/ 90 (*the suit properties*) and that the said suit properties were charged in favour of the Defendant.

17. According to the Plaintiffs, they have been making frequent deposits into the loan account held by the Defendant and that the Defendant advertised for sell the charged properties without issuing any statutory notices to the Plaintiffs pursuant to the provisions of Sections 96 (2) and 97 (2) of the Land Act.

18. From the pleadings before this court, the only issue to be determined is whether the Defendant issued to the Plaintiffs the requisite statutory notices as contemplated by the Land Act. According to the Defendant, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute, and that the suit having been filed in a court without jurisdiction, the Plaintiff's suit should be struck out with costs.

19. The requirement that a Court or Tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction cannot be overemphasized. In the case of ***Lillian "S" vs. Caltex Kenya Limited [1989] eKLR***, the Court of Appeal held as follows:

*"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

20. In ***Republic vs. Karisa Chengo & 2 Others [2017] eKLR***, the Supreme Court held as follows:

*"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court*

takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

21. This court’s jurisdiction emanates from the provisions of Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act (*the ELC Act*). Article 162(2)(b) of the Constitution provides as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to–

(b) the environment and the use and occupation of, and title to, land.”

22. Parliament enacted the Environment and Land Court Act in compliance with the provisions of Article 162(3). Section 13 of the Environment and Land Court Act provides as follows:

“(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.”

23. Article 165(5) of the Constitution divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the Constitution. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of the High Court in great detail in the case of **Republic vs. Karisa Chengo & 2 Others [2017] eKLR** in which it held as follows:

“[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act... From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa...”

24. The Plaintiffs have not denied that as security for a loan facility, they executed a charge over parcels of land known as Kitui Municipality/Block III/290 and Kitui Municipality/Block I/90 (*the suit properties*). The Plaintiffs have confirmed in the Plaintiff that the Defendant is seeking to exercise its statutory power of sale of the charged properties. The Plaintiffs have contended in the Plaintiff that the suit properties should not have been advertised for sale because they did not receive the requisite statutory notices.

25. The substratum of the suit therefore relates to the legal charges and the exercise of the statutory power of sale by the Defendant. The Plaintiffs are not challenging the legality of the charge documents, neither are they alleging fraud in the manner in which the Defendant has dealt with the suit properties.

26. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settled by the Court of Appeal in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the court held as follows:

“35. Accordingly, for land use to occur, the land had to be utilized for the purpose for which the surface of the land, air above it or ground below it was adapted. Therefore, to the law, land use entailed 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 was adapted. Neither the *cujus doctrine* nor article 260 of the Constitution whether expressly or by implication recognized charging land as connoting land use.

36. By definition, a charge was an interest in land securing the payment of money or money’s worth or the fulfillment of any condition. As such, it gave rise to a relationship where one person acquired rights over the land of another as security in exchange for money or money’s worth. The rights so acquired were limited to the realization of the security so advanced. Therefore, the creation of that relationship had nothing to do with use of the land as defined. That relationship was simply limited to ensuring that

the chargee was assured of the repayment of the money he had advanced the chargor.

37. Further, Section 2 of the Land Act recognized a charge as a disposition in land. A disposition was distinguishable from land use. While the former created the relationship, the latter was the utilization of the natural resources found on, above or below the land. Land use connoted the alteration of the environmental conditions prevailing on the land and had nothing to do with dispositions of land. Saying that creation of an interest or disposition amounted to use of the land, was akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constituted land use. The mere acquisition or conferment of an interest in land did not amount to use of that land. If that were the case, there would neither be 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 constituted use of land within the meaning of article 162 of the Constitution had to fail. In addition, the cause of action before the Court was not the validity of the charge, but a question of accounts...

40. To the Appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the Environment and Land Court. However, under section 2 of the Environment and Land Court Act, an instrument was a writing or enactment which created or affected legal or equitable rights and liabilities. For the purposes of the instant suit, that instrument was the charge. The cause of action was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale. [Emphasis mine]

41. Furthermore, the jurisdiction of the Environment and Land Court to deal with disputes relating to contracts under section 13 of the Environment and Land Court Act ought to be understood within the context of the Court's jurisdiction to deal with disputes connected to 'use' of land. **Such contracts, ought to be incidental to the 'use' of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court.** By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the Environment and Land Court was 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 concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting matters was without doubt, as evidenced by article 165(3) of the Constitution. The Appellant's objection on jurisdiction was rightly dismissed."

27. The Court of Appeal, whose decision is binding on this court, in the **Co-operative Bank case** (*supra*) found that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, and the issuance of statutory notices in respect of charges, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute.

28. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the Defendant, it is my finding that this court does not have jurisdiction to hear and determine this suit.

29. Although it has been the practice of this court, and the High Court, to transfer suits to the High Court and vice versa in instances where the court finds that it has no jurisdiction, the said practice has since been held to be illegal. In the case of **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others [2019] eKLR**, the Supreme Court held that a suit filed before a court without jurisdiction could not be transferred to another court. The Supreme court held as follows:

"[153] In that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of the Constitution leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) *supra*, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

[154] 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. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law." [Emphasis mine].

30. The above position has been followed by the Court of Appeal in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** where it was held as follows:

"We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction...These words were echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of **Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR** is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being **Kagenyi v. Musirambo (1968) EA 43**. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. **CIVIL APPEAL NO. 6 OF 2018 PHOENIX EAST AFRICA ASSURANCE CO.LTD v. S.M. THIGA T/A NEWSPAPER SERVICES** is therefore a nullity as it was based on a nullity.”

31. In the case of **Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another [2021] eKLR**, this court, with the guidance of the above decisions of the Court of Appeal and the Supreme court, stated as follows:

“From the above decisions of the Supreme Court and the Court of Appeal, it follows that this suit having been filed in a court without the requisite jurisdiction is not transferrable to the High Court. The suit is therefore struck out with costs to the Defendants.”

32. Both the Supreme Court and the Court of Appeal have been emphatic that a claim which is filed before a court devoid of jurisdiction is a nullity *ab initio* and is not transferable to another court. Such a claim can only be withdrawn or struck out with costs. Having concluded that this court does not have jurisdiction to hear and determine the dispute herein, and the suit having been filed in a court without jurisdiction, I shall, which I hereby do, allow the Defendant’s Application dated 9<sup>th</sup> October, 2020 as follows:

- a) **The Plaintiffs’ suit is struck out with costs.**
- b) **The Plaintiffs to pay the costs of this Application.**

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18<sup>TH</sup> DAY OF JUNE, 2021

O. A. ANGOTE

JUDGE