



**Chuna v Letshego Kenya Limited & 2 others (Commercial Case E470 of 2022)
[2023] KEHC 24540 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 24540 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E470 OF 2022
MN MWANGI, J
JUNE 16, 2023**

BETWEEN

JANE MUGURE CHUNA PLAINTIFF

AND

LET SHEGO KENYA LIMITED 1ST DEFENDANT

NAOMI NJONJO 2ND DEFENDANT

WESTMINISTER COMMERCIAL AUCTIONEERS 3RD DEFENDANT

RULING

1. This ruling is in respect to an application and a Notice of Preliminary Objection. The plaintiff filed a suit accompanied by a Notice of Motion application under certificate of urgency dated 28th November, 2022. The said application has been brought under the provisions of Order 40 Rules 1(a) & 2(1) and Order 51 of the Civil Procedure Rules, 2010, the Consumer Act (sic), the [Banking Act](#), Section 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya and all enabling provisions of the law. The plaintiff seeks the following orders-
 - i. Spent;
 - ii. Spent;
 - iii. That the 1st defendant either by itself, its servants and/or agents be restrained by an injunction from selling, transferring or discharging plot number Dagoretti/Uthiru/2258 and Dagoretti/Uthiru/2257 pending the hearing and determination of this suit;
 - iv. That the 2nd defendant be ordered by this Honourable Court to deposit Kshs.2 Million as security pending the hearing and determination of this suit;



- v. Pending the hearing and determination of this suit, the 1st and 3rd defendants by themselves, their servants and/or agents be restrained by this Honourable Court by a temporal (sic) injunction from any further attempt of disposing of the plaintiff's property which action is illegal; and
 - vi. That the costs of this application be for provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn by Jane Mugure Chuna, the plaintiff herein on 28th November, 2022. In opposition thereto, the 1st & 3rd defendants filed a replying affidavit sworn on 15th December, 2022 by Stella Ng'ang'a, the 1st defendant's Legal Officer. The 2nd defendant on the other hand filed a replying affidavit sworn by Naomi Njonjo, the 2nd defendant herein on 20th December, 2022. The 1st & 3rd defendants also raised a Notice of Preliminary Objection dated 15th December, 2022 in opposition of the instant application on the following grounds-
 - i. That the applicant's application is res judicata having already been heard and determined in Milimani CMCC No. 6266 of 2018 Jane Mugure Chuna v Letshego Kenya Limited & another by Hon. P. Muholi (PM) and Kikuyu CMCC No. 4 of 2019 Naomi Waithera Njonjo & another v Letshego Kenya Limited by Hon. D.N. Musyoka (SPM) when the applicant herein brought similar applications seeking similar reliefs touching on the subject matter of this suit; and
 - ii. That by reason of the aforesaid provisions of the law, this suit and the entire proceedings herein are misconceived, incompetent, a gross abuse of the Court process and a complete nullity.
 3. The application and the Notice of Preliminary Objection herein were canvassed by way of written submissions which were highlighted on 24th April, 2023. The plaintiff's submissions were filed on 7th March, 2023 by the law firm of Mbitio and Company Advocates, the 1st & 3rd defendants' submissions were filed by the law firm of Tobiko Njoroge & Company Advocates on 3rd March, 2023 and the 2nd defendant's submissions were filed on 8th March, 2023 by the law firm of Wanjiru Ng'ang'a & Company Advocates.
 4. Mr. Kiplagat, learned Counsel for the plaintiff contended that the 1st and 3rd defendants had secretly received a bid of Kshs.10 Million over the plaintiff's properties plot numbers Dagoretti/Uthiru/2258 and Dagoretti/Uthiru/2257, which is a throw away price compared to their current market value of Kshs. 20 Million and that they were in the process of finalizing the sale. He submitted that the plaintiff does not deny being indebted to the 1st defendant but the said defendant has refused to table an accurate tabulation of the loan account, despite the fact that the plaintiff has so far paid double the amount borrowed, since the 1st defendant tabulated exorbitant legal and Auctioneer fees together with the principal amount. Counsel relied on Section 44(a) of the *Banking Act* and the case of Scholastica Nyaguthi Muturi v Housing Finance of Kenya & another [2010] eKLR and stated that the in duplum rule provides that a lender cannot recover more than twice for loans that have become non-performing.
 5. He stated that the matter filed by the plaintiff herein in the lower Court touched on a single title with different parties save for the 1st defendant herein, and that the present matter is not in any way res judicata. He relied on the provisions of Article 50(1) of *the Constitution* of Kenya, 2010 and submitted that the suit in issue is rightfully before this Court to determine the issues between the parties herein and make a declaration that any public auction before issuing a clear loan repayment account statement is not only suspect but void. Mr. Kiplagat relied on Section 97(2) of the *Land Act* and the case of Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR and submitted that a



