



REPUBLIC OF KENYA



**First Community Bank Limited v Sakwa t/a Osundwa & Company Advocates (Commercial Case E985 of 2021) [2025] KEHC 11640 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E985 OF 2021**

**BK NJOROGE, J**

**JULY 24, 2025**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF**

**AND**

**MICHAEL OSUNDWA SAKWA T/A OSUNDWA & COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. This ruling pertains to the Defendant's application dated 30th September 2024.

**The Reliefs sought**

2. In the said application, the Defendant seeks the following reliefs from this Honourable Court:

- a. Spent.
- b. This Honourable Court be pleased to issue an Order of Stay of proceedings in the instant suit pending the substantive hearing and determination of Nairobi ELC No. E054 of 2020 - *Victor Owuor Ayoki & Roselyne Akoth (suing as the administrators of the Estate of the Late Wycliffe Adonijah Ayoki (deceased) vs. Multi-Stage Investments Limited & Others*.
- c. The costs of this Application be borne by the Plaintiff.
- d. Such other Orders and directions as may appear to this Honourable Court just and convenient to grant under the circumstances.

3. The Defendant's application is supported by an affidavit sworn by Michael Osundwa Sakwa, the Advocate on record for the Defendant in this matter.



4. In response to the Defendant's application, the Plaintiff filed a Replying Affidavit sworn on 18th February 2025 by Claris Ajwang Ogombo.
5. This Honourable Court directed that the application be canvassed by way of written submissions by both parties.

#### **Applicant/Defendant's Submissions**

6. This Court has duly perused and considered the Defendant's written submissions dated 7th April 2025.
7. The Defendant submitted that the Plaintiff's suit offends the doctrine of sub judice as codified under Section 6 of the *Civil Procedure Act*. It argued that the subject matter—I.R No. 3734/127 in Lavington—is directly and substantially in issue in a prior suit, ELC Case No. E054 of 2020, involving the same parties. The Defendant emphasized that the matter is pending before a Court of competent jurisdiction. That both parties were enjoined therein as Co-defendants via a Counter-claim. The Defendant submitted that this subsequent suit was filed by the Plaintiff to enforce its chargee rights over the same property. That it risks producing conflicting judicial outcomes. Citing authorities including *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] KESC54 (KLR), the Defendant contended that permitting concurrent proceedings would amount to an abuse of court process. That the appropriate remedy is a stay of proceedings in this suit pending the conclusion of ELC E054 of 2020. The Defendant further submitted that no prejudice would be occasioned to the Plaintiff by a stay, as the relief sought—exercise of the power of sale—remains contingent on the legal outcome of the earlier suit. The Court was urged to allow the application with costs.

#### **Respondent/Plaintiff's Submissions**

8. This Court has carefully read and considered the Plaintiff's submissions dated 10th March 2025 filed in opposition to the Defendant's application dated 30th September 2024.
9. The Plaintiff contended that the matter herein is not sub judice to ELC Case No. E054 of 2020—*Victor Owuor Ayoki & Roselyne Akoth Ayoki (suing as administrators of the Estate of Wycliffe Adonijah Onyango Ayoki (deceased) v Multi Stage Investments Limited, Francis Nyaga Njeru, The Chief Land Registrar, and in the Counter-claim, Multi Stage Investments Limited v Wycliffe Adonijah Onyango Ayoki (Deceased), Francis Nyaga Njeru, Judy Muthoni Ngugi, Michael Osundwa Sakwa, First Community Bank, Registrar of Titles, and the Hon. Attorney General*. In support of these submissions the Plaintiff relied on the decisions in *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] KEHC 2017 (KLR) and *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] KESC 54 (KLR).
10. The Plaintiff submitted that a simple test for determining whether the issues in this matter are substantially the same as those in ELC E054 of 2020 is, whether this Court can adjudicate the present dispute and grant or decline the prayers sought without delving into the matters pending in the ELC suit. It was further argued that, even if the prayers sought in the ELC case were granted, they would not directly affect the instant proceedings.
11. The Plaintiff asserted that the present suit was filed on 29th December 2021, seeking judgment against the Defendant for various reliefs:
  - a. Kshs.63,767,215.



