



**Gamachu Construction Limited v Agricultural Finance Corporation & another;
Equilog Enterprises Limited (Interested Party) (Commercial Suit 708 of 2024)
[2025] KEHC 10237 (KLR) (Commercial & Admiralty) (16 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL SUIT 708 OF 2024**

JK NG'ARNG'AR, J

JULY 16, 2025

BETWEEN

GAMACHU CONSTRUCTION LIMITED PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

AND

EQUILOG ENTERPRISES LIMITED INTERESTED PARTY

JUDGMENT

1. The plaintiff is a limited liability company registered in Kenya under the provision of the Company Act. It is in the business of construction and real estate. By Originating Summons dated 26th November 2024, supported by the grounds on its face and the supporting affidavit of Hussein Woge Chudo sworn on 26th November 2024, the plaintiff prays for the following:
 1. That this Honourable Court be pleased to declare that the applicant is entitled to the ownership of all that property known as L.R. No. 209/17237 (I.R. 109723/1) (maisonette No. 124) eagle plains' housing estate, Mombasa Road-Nairobi subject to the auction sale which occurred on 28th August 2024 carried out by the respondents;
 2. An order that the respondents herein do facilitate the transfer of all that property known as L.R. No. 209/17237 (I.R. 109723/1) (maisonette No. 124) eagle plains' housing estate, Mombasa Road-Nairobi and a new title be issued in favor of the applicant;



3. That the respondents and the interested party be restrained by themselves, their servants or agents from interfering with the applicant's quiet enjoyment of all that property known as L.R. No. 209/17237 (I.R. 109723/1) (maisonette No. 124) eagle plains' housing estate, Mombasa Road-Nairobi;
 4. That the costs of the suit be provided for.
2. The 1st defendant on its party relied on Evans Mainga' replying affidavit sworn on 4th February 2025. The deponent is in the employ of the 1st defendant as its legal officer. On the part of the interested party, it relied on the replying affidavit of Mohammed Bwika, its managing director, sworn on 20th January 2025.

The evidence

The plaintiff's case

3. Parties adopted their respective pleadings as their evidence. On the part of the plaintiff, it was in the business of selling and purchasing real estate property. The suit property, namely L.R. No. 209/17237 (I.R. 109723/1) (maisonette No. 124) eagle plains' housing estate, Mombasa Road-Nairobi was advertised by the 2nd defendant, at the behest of the 1st defendant, for sale by way of public auction. The property belonged to the interested party. The sale was intended to take place on 28th August 2024. On that day, the deponent availed himself to participate in the auction. He was accompanied by Farah Mohamed Said. According to the deponent, they emerged as the highest bidders concluding the auction at 11:20 a.m.
4. At the fall of the hammer, the plaintiff paid 10% of the purchase price, being Kshs. 19,500,000.00 in fulfillment of the auction conditions. The plaintiff was issued with a memorandum of sale that it duly executed. The terms included in the memorandum of sale were that the balance of the purchase price would be settled within 90 days.
5. Soon thereafter, the plaintiff obtained a loan facility from Equity Bank for 180 days from 30th September 2024. He was given a letter of offer stating that the facility would run for 180 days. Under the terms of engagement, it was agreed that before disbursement of the funds, the financier would need a valuation report before registering a charge against the property.
6. However, when the agents of the plaintiff's financier tried to access the property for valuation, they were denied access. Consequently, this has stalled the process of registration of the charge and release of the balance of the purchase price. Considering the predicament, the plaintiff applied and was granted an extension of a further 90 days to comply with the conditions vide their letter dated 12th November 2024.
7. The plaintiff was apprehensive that if the orders sought were not granted, it risked losing the 10% deposit and the entire transaction. Vide a letter dated 10th November 2024, the plaintiff deposited a further 8,000,000.00 with its advocates and communicated the same to the respondents. It urged that it was only just and fair that the property be transferred to it on account of its interest in the property.

The 1st and 2nd defendant's case

8. The 1st defendant stated that on 19th September 2014, the interested party applied for and was advanced an agricultural development loan in the sum of Kshs. 5,000,000.00 by the 1st respondent. Those sums were to be paid with interest. Securing the facility, the interested party gave all that parcel of land namely



L.R. No. 209/17237 (I.R. 109723/1) as security. A notification of charge was thus registered against the property.

9. The 1st defendant continued that immediately thereafter, the interested party defaulted in settlement of the loan. Thereafter, the interested party requested for a restructure of the loan. He was issued with a loan addendum dated 16th May 2018. The interested party however still continued to default in settlement of his loan. Resultantly, the 1st defendant issued him with a statutory notice notifying him to redeem his account on 28th May 2020. He failed to do so.
10. When the interested party became aware that that his property would be advertised, he requested the 1st defendant to restructure his loan facility for the second time vide a letter dated 10th August 2020. His request was granted vide an addendum dated 3rd November 2020. However, the interested party defaulted again. Consequently, the 1st defendant served him with a letter of demand 23rd February 2021. Later on, the interested party was served with a statutory notice dated 14th April 2021. Upon its maturity, the 1st defendant served the interested party with a 40 days' notice to remedy the default on 5th January 2022.
11. The 1st defendant instructed J.K. Wanderi Auctioneers to take over the conduct of the matter. The said firm served a 45 days redemption notice and notification of sale to the interested party. It later advertised the property for auction on 28th June 2022. This galvanized the interested party to file a civil suit in Milimani MC ELC No. E228 of 2022. The interested party obtained status quo orders. However, the suit was later dismissed for want of prosecution on 9th July 2024.
12. Following dismissal of the suit, the 1st defendant instructed Oallstate Realtors Limited to conduct a valuation on the suit property on 5th February 2024. Upon receipt of the valuation report, the 1st defendant exercised its statutory power of sale and instructed the 2nd defendant to auction the property.
13. The 2nd defendant served a 45 redemption notice and notification of sale upon the interested party. Upon maturity of the 45 days, the property was advertised through the dailies on 19th August 2024. Thereafter, the 2nd defendant conducted a public auction on 28th August 2024. The plaintiff was recorded as the highest bidder and executed a memorandum of sale.
14. Taking note of the conditions embedded in the memorandum of sale, the 1st defendant opined that the plaintiff should not have joined the defendants in these proceedings. It therefore disputed the prayer for reselling the property after a 90-day lapse. It also denied the averments set out by the interested party maintaining that its actions were in compliance with the law.

