



REPUBLIC OF KENYA



**Njuguna v Progressive Credit Limited (Miscellaneous Application
E001 of 2024) [2024] KEHC 16662 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E001 OF 2024**

**JL TAMAR, J
SEPTEMBER 18, 2024**

BETWEEN

DANIEL KURIA NJUGUNA APPLICANT

AND

PROGRESSIVE CREDIT LIMITED RESPONDENT

RULING

1. This ruling is in respect of a preliminary objection dated 18th January 2024 and filed on 25th January 2024 by P.K. Mbabu advocate for the respondent seeking the dismissal of the Notice of Motion application dated 4th January 2024 on the following grounds;
 1. That the suit giving rise to the notice of motion application and the intended appeal was a land matter as the same related to the validity of registration of a transfer and charge over title No. Ngong/Ngong/61850 among others in the alternative.
 1. That the Environment and land court has the exclusive Original and appellate jurisdiction to hear disputes relating to use and occupation of and title to, land by dint of section 13 of *Environment and Land Court Act*
 2. That the application therefore is incompetent, on-starter and bad in law as it has been filed in court bereft of jurisdiction to hear it.
 3. The notice of motion referred to above and the subject of the objection sought in the main; leave to appeal out of time against the judgement of Hon P. Achieng SPM as she then was, delivered on 11th may, 2023. Further that there be a stay of execution in civil case no 192 of 2018 pending the hearing and determination of the intended appeal in which the court ordered the applicant to pay the respondent a sum of ksh.7,448,122.00.



2. What constitute a Preliminary Objection was stated in the much-celebrated case of *Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors* [1969] E A 696 as follows;
 - a.” A Preliminary Objection consists of point of law which has been pleaded or which arises by clear implication out of pleading, and which if argued as a Preliminary point, will dispose of the suit. Examples are an objection to the jurisdiction of the court, (emphasis supplied), a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration”.
3. In *John Musakali –vs- Speaker County of Bungoma & 4 others* [2015] eKLR, Justice Chacha Mwita stated “once raised the Preliminary Objection should have the potential of disposing of the suit at that point without the need to go for trial.”
4. One has to examine whether the point of law raised is obvious from the pleadings or implicitly expressed, though not specifically pleaded. The pleadings in the magistrate court would help to determine whether or not the suit giving rise to the notice of motion application was a land matter and therefore divesting this court of requisite jurisdiction to deal with it.
5. The plaintiff in the Magistrate civil suit No 192 of 2018 progressive credit limited vs Daniel Kuria Njuguna & 6 others sought the following orders as set out in the Judgment dated 11th may 2023:

A declaration that the defendants are guilty of fraud and collusion

A declaration that the registration of the transfer and charge over title No. Ngong/ Ngong/61850 in favour of the 4th and 5th defendants was fraudulent and contrary to the laid down procedures and the law thus null and void.

An order directing the 6th and the 7th defendants to cancel entry number 8 and 9 on the proprietorship section and entry number 1 on the encumbrances section of title No Ngong/ Ngong/61850 and register the charge in favour of the plaintiff

A declaration that the 3rd defendant is guilty of professional misconduct
6. In the alternative, payment of ksh.7,448,122 to the plaintiff together with interest at the rate of 7% per month with effect from 28th June 2018 until payment in full.
7. The respondent content both in his preliminary objection and the submissions in support that the substantive issues before the magistrate court relate to the validity of registration of a transfer and charge over title No. Ngong/ Ngong/61850 which issue squarely falls within the jurisdiction of the Environment and Land court. On the other hand, the applicant contends that the suit before the magistrate court arose out of a loan advanced by the respondent to the applicant and which ought to be secured by the title Ngong/ Ngong/61850. Further that the magistrate found that the registration of the transfer and charge over the subject title was valid and without fraud.

Issue For Determination:

8. In my view, the single issue for determination is whether this court has jurisdiction to hear and determine the Notice of Motion application dated 4th January 2024 arising from Ngong Magistrate civil case no 192 of 2018.
9. As stated by the court of appeal in *Owners of Motor Vessel M.V Lilian vs Caltex oil k ltd* (1989) klr, Jurisdiction is everything, without which the court can do nothing else but down its tools. In Mukisa Biscuits case supra, jurisdiction is one of the examples given of what constitute a point of law.



10. It is important to set out the jurisdiction of the Environment and Land court in order to place the issue in controversy in context.

Article 162 (2) & (3) of the Constitution requires inter alia that;

- a. 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.
Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

11. And so, parliament enacted Environment and Land court Act which provides the jurisdiction of the court in section 13 as follows;

“the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

12. In exercise of its jurisdiction under Article 162 (2) (b) of Constitution, the court shall have power to hear and determine disputes;

- a. relating to environment 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 interest in land; and
- e. any other disputes relating to environment and land.

13. In Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates vs Daniel Ochieng Ogolla t/a Ogola Okello & Advocates (2019) eKLR the court of Appeal stated

“it is evident from Article 162 (2) of Constitution that the intention of framers of Constitution was the creation of special courts to determine disputes relating to environment and the use and occupation of, and title to, land, and in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute(underline mine) and whether the issue relates to environment and the use and occupation of, and title to, land”

14. What then was the dominant issue in the suit before the Magistrate court? The plaintiff in the suit, now the respondent herein sought for a declaration that the registration of the transfer and charge over title No Ngong/Ngong/61850 was fraudulent and contrary to the laid down procedure and that if the court declares the registration and transfer fraudulent, then an order directing the cancellation of the entries be made in the proprietorship and encumbrances sections of the register. This in my view was and still is the dominant issue the subject of the application under consideration. The payment of 7,448,122 to the plaintiff together with interest was an alternative relief sought by the plaintiff and which found favour in the magistrates Court. The respondent did not move the magistrate court



seeking to enforce its statutory power of sale, an issue which would perfectly been within the civil jurisdiction of the High Court established under Article 165 (5) of *Constitution*.

15. The applicant contends that the suit in the Magistrate court arose out of a loan advanced by the respondent to the applicant which ought to be secured by the title Ngong/Ngong/61850 and that there was failure to register the charge and the loan became outstanding and owing. This in my view is not correct. The suit was instituted by the respondent against the applicant and others, clearly set out the cause of action and the reliefs sought. The prayer by the respondent for payment of monies advanced to the applicant was an alternative to the dominant issue to wit invalidating the registration of transfer and charge over title referred to above and subsequent cancellations which relate to use and occupation of, and title to, land.
16. Consequently, the preliminary objection dated January 18, 2024 is upheld. This court lacks jurisdiction to hear and determine the matter.

DATED AND DELIVERED THIS 18TH DAY OF SEPTEMBER 2024

JOHN.T. LOLWATAN

JUDGE

In presence of;