- sale by public auction can only obtain the best reasonably obtainable price at the time of sale, if a sale valuation is undertaken by a professional valuer prior to the auction but in this case, the 3rd defendant purported to sell the charged properties by way of public auction before conducting a current and accurate valuation.
6. He referred to the decisions in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Courts extensively discussed the conditions precedent to the issuance of an order of an injunction. He also referred to the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, where the Court defined what constitutes a prima facie case and submitted that failure by the 1st defendant to issue a clear tabulated loan accounts statement and a proper valid valuation report, amounts to infringing on the plaintiff's rights and as such, an order for an injunction as sought in the instant application will be appropriate in the circumstances. To this end, Mr. Kiplagat relied on the case of *David Ngugi Ngaari v Kenya Commercial Bank Limited* [2015] eKLR.
 7. He stated that the 2nd defendant having nothing to lose, had not informed and/or disclosed to the plaintiff the case she is alleged to have filed in Kikuyu Law Courts but she had no authority to institute a suit over a property registered in the name of the plaintiff.
 8. Mr. Mukeli, learned Counsel for the 1st and 3rd defendants cited the provisions under Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, and the case of *Mwangi Stephen Muriithi v Daniel. T. Arap Moi & another* [2017] eKLR and submitted that the instant application is res judicata since the plaintiff had previously filed similar applications in Milimani CMCC No. 6266 of 2018 *Jane Mugure Chuna v Letshego Kenya Limited & another* and Kikuyu CMCC No. 4 of 2019 *Naomi Waithera Njonjo & another v Letshego Kenya Limited* which were heard and determined by Hon. P. Muholi (PM) and Hon. D.N Musyoka (SPM), respectively. He cited Section 107 of the [Evidence Act](#) and submitted that the plaintiff had not tendered evidence in the form of a valuation report to support the allegation that the suit properties were undervalued and that she ever requested for her loan statement. He submitted that the in duplum rule as codified in Section 44 of the [Banking Act](#) does not apply to micro-finance institutions, as it only regulates banks.
 9. He relied on the case of *George W. M. Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR and submitted that the doctrine of res judicata also applies in instances where matters which could have been brought in, were not brought in, or where parties who could have been joined were not joined in a suit. He cited the case of *ET & another v Attorney General* [2012] eKLR and stated that the application and the suit herein offend the provisions of Section 7 of the [Civil Procedure Act](#) hence they should be struck out for being a gross abuse of the Court process.
 10. On whether the Preliminary Objection is merited, Mr. Mukeli referred to the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA where the Court defined what constitutes a Preliminary Objection. He cited the case of the Owners of the Motor Vessel "Lillian S" v *Caltex Oil (Kenya) Ltd* [1989] 1 KLR and contended that having established that the instant application is res judicata, this Court lacks the jurisdiction to handle this matter which has already been decided upon by Courts of competent jurisdiction. He stated that the Preliminary Objection herein is merited and ought to be allowed.
 11. On whether the plaintiff has met the legal threshold for granting an injunction, learned Counsel for the 1st & 3rd defendants relied on the cases of *Giella v Cassman Brown & Co. Ltd* (supra) where the principles for granting an injunction were set down, and the case of *American Cyanamid Co. v Ethicom Limited* [1975] AAER 504 where the test for granting an injunction was also considered. He submitted that the application herein has not met the requirements set out therein. In submitting



that the plaintiff does not have a prima facie case with high chances of success, Mr. Mukeli referred to the case of *Mrao v First American Bank of Kenya* [2003] eKLR. He further referred to the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* [1990] eKLR and stated that in order to succeed in an application for an injunction, the plaintiff must show that she has a legal or equitable right, which requires protection by an injunction which is not the case herein.

