



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 49 OF 2021**

**MATHEW NAMUSEI CHAHASI.....PLAINTIFF**

**VERSUS**

**COOPERATIVE BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NICHOLAS MUGA OWINO T/A LINKS INTERGRATED SERVICES.....2<sup>ND</sup> DEFENDANT**

**RULING**

**(On the jurisdiction of the Environment and Land Court in matters of accounts relating to charges on land)**

1. By way of a Notice of Motion dated 15/9/2021, the Plaintiff sought the following orders:-

(a) ....spent

(b) ...spent

(c) That a temporary injunction do issue against the 1<sup>st</sup> defendant/respondent by themselves, their agents, servants and or employees or whomsoever from repossessing, offering for sale, selling, encroaching, removing from, transferring or in any other way interfering with the Plaintiff's property known as L.R. No. 8699/18 (I.R. No. 121934) within Kitale Municipality, Trans Nzoia County, pending the hearing and determination of this suit.

(d) THAT a temporary injunction do issue restraining the 1<sup>st</sup> defendant from attaching, offering for sale, selling any of the Plaintiff's property, in enforcement of the subject agreements or any other agreements(s) between the Plaintiff and the 1<sup>st</sup> Defendant.

(e) Any other relief that this Honourable Court deems fit.

(f) The costs of this application be borne by the defendants/respondents.

2. The Application was supported by an affidavit sworn on 15/9/2021 by one, **Mathew Namusei Chanasi**, the **Applicant** herein. The Application was opposed vide a Replying Affidavit sworn on 27/9/2021 by an officer, one **John Owiti**, who works with the 1<sup>st</sup> Defendant. To both Affidavits were attached a number of annexures evidencing the various depositions on the facts the deponents alluded on the transactions leading to the suit herein.

When the Application came up the first time before me, under certificate of urgency, that is to say, on 20/9/2021, I gave directions that it be disposed of by way of written submissions. These were to be filed before 12/10/2021 when a ruling date would be given. Thereafter, I issued conservatory orders to preserve the status quo.

3. On 12/10/2021, the Court gave the ruling date of 15/11/2021. It then embarked on writing a ruling thereon. But in the course of finalizing the ruling, it became apparent in the that the issue of the jurisdiction of the Court ought to have been addressed. This is because jurisdiction is the only buoyant for a court. Thus, the court was of the view that the consideration of that issue should take precedence over the one of the merits or otherwise of the Application. So much so that in case the Court would find that it has jurisdiction, it would render its decision on the Application thereafter.

4. Thus, on 15/11/2021 the court invited the parties to address it on the issue of jurisdiction. Each party was given opportunity to make

further submissions thereon but, under **Rule 33(b)** of the **2013 Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title of Land and Proceedings on Other Courts (Gazette Notice No. 5178)**, limited to a length of two pages. The 1<sup>st</sup> Respondent filed 'its' on **19/11/2021** way ahead of the Applicant while the Applicant did on **24/11/2021**. Although the Applicant filed his out of the time stipulated, this Court decided, in the interest of justice, to consider them. The Second Respondent did not file its, and there seems to be no evidence, by way of an Affidavit of Service, that he was ever served with the Application. The issue will come into play when the Court shall determine the merits of the Application, if it gets to that. However, as of now, the issue is neither here nor there since this Court is set to determine a point of law which has been ably canvassed by the parties who have already filed submissions.

5. For a court to be in a position to determine a matter before it, it has to first ascertain whether or not it has jurisdiction over the subject. This court will not belabor the point by defining in detail what jurisdiction means. Suffice it to say that

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”* (Reference: **John Beecroft Saunders, Words and Phrases Legally defined -Volume 3: I - N, 113**).