The interested party's case

15. According to the interested party, he was never served with fresh notices after the initial process of sale of his property had been challenged. Furthermore, it challenged the legality of the advertisement and the auction itself stating that it failed to comply with Rule 16 of the Auctioneer Rules 1997. It further contended that the auction was irregular since the property was sold absent a forced sale valuation. That the valuation breached section 97 and rule 11 (b) (c) of the Auctioneer's rules.
16. In summary, it posited that the sale was materially irregular and fraudulent contrary to the Auctioneer's Act, the Rules thereunder and the *Land Act*. The deponent urged this court to dismiss the suit on account of the fact that the property was matrimonial property. It further asserted that it has sent several proposals to the 1st defendant to settle the outstanding loan amount.



The submissions

17. The Originating Summons was canvassed by way of written submissions. the plaintiff filed its written submissions dated 9th May 2025. It abridged the facts to submit that the evidence demonstrate that the sale was successful. Disputing the interested party's contentions, the plaintiff submitted that his equity right of redemption was extinguished at the fall of a hammer. Accordingly, his relief only lay in damages as he held no right of claim over the property. Relying on the facts set out in its pleadings, the plaintiff submitted that it was entitled to the reliefs sought. It prayed that this court finds merit in its suit. It further sought costs of this suit.
18. The 1st and 2nd defendants filed joint written submissions dated 12th June 2025. They submitted that there was a valid and lawful auction sale where the plaintiff was the successful bidder. That the process complied with the Auctioneer Act, the Rules thereunder and other provisions of statute. Since the sale was statutory compliant, the defendants submitted that the 1st interested party ought to be evicted from the suit property. They also submitted that this court ought to compel the interested party to grant vacant possession of the suit property. On costs, the defendants urged this court to take into account public interest.
19. The interested party filed its written submissions dated 26th June 2025. It submitted that the prayers sought fell outside the ambit of order 37 of the Civil Procedure Code since on of the orders sought to evict the occupants from the suit property. It urged this court to find that the Originating Summons was defective. Be that as it may, the interested party captured the contents of its replying affidavit to submit that there was no valid public auction sale.

Analysis and determination

20. I have considered the pleadings and the submissions of the parties. the plaintiff seeks for declaratory orders that he is entitled to ownership over all that parcel of land L.R. No. 209/17237 (I.R. 109723/1) (maisonette No. 124) eagle plains' housing estate, Mombasa Road-Nairobi on account of an auction sale that occurred on 28th August 2024. Upon that declaration, the plaintiff urged that an order be issued facilitating the transfer of the property in its name. it also sought injunctive relief. Though none of the parties raised this issue before me, this court suo motu thinks that it is best to determine whether it had jurisdiction given the nature of the orders sought.
21. The primary source of jurisdiction of courts is to be found in *the Constitution*. Article 162 (2) of *the Constitution* provides that parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
22. Under Article 165 (5), it is categorically stated that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). Furthermore, the jurisdiction of the Environment and Land Court is set out in section 13 of the *Environment and Land Court Act* 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 the 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.”

23. Jurisdiction is at the cornerstone of the powers donated by the court. And without it, a court cannot do anything. In fact, jurisdiction is everything and so much so that once it is established that a court lacks jurisdiction, it cannot take another step. It must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. [See Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR.]

24. Furthermore, the Supreme Court in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR buttressed as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

25. Similarly, the Court of Appeal in Phoenix of E.A. Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR) held as follows:

“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 complaint 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. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989).



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)

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.”

26. The issues before me concern declaratory orders that the plaintiff is entitled to ownership over the suit parcel of land. The plaintiff is also seeking injunctive relief restrain the interested party from interfering with the plaintiff’s quiet enjoyment of the suit parcel of land. However, Article 165 (5) of *the Constitution* exclusively interdicts this court from determining issues of land. So much so that I do not have powers to transfer the dispute to the court vested with the requisite jurisdiction. This is an issue that can be handled by the court with the proper jurisdiction.
27. In my view, the prayers sought and issues that squarely fall within the jurisdiction of the Environment and Land Court. Accordingly, I am left with no option but to find that for want of jurisdiction, the Originating Summons lacks merit. It is hereby dismissed but I direct each party to bear it own costs.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JULY, 2025
IN THE ABSENCE OF THE PARTIES.MARK/SIELE (COUNT ASSISTANTS).**

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J. NG’ARNG’AR
JUDGE