12. Mr. Mukeli contended that the applicant should demonstrate that in the event the orders sought herein are not granted, she will suffer irreparable injury which cannot be adequately compensated by an award of damages. He relied on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR and stated that the plaintiff herein will not suffer any substantial loss that cannot be adequately compensated by an award of damages as the suit properties in issue were offered as security to be sold in the event of default hence they became commodities for sale and there is no commodity for sale, whose value cannot be ascertained. He relied on the case of *Kitur v Standard Chartered Bank & 2 others* [2002] 1KLR.
13. He cited the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Limited & 2 others* [2016] eKLR and submitted that the balance of convenience tilts in favour of the 1st & 3rd defendants since if the instant application is granted, it will impose greater hardship on the 1st defendant because the outstanding debt shall continue to accrue interest, but if it is disallowed and it is later found that the applicant was entitled to an injunction, the 1st defendant can easily compensate her for any loss as it is a reputable micro finance institution capable of doing so. He added that the instant application has since been overtaken by events considering the fact that the suit properties have already been sold to third parties who are not participating in these proceedings.
14. Ms. Ng'ang'a, learned Counsel for the 2nd defendant cited the provisions of Order 40 Rule 1(a) of the Civil Procedure Rules, 2010 and submitted that the purpose of granting an injunction is to maintain the status quo and to prohibit any modifications until litigation is concluded. She relied on the case of *Giella v Cassman Brown & Co. Ltd* (supra) and stated that although the plaintiff is yet to offset the loan granted to her by the 1st defendant, she has identified a buyer who is willing to buy the suit property and offset the loan within ninety (90) days and she is willing to deposit in Court one monthly installment as a sign of goodwill.
15. It was stated by Counsel that the 2nd defendant had been diligently paying the 1st defendant her loan repayment installments without fail until sometime in the year 2021 when her husband was diagnosed with cancer and other related illness (sic) and later succumbed to the illness, thus leaving her in financial constraints and incapable of paying the loan repayment installments. She further stated that the 2nd defendant still has pending hospital bills for her deceased husband and she cannot afford to deposit Kshs. 2,000,000/= in Court.
16. Based on the foregoing, Ms. Ng'ang'a submitted that the plaintiff has established a prima facie case and if an order for a temporary injunction is not granted, the plaintiff and the 2nd defendant will suffer irreparable damage which cannot be compensated by an award of damages.

Analysis and Determination.

17. I have considered the application herein, the affidavit filed in support thereof and the replying affidavits by the defendants. I have also considered the Notice of Preliminary Objection filed by the 1st and 3rd defendants, as well as the written submissions filed by the Counsel for the parties. The issues that arise for determination are-
 - i. Whether the Preliminary Objection should be sustained.