6. Jurisdiction is the footing upon which a court stands to dispense justice. Without it, the court will not shine and justice stand gazing into darkness. Thus, to a court, jurisdiction is everything. This was stated in the seminal case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi J of the Court of Appeal then held as follows:-

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

7. In **Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011**, the Supreme Court observed that:

*“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...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.”*

8. The two authorities cited immediately above clearly indicate courts of law can only exercise authority conferred upon them by law. Where it becomes plain that no authority is vested in them to do anything they have to cease taking any step in that matter before them. This is because courts, and by these I mean that, all judicial officers have to be the first beings to uphold the law. They have to lead the way so that others follow. Those who should join them and without hesitation and delay should be all who have sworn to uphold and respect the (rule of) law, beginning from the Constitution. This class consists of counsel and state officers and all men and women of goodwill. It would be a sad day for those who have been entrusted with this sacred duty to craft ways of circumventing the law.

9. That said, I wish to state that if it turns out that I have no jurisdiction over the subject herein, I will down my tools immediately I so find. If find otherwise, I am under the constitutional and statutory duty to dispense justice swiftly and without fear, favour or impartiality. That for me too is my sacred duty as a judge. Thus, I have to first find my footing - trace the source of jurisdiction of this Court - before I apply the existing facts herein to the law.

10. The jurisdiction of the **Environment and Land Court (ELC)** emanates from **Article 162 (2) (b)** of the **2010 Constitution** as read with **Article 162 (3)** thereof. The Sub-clause and Clause provide that

**“(2) 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.**

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”**

11. Parliament, in obedience to its constitutional duty of making law to actualize the provisions of the **2010 Constitution** which require to be given effect one of which was the above-cited one, enacted the **Environment and Land Court Act, No. 19 of 2011 (ELC Act)**. **Section 13** thereof gives the extent of the jurisdiction of this Court. **Subsection 1** confers this Court with both “*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 environment and land.*” (Emphasis by way of underline, mine). **Subsection 2** then provides in the relevant part that the statute confers the Court with the “*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;*

***(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.”***

12. **Subsection 3** bestows on the Court with jurisdiction over applications for redress over constitutional issues touching on “a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment”.

13. The issue that arises, from the above provisions in relation to the facts of this case is, where does the current dispute between the parties fall? Within or outside the jurisdiction of this Court? This dispute arises from a contract which apparently seems not to be working properly. It was entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in **May 2015** but its original was one which was entered between the 2<sup>nd</sup> Defendant and Family Bank in **July, 2014**. By it the Plaintiff gave his parcel of land, namely, **L.R. No. 8699/18 (I.R. No. 121934)** within **Kitale Municipality**, as a security for due performance.

14. The contract under reference was entered between the parties, under the provisions of both the **Land Act, Act. No 6 of 2012** and the **Registration of Titles Act, No. 3 of 2012** of the **Laws of Kenya**. It is clear that the contract emanates from the provisions of statutes which form part of any other applicable law relating to land, as contemplated under **Section 13** of the **ELC Act**, cited above. Further, it is not in dispute that this was done with the knowledge and consent of the Plaintiff. The only issue herein is whether such a contract as it is presently and the issues raised about it by the Plaintiff amount to the contracts contemplated in the **Sub-section (d)** of the provision and the disputes that the ELC has jurisdiction on respectively.

15. The Applicant submitted that the contract does not fall within the ambit of the Court of Appeal decision of **Cooperative Bank of Kenya vs. Patrick Kangethe Njuguna and 5 others [2017] eKLR**. In the case, their Lordships stated that “*Neither the cujus doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.*” Again, they stated, “*... a charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition (see Section 2 of the Land Act). As such, 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 use of the land (as defined above).*” They then went on to find that a charge does not constitute land use and that the contracts contemplated under **Section 13** of the **ELC Act** do should be those that relate to “use” of land and cannot be of the class of “mortgages, charges, collection of dues and rents.”

