



**Thagana v Cooperative Bank of Kenya Ltd & 2 others (Civil Case E089 of 2021)
[2024] KEHC 5770 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E089 OF 2021
JWW MONG'ARE, J
MAY 13, 2024**

BETWEEN

JOHN KARATU THAGANA PLAINTIFF

AND

THE COOPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

JOHN MUNDIA T/A UPSTATE KENYA AUCTIONEERS 2ND DEFENDANT

BEATRICE WANGARI NJAGUTI 3RD DEFENDANT

RULING

1. On 20th June 2023, the 3rd Defendant moved this Honourable Court by a Notice of Preliminary Objection challenging the jurisdiction of this Court to hear and determine the issues before this Court in the present suit.
2. The 3rd Defendant argues that having been enjoined in the present suit, the question now pending determination by the Court relate to issues within the mandate of the Land and Environment Court and therefore the High Court is not the right forum.
3. The Applicant has set out the issues as follows:-
 - a. In so far as the Plaintiff seeks to challenge the ownership of the suit property by the 3rd Defendant, and the title she holds thereof, including seeking for cancellation of the sale and transfer of the suit property, this Honourable Court lacks the jurisdiction to hears and determine the suit.



- b. In so far as the Plaintiff is in possession of the Suit property which is owned by the 3rd Defendant, who intends to bring a claim against the Plaintiff for mesne profits and vacant possession thereof, this Honourable Court lacks jurisdiction to hear and determine the suit.
 - c. The alleged dispute is not civil or commercial in nature and relates to ownership of the suit property including prayers for cancellation of the sale and transfer of the 3rd Defendant's title which is the remit of the Environment and Land Court.
 - d. The suit is incompetent, an abuse of this honourable Court's process and ought to be struck out with costs.
4. The 3rd Defendant urges that the Court should find that it lacks the requisite jurisdiction to determine the matter and dismiss the suit, as to transfer the suit to the Environment and Land Court without jurisdiction would be a travesty of justice and nullity *ab initio*.
 5. The Plaintiff opposed the application. The Plaintiff argues that it is trite that parties are bound by their pleadings and that the Defendants in their defence to the suit filed acknowledged the jurisdiction of this Court to try the dispute before it and cannot therefore be heard to depart from the same. The Plaintiff argued that under Order 2 Rule 6 of the Civil Procedure, a party is barred from departing from what he pleads and therefore cannot be allowed to travel from beyond what it has pleaded in the pleadings before the Court.
 6. Secondly and most important, the Plaintiff argues that Courts in determining whether or not it has jurisdiction in a dispute before it, when in doubt, it must determine what the dominant question before the Court relates. In the present suits, the Plaintiff argues, the issues in question are of a financial nature and whether a charge and the exercise of the Banks/financial institutions statutory power of sale entails to land use as provided under Article 162 (2) (b) of the Constitution.
 7. The Plaintiff argues that this question was correctly determined by the Court of Appeal in the case of Cooperative Bank of Kenya v Patrick Kangethe Njuguna & another [2017] eKLR where the Court stated:-

“... By definition , a charge is an interest in land securing payment of money or money's worth or the fulfilment of any condition.(see section 2 of the land Act). 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 the use of the land(as defined above). Indeed, that relationship is simply limited to ensuring that the charge is assured of the repayment of the money he has advanced.”
 8. The Plaintiff further argues that the 3rd Defendant was a late entrant to this suit, having been enjoined through an amendment to the suit as a result of the sale and transfer to her of the suit property while the dominant question before the Court has always been the financing and charge document, which issues cannot be determined by the Environment and Land Court(ELC).
 9. After careful consideration of the Pleadings, the application and the affidavits filed in support and opposition thereto and after having heard the rival submissions from the parties, I find that the issue that this Court is called upon to determine is “whether it is clothed with the relevant jurisdiction to hear and determine the dispute before it”.



10. It is trite that jurisdiction, being the power of the Court to determine a matter before it, flows from either the Constitution or legislation. The Supreme Court of Kenya in the case of Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others (20120eKLR had this to say on jurisdiction:-

“A Court’s jurisdiction flows either from 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...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.”