- ii. Whether the instant application and suit are res judicata; and
 - iii. If the application herein is merited.
18. The plaintiff in her supporting affidavit deposed that sometime in June, 2015, she took a loan of Kshs.2.5 Million from the 1st defendant which together with the agreed interest, was to be paid within 5 years. She indicated that the said loan was secured by Title No. Dagoretti/Uthiru/2257. She averred that the 2nd defendant also took a loan from the 1st defendant of Kshs.5,000,000/= secured by title number Dagoretti/Uthiru/2258 registered in the name of the plaintiff but the 2nd defendant has since refused to service the said loan which has a balance of Kshs.4,304,608.22, thus exposing her to losing the said property.
 19. The plaintiff further averred that she had identified a willing buyer to buy off the said loan within the next ninety (90) days but the 1st and 3rd defendants had gone ahead and received a bid of Kshs.10 Million for both titles which is half the market value of the suit properties. She stated that she is willing to deposit a one-month installment in Court as a sign of good faith. It was stated by the plaintiff that the 1st defendant has received a deposit of the initial bid and is in the process of executing the transfer and discharge documents of the suit properties to the purchaser.
 20. She further stated that the 2nd defendant has since gone underground and has not demonstrated and/or indicated how she intends to clear her loan balance. It was the plaintiff's contention that no prejudice shall be suffered by the defendants in the event the orders sought herein are granted but she stands to suffer irreparable losses and damages (sic) if the orders sought are not granted.
 21. The plaintiff's case is that the 1st and 3rd defendants advertised her property in a daily newspaper for a public auction which was to take place on 28th January, 2022 but on the said date, they could not get a buyer. She deposed that the 1st and 3rd defendants had not advertised the suit properties for sale again but they instead went for the lowest available bidder so as to quickly dispose of her property. She submitted that this Court has the jurisdiction to issue orders setting aside the intended sale, transfer and discharge of charge of the suit properties pending the hearing and determination of the suit. This Court was urged to compel the 1st defendant to produce the current loan statement.
 22. The 1st & 3rd defendants in their replying affidavit deposed that the plaintiff and the 2nd defendant defaulted on their respective loans which led to the 1st defendant issuing several demand letters that were not heeded. That subsequently, the 1st defendant issued the plaintiff and the 2nd defendant with statutory notices dated 16th November, 2017 and 28th August, 2018 requiring them to settle the outstanding loan amount within three (3) months from the date of service, failure to which the 1st defendant would exercise its statutory rights.
 23. The 1st defendant averred that despite the said notices, the plaintiff and the 2nd defendant did not pay the outstanding loan amounts thus prompting it to instruct Antique Auctions Agency and Jogedah Auctioneering Services to proceed and realize the securities. That pursuant to the said instructions, the Auctioneers proceeded to issue and serve a forty-five (45) days' redemption notices and a notification of sale dated 3rd April, 2018 and 14th December, 2018, respectively. The 1st defendant further averred that it carried out a valuation of the suit properties through Royal Valuers Limited and Advent Valuers Limited respectively.
 24. It was stated by the 1st defendant that the plaintiff and the 2nd defendant being aware that the 1st defendant was going to sell the suit properties by way of public auction, instituted two suits being Milimani CMCC No. 6266 of 2018 Jane Mugure Chuna v Letshego Kenya Limited & another and, Kikuyu CMCC No. 4 of 2019 Naomi Waithera Njonjo & another v Letshego Kenya Limited where



- they sought injunctive orders to restrain the 1st defendant from selling the suit properties to recover the loan amount. The 1st defendant deposed that the plaintiff failed to prosecute Milimani CMCC No. 6266 of 2018 Jane Mugure Chuna v Letshego Kenya Limited & another and the said case was dismissed on 19th April, 2021 for want of prosecution.
25. In regard to Kikuyu CMCC No. 4 of 2019 Naomi Waithera Njonjo & another v Letshego Kenya Limited, it was deposed that the Court granted the plaintiff and the 2nd defendant an injunction on condition that they paid the outstanding loan balances within three (3) months from 15th October, 2019, which was the date of its ruling, failure to which the application for injunction would stand dismissed. It was stated that to date, they have failed to settle their respective loan balances despite having been served with all relevant notices. The 1st defendant asserted that the orders issued by the Court in Kikuyu Law Courts had not been set aside and they are still binding on the parties herein.
 26. The 1st defendant stated that it re-issued the plaintiff with a three (3) months' statutory notice dated 13th May, 2021 to repay the outstanding balance which at the time stood at Kshs.1,759,262.01 and a forty (40) days' notice of sale dated 23rd August, 2021 but to date, the plaintiff is yet to pay a single cent to offset the loan balance. The 1st defendant stated that as a result, it instructed the 3rd defendant to proceed and sell land title No. Dagoretti/Uthiru/2257 leading to the 3rd defendant issuing the plaintiff with a forty-five (45) days' redemption notice, notification of sale and schedule of immovable property.
 27. The 3rd defendant averred that after issuance of instructions from the 1st defendant, Advent Valuers Limited carried out a valuation of land title No. Dagoretti/Uthiru/2257 and prepared a valuation report dated 17th November, 2022 where the market value of the said property was valued at Kshs.5,000,000/= with a forced sale value at Kshs.3,750,000/=. It also averred that the said parcel of land was advertised for sale by way of public auction on 18th November, 2022 and it was sold to the highest bidder at the said auction for Kshs.4,200,000/=.
 28. In regard to the loan advanced to the 2nd defendant, the 1st defendant averred that it issued demand letters dated 7th April, 2021 to both the plaintiff and the 2nd defendant demanding for payment of the outstanding balance which stood at Kshs.3,779,252.24 at the said time but the letters elicited no response and as a result, the 1st defendant issued the plaintiff and the 2nd defendant with a statutory notice dated 24th April, 2021 and a forty (40) days' notice to sell dated 4th August, 2021 which also elicited no response. The 1st defendant stated that it instructed Advent Valuers Limited to carry out a valuation of land title No. Dagoretti/Uthiru/2258 and the latter prepared a valuation report dated 8th February, 2022, where the market value of the property was valued at Kshs.7,200,000/= and the forced sale value at Kshs.5,400,000/=.
 29. The 1st defendant deposed that it instructed the 3rd defendant to proceed and sell the said parcel of land and the 3rd defendant issued the 2nd defendant with a forty-five (45) days' redemption notice, notification of sale and schedule of immovable property. That the 3rd defendant advertised the said property for sale by way of public auction which was held on 18th November, 2022 and it was sold to the highest bidder at the said auction for Kshs.5,800,000/=.
 30. The 1st & 3rd defendants asserted that the instant application has been overtaken by events since the suit properties have already been sold to third parties who are not a party to these proceedings hence the plaintiff's right of redemption was extinguished upon the fall of the hammer at the public auctions. They however hold the view that the plaintiff will not suffer any substantial loss that cannot be adequately compensated by an award of damages in the event the instant application is not allowed.