16. Learned counsel for the Applicant invited this Court to rely on the persuasive authority of **Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] eKLR** wherein my brother Munyao J., in finding that the ELC had jurisdiction to consider whether the sale of the security in question by the bank was properly carried out, stated as follows:-

***“This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act... You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another.”***

17. He also relied on the case of **Alphose Yankulije v One Twiga Road Limited & 2 others [2019] eKLR** which cited with approval Munyao J’s view that I have reproduced above, as rendered in the case of **Lydia Nyambura [2018]**. Counsel for the 1st Respondent purported to submit on the issue but did not cite any authority. What he did cannot pass as submissions: I wish he just wrote “*your Lordship, read paragraphs 25, 26, 27, 35, 36 and 41 of this authority, and find your way into the ruling.*” He ‘cleverly’ lifted, reproduced or copied and pasted word for word, as his own thinking, the entire of **paragraphs 25, 26, 27, 35, 36 and 41** of their Lordships’ statements in the Court of Appeal decision of the **Cooperative Bank of Kenya [2017]** case. His ‘submission’ was, “Your Lordship...” and then he went on with the reproduction, “The respective jurisdictions of the ELC and High Court...” His addition consisted of only two sentences loaded with a lot of grammatical errors. They were meant to sum up the issues but did little.

18. The fact that both the computer and internet showed up in life does not mean that people just google, copy and paste every other thing they come across while researching. What counsel did is reminiscent of those days in school when a teacher would give pupils or students assignments to do, one or two of the candidates copy from others and present that as their work. It did not auger well for values of honesty and hard work. Thank God this is not an examination: counsel would have failed it totally for reason of plagiarism. It is advisable for counsel and parties to give credit to the source of information they give to the courts. Had this Court not been familiar with the Court of Appeal authority, it could have fallen for and praised at heart counsel who ‘submitted’, saying, “Oh! What a great and brilliant mind!”, only for it to turn out to be an ‘extraction’ of the learned Lordships’ mind. Counsel are advised kindly not to encourage such lackadaisical culture. Those on whom are bestowed the oracles of assisting the court to deliver justice would do well to be analytical, critical thinkers and, importantly, intellectually (and holistically) honest.

19. The above notwithstanding, this Court agrees with the reasoning of my brother Judges Munayo and Yano in regard to the jurisdiction of the ELC regarding instruments created in respect to land. By virtue of **Sections 150 and 101** of the **Land Act** and the **Registration of Titles Act** respectively, the ELC is the only one that has jurisdiction over disputes that arise in relation to instruments created on land in relation to the statutes. This would include their validity, enforcement and the process of their realization. But does that mean the Court of Appeal was wrong in its reasoning in the **Cooperative Bank of Kenya** case. Not so. The issues of rendering accounts on those instruments, and collection of levies and dues stand alone and in the jurisdiction of the Commercial division of the High Court. This is a fine distinction which often confuses.

20. It is important to note that in that decision, the issue that clearly came out that the Court of Appeal considered was as explained in **paragraph 40** of the judgment. The Court stated:-

***“the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge***

**instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.**

21. I wish now to distinguish the two decisions of my brother judges from the above case and analyze them as against the instant circumstances. In the **Alphonse Yankulije [2019]** case, the Court was dealing with the issue of the sale of “apartment 2A2”. His Lordship Yano J stated this immediately after citing that authority: “*The plaintiff is seeking an order for specific performance among others which are disputes within the power of this court to determine. The issue of accounts has not arisen, although there is an alternative prayer for refund. The issues in this suit, in my view, fall within the jurisdiction of this court.*” The Court went on to say that the “predominant issue” in it was the sale of the apartment. In the **Lydia Nyambura** case, my brother Munyao J was dealt with the issue of whether or not a sale that had been carried out as a result of realization of the parcel of land given as security was proper. In any event the learned judge was dealing with a case that was filed in the Court in 2003, way before the current land laws regime came into existence. I even wonder how counsel would gather courage and raise the issue of jurisdiction of the court before my brother Munyao J when the **Section 30 of the ELC Act - Transitional provisions** - is clear on how courts are to handle matters commenced any Court or tribunal of competent jurisdiction before the Act.