- b. Profit on (a) above at 13% per annum with effect from the 5<sup>th</sup> November 2021 until payment in full.
  - c. Default damages on (a) and (b) above at 30% per annum with effect from the 5<sup>th</sup> November 2021 until payment in full.
  - d. Costs of this suit and interest thereon.
12. The Plaintiff maintained that its claim against the Defendant is for Kshs.63,767,215, being the amount due and payable arising from a financing facility issued to the Defendant. This was under a diminishing Musharaka agreement in the principal sum of Kshs.48,000,000, disbursed on 6<sup>th</sup> December 2019. It was contended that, under the express terms of the agreement, the facility was granted on, inter alia, the following conditions:
  - a. The facility would be repaid by way of monthly instalments of Kshs.716,691.55 with effect from the 5<sup>th</sup> of January 2020 for a period of 120 months (10 years).
  - b. The facility advanced would be secured by a charge over the Defendant's property known as LR number 3734/27 in favor of the Plaintiff.
  - c. In the event of default by the Defendant in payment of the principal or profit the Defendant would have the right to take possession of the property known as LR Number 3734/27 Lavington and sell the same by private sale or public auction to recover the outstanding loan. In the event of default by the Defendant in payment of the principal sum or profit the Defendant was to pay to the Plaintiff default damages calculated at 30 % per annum on the total amount of the outstanding sum.
  - d. The title of the suit property would vest in the Plaintiff until payment in full by the Defendant of the sum financed.
13. The Plaintiff further asserted that, pursuant to and in full performance of its obligations under the agreement, it financed the Defendant's purchase of the property known as LR No. 3734/27, Lavington, in the sum and on the terms previously stated. Consequently, the Defendant was bound to make monthly instalment payments as agreed. However, the Plaintiff maintained that the Defendant breached the agreement by refusing, neglecting and/or failing to make any payments toward the facility. As at 5<sup>th</sup> November 2021, the Defendant's account was in arrears to the tune of Kshs.63,767,215.
14. The Defendant herein was served with the pleadings herein together with the summons to enter appearance and entered appearance in this matter on the 22<sup>nd</sup> of February 2022. Since the filing of the said Memorandum of Appearance, the Defendant did not file a statement of defence within the required timelines or at all. On the 22<sup>nd</sup> of March 2022 a Request for Judgement was filed by the Plaintiff's Advocates herein, seeking that Judgement be entered for the Liquidated amount of Kshs63,767, 215. The Honourable Court entered Judgement on the 30<sup>th</sup> of April 2024 for the liquidated sum of Kshs63,767,215 and directed that the matter be set down for formal proof hearing on prayers (b) and (c) of the Plaint. These prayers were seeking profit and default damages on the Liquidated amount, which formal proof date was set for the 27 of October 2024. When the matter came up for formal proof hearing on the said 2<sup>nd</sup> of October 2024, the Plaintiff gave instructions to their Advocates in the matter herein, to withdraw the claim for profit and default damages on the liquidated amount. The Advocates were to proceed with the taxation of the Party and Party bill of costs which was allowed by the Court.



15. The Plaintiff stated that its advocates on record, Kemunto Ntenga Advocates, filed the party-and-party bill of costs on 2nd October 2024, which was subsequently scheduled for directions. It was only upon issuance of directions on the said bill of costs that the Defendant, instead of filing submissions, opted to seek directions on the present application.
16. The Plaintiff asserted that the subject matter in the present suit is a debt recovery claim for Kshs.63,767,215, in respect of which judgment has already been entered against the Defendant.
17. The Plaintiff maintained that the subject matter herein is distinct from that in ELC Case No. E054 of 2020. The Plaintiffs in the said ELC suit seeks the following reliefs:
  - a. An order directing the 3 Defendant to rectify the register with regard to property known as Land Reference No. 3734/27;
  - b. A declaration that that the 2<sup>nd</sup> Defendant holds the property Land Reference No. 3744/27 as a trustee for the Estate of Wycliffe Adonijah Onyango Ayoki;
  - c. A permanent injunction restraining the 2nd defendant, his agents, servants, employees from entering, remaining on, developing or in any way interfering with Land Reference No. 3734/27 whatsoever;
  - d. Damages for trespass against the 1t and 2nd defendants;
  - e. Mesne profits;
  - f. Costs of the suit plus interest thereon at court rates; and
  - g. Any further or other relief this court may deem just to grant.
18. The reliefs sought in the Counter-claim include the following:
  - a. The Plaintiff's ownership and right to vacant possession of the suit property being LR number 3734/2 Nairobi as established in Nairobi ELC No. E327 of 2022 *Wilberforce Onyango Rabul & John Njenga Kinuthia Vs Multi Stage Investment Limited* and Nairobi CMCC No.642 of 2011 *Kilimani Jua Kali Association v Multi SATE Investment Limited* be upheld.
  - b. An order that the parallel deed file opened/created and all entries therein including entry nos. 16, 17, 18 and 19 and particularly any entries therein purporting to grant any interests or rights of whatsoever nature to Francis Nyaga Njeru, Judy Muthoni Ngugi, Michael Osundwa Sakwa, First Community Bank Limited or any of their successors or assigns ,be expunged by the Registrar of Title from the records of the Lands focused in respect of the property known as LR Number 3734/27 Nairobi.
  - c. Permanent Injunction do issue restraining the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants' their agents, servants and employees from entering, remaining on, developing, alienating, charging, disposing, occupying or in any way meddling or interfering with the Plaintiffs property known as LR number LR3734 /27 Nairobi.
  - d. An order that all documents touching the suit property LR Number 3734/2 Nairobi held by the 1st,2nd 3rd 4th and 5" Defendants be surrendered to the Plaintiff's through their advocates on record forthwith, and in any event within fourteen days of the Order thereto.
  - e. The 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants, their agents, servants and employees be ordered to vacate the property known as LR 3734/27, Nairobi forthwith.