11. Article 165 of the Constitution mandates the High Court to hear and determine all criminal and civil matters save for those reserved for the two Courts of Equal Status under article 162. Article 162(2)(b) obligates the Environment and Land Court to hear matters related to the land question. As stated previously in this ruling, the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others(*supra*) the Court of Appeal that to determine whether there is doubt as to which has jurisdiction, the Court is to look at the dominant question for determination before it.

12. In considering the matter before this Court, I have considered what issues the Plaintiff in moving this Court desired to be determined. I note from the original Plaintiff filed on 9th February 2021 the Plaintiff’s prayers to the Court were as follows:-

- i. A permanent injunction restraining the Defendants by themselves or their agents and/or servants from attaching, selling, and auctioning the Plaintiff’s land known as parcels of land Registration No.16217/87/27(IR90035)- Muthaiga North Parkside Estate, Nairobi City County In The Alternative Status quo be maintained and the Plaintiff do retain possession of the suit property pending the Defendant Complying with the Law.
- ii. The 1st Defendant be ordered to issue the Plaintiff Mandatory Forty(40) days Notice to sell as provided for under the provisions of section 96(2) of the Land Act, 2012.
- iii. A fresh and independent valuation of the suit property be conducted by an independent valuer to obtain a proper value of the land.
- iv. The Plaintiff be allowed a period of Six Months to enable him obtain a suitable buyer for the property.
- v. The 1st Defendant do file a proper statement of the Plaintiff’s loan account.
- vi. Costs of the suit.
- vii. Interest on 5) above at Court rates.
- viii. Any other relief(s) that the Court may deem fit and just.

13. Upon learning that the property had been sold by the 1st Defendant through the 2nd Defendant and on 19th March 2021, the Plaintiff filed an amended Plaintiff and in addition to the above prayers sought, added two other prayers:-

- i. 1.2 A permanent injunction restraining the 1st and 2nd Defendants from proceeding with the intended sale purported to emanate from the unlawful and or unprocedural Auction



conducted on 26th February 2021, payment of purchase price, transfer and / or any other dealings on the suit property being Land Registration No.16217/87/27(IR 90035)- Muthaiga North Parkside Estate, Nairobi City County In The Alternative by their agents or servants pending and from transferring the suit property to the 3rd Defendant or any other party or in any way taking possession of/ alienating the suit property or in any other way interfering with the Plaintiff's ownership, quiet enjoyment of the suit property.

- ii. 1.3 the sale of the suit property -Land Registration No. 16217/87/27 to the 3rd Defendant that is alleged to have occurred on 26th February 2021 together with any transfer of the to the 3rd Defendant be cancelled.
14. A perusal of the record reveals that the Defendants have their respective defence to the Plaintiff's suit and none has put in a counterclaim. It must therefore be remembered that a suit belongs to the party who has filed the same before the Court.
15. From my reading of the Plaint and the Amended Plaint filed herein, I note that the cause of action emanates from a financial relationship between the Plaintiff and the 1st Defendant and that relationship has now drawn into the fray the 2nd and 3rd Defendants who have been enjoined to the suit because of the roles their roles pursuant to the financial arrangement between the Plaintiff and the 1st Defendant. The 2nd Defendant is an auctioneer who pursuant to the 1st Defendant's exercise of its statutory power sale was instructed to sell the suit property by public auction and the 3rd Defendant was the purchaser under the said sale.
16. I further note despite the amendment to the Plaint, the Plaintiff has not abandoned its claim against the 1st Defendant. As guided by the Court in the Co-operative Bank of Kenya case(*supra*), the dominant question that this Court is called upon to determine, in my view, relates to the financial relationship between the Plaintiff and 1st Defendant. The issue of cancellation of transfer and retransfer to the Plaintiff that has been introduced in the suit, is therefore secondary and not the main or dominant issue before the Court. Subsequently and pursuant to Article 165 of the Constitution, I am satisfied that the High Court is the proper forum for the determination of the dispute between the parties herein. The Application by the 3rd Defendant is therefore defeated. The same is dismissed with costs to the Plaintiff. The suit presently filed shall be heard and determined by this Court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Mirie for the Plaintiff.**
- 2. Mr. Wanjau for the 3rd Defendant.**
- 3. Amos - Court Assistant**