31. The 2nd defendant in her replying affidavit deposed that she secured the loan of Kshs.5,000,000/= from the 1st defendant partly for the plaintiff's benefit and that since she pressurized her to secure the said loan, she should carry her own cross. She averred that she has endeavoured to assist the plaintiff by paying a reasonable amount as part payment of the said loan, and that the full facts are within the plaintiff and the 1st defendant's knowledge. It was stated by the 2nd defendant that she would be highly prejudiced in the event that the instant application is not allowed.

Whether the Preliminary Objection should be sustained.

32. In the case of *Oraro v Mbaja* [2005] eKLR, Ojwang J (as he then was) described a Preliminary Objection as hereunder -

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

33. The above decision means that in order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought, is the exercise of judicial discretion.

34. The 1st defendant has raised a Preliminary Objection in opposition to the instant application and the suit on the ground that they are *res judicata* since the plaintiff had previously filed similar applications in *Milimani CMCC No. 6266 of 2018 Jane Mugure Chuna v Letshego Kenya Limited & another* and *Kikuyu CMCC No. 4 of 2019 Naomi Waithera Njonjo & another v Letshego Kenya Limited* which were heard and determined by Hon. P. Muholi (PM) and Hon. D.N Musyoka (SPM), respectively. The plaintiff on the other hand contended that the matter she filed in the lower Court touched on a single title with different parties save for the 1st defendant herein, and in addition, the 2nd defendant did not inform and/or disclose to her the case she is alleged to have filed in Kikuyu. She stated that she had no authority to institute a suit over a property registered in the name of the plaintiff.

35. On the issue of *res judicata*, in the case of *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* [2014] eKLR, the Court stated as follows-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of *res judicata* by way of Preliminary Objection. The best way to raise a ground of *res judicata* is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*. Professor Sifuna did not raise the issue of *res judicata* by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

36. I hold a similar view as in the decision above that in order for this Court to properly determine whether the application and the suit herein are *res judicata* or not, it will have to ascertain facts from the pleadings in *Milimani CMCC No. 6266 of 2018 Jane Mugure Chuna v Letshego Kenya Limited & another* and *Kikuyu CMCC No. 4 of 2019 Naomi Waithera Njonjo & another v Letshego Kenya*



Limited. I therefore hold that the 1st defendant's plea of res judicata cannot be raised as a point of Preliminary Objection in the sense of the law. Therefore, the Preliminary Objection herein cannot be sustained.

37. On perusal of the pleadings herein, I note that there is an issue raised of whether this Court is clothed with the requisite jurisdiction to hear and determine the application and the suit herein. I will determine the issue of jurisdiction before delving into the other issues. The locus classicus on jurisdiction is the case of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. where Nyarangi, JA., held that -

"...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. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

38. The 1st defendant in its replying affidavit stated that by the time the suit properties were advised for sale by public auction by the 3rd defendant, the plaintiff's outstanding loan balance was Kshs.1,759,262.01, whereas the 2nd defendant's outstanding loan balance was Kshs.3,779,252.24. It therefore follows that cumulatively, the plaintiff and the 2nd defendant owed the 1st defendant Kshs.5,538,514.25. The 1st defendant stated that it instructed Advent Valuers to carry out valuations on the suit properties before they were advertised for sale. On perusal of the Valuation Report dated 17th November, 2022, the market value for land Title No. Dagoretti/Uthiru/2257 was Kshs.5,000,000/=. From the Valuation Report dated 8th February, 2022, the market value for land Title No. Dagoretti/Uthiru/2258 was Kshs.7,200,000/=. This means that the cumulative value of the suit properties herein is Kshs.12,200,000/=.