- f. General Damages for trespass against the 2nd to 4th defendants;
  - g. Costs.
  - h. Exemplary and Punitive damages against the 1st ,2nd 3 4th and 5<sup>th</sup> Defendants.
  - i. Interest.
19. The Plaintiff, in its submissions dated 10th March 2025, contended that the dispute before the Environment and Land Court (ELC) in Case No. E054 of 2020 concerns competing claims of ownership over the suit property, LR No. 3734/27, Nairobi. The Plaintiff emphasized that the parties in that suit seek cancellation of the Defendant’s title and transfer of the property, whereas the present suit concerns recovery of a liquidated debt advanced under a commercial facility. Consequently, the Plaintiff submitted that the causes of action, issues, and parties involved in the two suits are distinct.
20. The Plaintiff further submitted that the filing of the ELC case did not suspend the Defendant’s contractual obligation to repay the outstanding sum of Kshs.63,767,215. It was submitted that the Plaintiff, having advanced the facility and not being a claimant in the ELC matter, is entitled to recover the sums due without interference. The Plaintiff decried the defendant’s reliance on the doctrine of sub judice as a deliberate tactic to avoid repayment and frustrate enforcement of the plaintiff’s rights under the financing agreement.
21. The Plaintiff relied on judicial precedents, including *Thiba Min. Hydro Co. Ltd v Josphat Karu Ndwiga* [2013] KEHC 2017 (KLR) and *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] KESC 54 (KLR), to assert that sub judice is only applicable where the subject matter and the parties in both suits are substantially the same. It was submitted that since the issues in the two suits differ materially, the doctrine of sub judice does not apply.
22. Further, the Plaintiff noted that while it had filed a defence to a Counter-claim in the ELC matter, it had not instituted any debt recovery claim therein. It stressed that the Environment and Land Court lacks jurisdiction to entertain commercial debt recovery claims, which properly fall within the jurisdiction of this Honourable Court. Therefore, the present proceedings were said to be lawfully instituted and jurisdictionally proper.
23. The Plaintiff also pointed out that the judgment for Kshs.63,767,215 in the present suit has not affected the progression of the ELC matter, which remains pending. It maintained that a resolution of the ELC case—whether in favour of or against the defendant—would not dispose of or determine the commercial debt owed. The present claim is based on an independent contract and is not dependent on the outcome of the ELC matter.

### Issues For Determination

24. Upon considering the Defendant’s application and submissions, as well as the Plaintiff’s response and submissions, the Court finds that the following issue arises for determination in this application;
- a. Whether the present suit should be stayed pending the hearing and determination of Nairobi ELC Case No. E054 of 2020.



## Analysis

25. Before delving into the substantive issues raised, this Court must first determine the critical question of whether it has jurisdiction to hear and determine the present suit Alternatively, whether the matter ought to be stayed pending the hearing and determination of Nairobi ELC Case No. E054 of 2020.
26. The centrality of jurisdiction in judicial proceedings was aptly captured by Madan, J.A. in the celebrated decision of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where the learned Judge stated:

“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.”

27. It is therefore imperative that this Court first satisfies itself that it is properly seized of the matter and clothed with the requisite jurisdiction to entertain both the application and the main suit.
28. It is settled law that jurisdiction flows either from the *Constitution* or from a statute. Article 162(2) (b) and (3) of the *Constitution* established the Environment and Land Court (ELC) It is a superior court of equal status to the High Court. It is empowered to hear and determine disputes relating to the environment and the use, occupation, and title to land. Conversely, the High Court, established under Article 165(3) of the *Constitution*, is vested with original and unlimited jurisdiction in criminal and civil matters, except in respect of matters reserved for the exclusive jurisdiction of Courts established under Article 162(2).
29. The Court of Appeal in *Co-operative Bank of Kenya Ltd v Patrick Kang'ethe Njuguna & 5 Others* [2017] eKLR authoritatively addressed the question of jurisdiction in matters involving mortgage facilities and related accounting. The Court held that disputes arising from contracts involving mortgages or charges, even where land is involved as security, fall within the purview of the High Court. This is because they are fundamentally commercial in nature. The Appellate Court stated:

“ 41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/ employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation,



which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this 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 ELC is limited to the areas specified under Article 162 of the *Constitution*, Section 13 of the *ELC Act* and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the *Constitution* provides inter alia, that;

1. subject to clause (5), the High Court shall have-
  - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant’s objection on jurisdiction was rightly dismissed.”

