



REPUBLIC OF KENYA



Kitho Civil & Engineering Co. Ltd v National Bank of Kenya & 4 others (Commercial Case E042 of 2020) [2025] KEHC 5766 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E042 OF 2020**

PM MULWA, J

MAY 8, 2025

BETWEEN

KITHO CIVIL & ENGINEERING CO. LTD PLAINTIFF

AND

NATIONAL BANK OF KENYA 1ST DEFENDANT

MUTISYA MUEMA UTOTO 2ND DEFENDANT

PETER NGOVE MAKAU 3RD DEFENDANT

ERASTUS MBUTHIA MUHURI 4TH DEFENDANT

LYDIA NJERI KINYANJUI 5TH DEFENDANT

RULING

1. Vide an amended plaint dated 19th January 2024, the plaintiff instituted the present suit against the defendants and sought various reliefs including; a permanent order of injunction to restrain the defendants from disposing of the suit properties, a declaration that the sale by public auction of some of the suit properties was unlawful, fraudulent, null and void, and an order to cancel any transfer and title issued in favour of the 2nd defendant or any third party pursuant to the sale of some of the suit properties.
2. The plaintiff's case was that it had on-going construction works in which it had invested heavily and the purported sales and/or auction by the defendant had occasioned it significant financial loss and inconvenience. The plaintiff further argued that the defendants breach of contract, fraud, malice and unlawful or fraudulent sale of its properties led to loss and damages.



3. The 2nd defendant filed a preliminary objection (PO) dated 20th August 2024 in opposition to the suit against him, in which he prays to have it dismissed or struck out with costs on the grounds that it offends Section 99(1)(a), (2)(c), (3) and (4) of the Land Act, Cap 280 Laws of Kenya. That as a purchaser in good faith and for value, he is fully protected from any suit thereof.

Analysis and determination

4. Learned counsel for the 2nd defendant and the plaintiff made oral submissions on the PO, which I have considered alongside the pleadings filed herein. The issue for determination is whether the suit ought to be struck out on the basis that the 2nd defendant is protected from this suit under the provisions of Section 99 of the Land Act.
5. Section 99 of the Land Act states thus:
 99. Protection of purchaser
 - (1) This section applies to—
 - (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - (b) ...
 - (2) A person to whom this section applies—
 - (a) ...
 - (b) ...
 - (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
 - (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
 - (4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.- 6. The amended plaint reveals to this court that the plaintiff, at para. 13(b) contended that the sale of the said properties was fraudulent, unlawful, irregular and hence null and void. It goes on to particularize the alleged fraud and illegality. More specifically at para 13(b)(vii) it is argued that there was a conflict of interest in that the 2nd defendant's wife or relative is an employee of the defendant bank.
- 7. Further, prayer (b) of the amended plaint, seeks for an order to cancel any transfer and title issued in favour of the 2nd defendant or any third party pursuant to the sale of parcels of land as listed therein.



8. In the case of *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others*, Petition No. 10 Of 2013, [2014] eKLR the Court held thus:

“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...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. Based on the above cited authority, it is clear that the PO as raised must meet the threshold of being capable to determine the suit.

10. The cause of action as particularized in the plaint is evident that some factual aspects, especially of fraudulent activities, call for substantiation as against the 2nd defendant which can only be done during the trial.

11. The upshot of the foregoing is that the PO lacks merit and is hereby dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Kalii h/b for Eric Mutua, SC for Plaintiff

Mr. Mwangi h/b for Mr. Rimui for 1st Defendant

Court Assistant: Carlos