39. The plaintiff's case is that the current market value of the suit properties is Kshs.20,000,000/=. She did not however tender any evidence in the form of a Valuation Report in support of these allegations. The rule of evidence dictates that whoever alleges must prove as per the provisions of Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya which states that-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

40. The legal burden of proof lies on the party who wishes the Court to believe that a particular fact is true. In light of the foregoing, the law is in favour of the 1st defendant herein. Section 7 of the Magistrates' Courts Act prescribes the pecuniary jurisdiction of the Magistrates' Courts in civil matters. Section 7(1) (a) thereof provides that a Chief Magistrate shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed Twenty Million.

41. Having found that the cumulative value of the suit properties herein is Kshs.12,200,000/=:, and the outstanding loan balances by the plaintiff and the 2nd defendant is Kshs.5,538,514.25, I hold that the suit herein falls within the pecuniary jurisdiction of the Chief Magistrates' Court. Pursuant to the provisions of Article 165(3) of the Constitution of Kenya, 2010, the High court has unlimited original jurisdiction in both criminal and civil matters. However, Section 11 of the Civil Procedure Act, Cap 21 Laws of Kenya provides that -

"Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that



he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

- i. if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- ii. nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county. [Act No. 19 of 1964, Sch., Act No. 18 of 2018, Sch.]

42. Based on the above provisions, the suit and present application ought to have been filed before the Chief Magistrate’s Court, being the Court of the lowest grade competent to try it, and thereafter, if either of the parties will not be satisfied with the decision of the Chief Magistrate’s Court, they will be at liberty to appeal to the High Court. The Court in the case of *Dr. Selina Vukinu Ambe v Ketan Shashikant Khatri* [2020] eKLR, when faced with a similar issue held thus-

“ ... While as I agree with the defendant that Section 11 of the *Civil Procedure Act* requires that a suit should be filed in the court of the lowest grade competent to try it, this provision in my view cannot be used to challenge the civil jurisdiction of the High Court to entertain and determine suits filed before it. Besides the fact that the provision clearly regulates the filing of suits in subordinate courts, it is pertinent to note that the jurisdiction of the High Court is derived from *the Constitution* of Kenya 2010 which at Article 165 (3) confers on the court unlimited original jurisdiction in both criminal and civil matters.”

43. The filing of a suit whose subject matter does not exceed Kshs.20,000,000/= in the High Court is not fatal since the High Court has unlimited original jurisdiction in both criminal and civil matters, however, as explained herein above, the suit herein ought to have been filed before the Chief Magistrate’s Court as provided for under Section 11 of the *Civil Procedure Act*, Cap 21 Laws of Kenya. In the said circumstances, the right course of action is to transfer the case file in this Court to the Chief Magistrate’s Court for hearing and determination on merits.

44. In the case of *Kagenyi v Musiramo and Another* [1968] EALR 43 quoted by the Supreme Court in the case of *Albert Chaurembo Mumba and 7 others v Maurice Munyao & 148 others* [2019] eKLR, it was held that an order for transfer of a suit from one Court to another cannot be made unless the suit has been brought in the first instance, to a Court which has jurisdiction to try it.

45. The powers of High Court to withdraw and transfer cases instituted in the said Court to Subordinate Courts or from one Subordinate to another, is provided in Section 18 (1) of the *Civil Procedure Act* in the following words-

- “(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage-
 - a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or



- b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter-
 - i. try or dispose of the same; or
 - ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - iii. retransfer the same.” (emphasis added).

46. In the premise, I hereby make an order withdrawing this suit from this Court. I hereby transfer it to the Chief Magistrate’s Court, Milimani Commercial Court, for hearing and determination on merits. The case will be mentioned on 20th July, 2023 before the said Court for directions.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

Mr. Mukeli for the 1st & 3rd defendants/respondents

Mr. Kongani h/b for Mr. Kipngéno for the 2nd defendant/respondent

Ms B. Wokabi – Court Assistant.