30. The *Black’s Law Dictionary*, 11th edn (Thomson Reuters, 2019) at p. 1020 defines subject matter jurisdiction as “jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or status of things.” This definition underscores that subject matter jurisdiction relates not to the parties, but to the legal character of the claim and the remedy sought.
31. On the concept of subject matter, the same dictionary at p. 1723 provides that it is “the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute.” This makes clear that the subject matter concerns the substantive issue forming the basis of the litigation.
32. Further, the *Judicial Officers’ Law Lexicon*, 2nd edn (LexisNexis Butterworths, 2013) at p. 4536 elaborates that “the expression ‘subject matter’ has a reference to the right in the property, which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit [are the same], it cannot be said that the subject matter of the second suit is the same as that in the previous suit.” This interpretation provides a composite view that the subject matter must be assessed with reference to the right claimed, the relief sought, and the underlying cause of action.
33. Lastly, the *Major Law Lexicon*, vol 6, 4th edn (New Delhi: Wadhwa and Company, 2010) at p. 6514 explains that “when the relief involved in the suit is eviction of the tenant, the entire property itself cannot be said to be the subject matter of the suit. The expression ‘subject-matter of the suit’ cannot be equated to the property itself. Thus the right in dispute is the right of the tenant to continue in possession.” This definition further illustrates that subject matter refers to the legal issue in controversy—not merely the physical object or property connected to the suit.
34. Upon consideration of the parties’ submissions and the procedural history of the matter, this Court is persuaded by the position advanced by the Plaintiff (Respondent). The dispute before this Court



concerns the enforcement of a loan facility extended to the Defendant. The loan was secured by a legal charge over immovable property. It is well established that the High Court has jurisdiction to entertain and determine disputes of a commercial nature, including those involving the recovery of debts secured by land. The mere fact that the security involves land does not oust the jurisdiction of this Court, as the primary claim arises from a contractual and commercial relationship between the parties.

35. The Court notes that the Plaintiff had fully performed its obligations under the financing agreement by disbursing the agreed sum to facilitate the defendant's acquisition of LR No. 3734/27, Lavington. In turn, the Defendant was contractually bound to make monthly repayments but failed, refused, and/or neglected to do so, resulting in arrears said amounting to Kshs.63,767,215 as at 5th November 2021. This is an issue that the Plaintiff seeks to establish before this Court through this suit.
36. Despite having been served and entering appearance on 22nd February 2022, the Defendant failed to file a defence within the statutory timelines or at all. Consequently, judgment in default was regularly entered by the Court on 30th April 2024 for the liquidated sum of Kshs.63,767,215, following a formal request. Thereafter, the Plaintiff opted to withdraw its claims for profit and default damages, and proceeded with taxation of the party and party bill of costs, which the Court allowed.
37. The Court accepts the Plaintiff's position that the pendency of ELC Case No. E054 of 2020 did not suspend or affect the Defendant's contractual obligation to repay the outstanding debt. It was persuaded that the ELC suit raised an entirely distinct cause of action—relating to competing claims of ownership and the validity of title—and involved parties not present in the current suit. As matters now stand, whatever the outcome of the ELC suit, the dispute as to whether the Defendant took out this loan, and whether it is now due for repayment can only be resolved in this suit. This suit need not wait for the outcome or deliberations in the ELC suit. The Court further agrees that the sub judice doctrine is inapplicable, as the two suits neither share the same subject matter nor the same parties acting in the same capacity.
38. Ultimately, the Court finds that the Defendant's application seeking a stay of proceedings is a calculated attempt to delay justice and frustrate lawful recovery. It would be unjust and contrary to the principles of equity to allow a party who had benefitted from the Plaintiff's funds to evade repayment by exploiting unrelated litigation. The Court therefore upholds the Plaintiff's submissions and finds no reason to stay the suit.
39. Categorically, this Court finds and holds that it has the requisite jurisdiction to determine the present case.

### **Determination**

40. The Defendant's application dated 30th September 2024 lacks merit and is hereby dismissed with costs to the Plaintiff/ Respondent.
41. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 24TH DAY OF JULY, 2025**

**NJOROGE BENJAMIN K.**

**JUDGE**

In the presence of;

Mr. Osundwa holding brief for Sheunda for the Plaintiff/Respondent

N/A for Miss Kemunto for the Defendant/Applicant.



Mr. Luyai – Court Assistant