22. In the instant case, what is the predominant issue? This should be gathered from the reading of the totality of the pleadings, the documents presented in support of the pleadings especially the witness statements and affidavits before the Court and the prayers. The Plaintiff, the Plaintiff’s witness statement dated **15/09/2021** and the Affidavit sworn by the Plaintiff on the same date and the Supplementary Affidavit sworn by him the on **05/10/2021**, give a narrative - his complaint.

23. If I hear the Applicant correctly, it is that he has an issue about the accounts on the amount loaned and demanded by the 1<sup>st</sup> Defendant. He has not issue with the charge instrument. It exists, he has honoured it in part, only that due to economic hardship, which includes the passing away of his son, one **Moses Namusei Askari** on **28/1/2020**, and the fact that, to him, the 1<sup>st</sup> Defendant is not going for recovery from the borrower but him as the guarantor. Had he this, he could have not attempted to make even one payment towards the amount demanded on the charge. And even then, he could have not been asking the bank for the accounts or even asking it to permit him sell part of the property charged as security or at all. As to non-service of the requisite statutory notice, it came out that he was when the bank attached the **Annexure JO 5** to the Replying Affidavit sworn by **Mr. Owiti**, to show that the Applicant actually received and signed the statutory notice on **29/06/2021**, he went totally silent about it when he swore the Supplementary Affidavit. Instead he introduced the aspect of a proposed buyer of part of the security and loan itself.

24. In sum, the predominant issue he raises is accounts in regard to the loan advanced. The issues of coercion, fraud or illegality of the agreement or the property being a matrimonial one are being raised by the Applicant to hide the real issue and try to paint a picture that that exists. To demonstrate how it is that way, first, it is the Applicant who willingly presented his land as security to the bank. He has not presented any evidence at all that he raised the issue of it being matrimonial property hence the need for spousal consent being required at the time of creation of the charge and the bank failed to act on that information. Unless he wants this Court to believe that he was part of a scheme to defraud the bank of money. Again, it is telling why it is him and not the wife who would be complaining about lack of spousal consent. For the reasons in this paragraph, I will not endeavor to discuss the meaning of fraud, coercion and illegality as understood in the law of contracts.

25. Secondly, by his actions or conduct, the Applicant has affirmed the charge or contract: he cannot be heard to retract on it again. He deponed in the two affidavits and stated in his witness statement that pursuant to the said charge, he has paid the sum of Kenya Shillings four million (**Kshs. 4,000,000/=**). This is contained at **paragraph 6** of his statement and **paragraph 9** of the Supporting Affidavit. He has not prayed for the refund of the said sum. Moreover, at **paragraphs 6, 7, 8 and 9** of his Supplementary Affidavit, the Applicant depones that he has even been permitted by the first defendant to sell part of his land in order to offset the loan; he has requested the first defendant to permit the buyer to buy off the loan but in vain. But of importance to note is that in **paragraph 9** of the Supporting he depones that he has pleaded for the bank to waive accrued interest and penalties to enable him redeem the account. Again, at **paragraph 19** he depones, “*I have never been given credible periodic statements of account since I started making payments to the bank. The bank has been heaping interest on the principal sum, penalties and interest. The debt herein keeps increasing by the day without the 1st defendant explaining to me or furnishing me any statement of account.*” At **paragraph 20** he states further, “my efforts to have reconciliation over the loan accounts, remove the excessive charges levied thereon and give me opportunity to redeem the account and/or any dues unjustifiably owing have been dismissed...” At **paragraph 21** he depones that, “it is clear that the 1st defendant has lumped exorbitant, unconscionable and unexplained interest on the loan, in gross violation of the well settled duplum rule.” These are purely issues of accounts. They do not fall within the jurisdiction of this Court.

### **Conclusion**

26. The upshot is that I find that this Court lacks jurisdiction to entertain this suit. I can do no more than down my tools. The suit is hereby dismissed with Costs to the Defendants. Consequently, the interim orders of maintenance of status quo issued on **15/11/2021** in favour of the Applicant are hereby vacated.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF NOVEMBER, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**