



**Mbutu v Middle East Bank Kenya Limited (Commercial Civil Case E530 of 2020)
[2021] KEHC 21 (KLR) (Commercial and Tax) (7 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 21 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E530 OF 2020**

JM MATIVO, J

SEPTEMBER 7, 2021

BETWEEN

BENJAMIN CLAY MBUTU PLAINTIFF

AND

MIDDLE EAST BANK KENYA LIMITED DEFENDANT

RULING

1. By a Notice of motion dated 25th January 2021, the defendant prays that this suit be dismissed or struck out and that the costs of this suit including the costs of the application be paid by the Plaintiff to the defendant.
2. The core ground in support of the application is that this court lacks jurisdiction to try and determine the issues raised in the Plaint. The applicant's ground that this court lacks jurisdiction is anchored in its argument that the Plaintiff is disputing sale of the suit property pursuant to which the entire interest and title in the property was transferred to a Purchaser. Further, the Plaintiff seeks cancellation of all entries at the Land Registry transferring the suit property from the Plaintiff to any third party pursuant to the Public Auction conducted by the defendant in exercise of its statutory power of sale.
3. The applicant also states that the Plaintiff is seeking a declaration that the defendant has breached its statutory duty of care to obtain a best price for the suit property sold pursuant to exercise of defendant's statutory power of sale. Further, the defendant took over physical possession of the suit property prior to completion of sale.
4. The applicant states that under Article 162 of The Constitution, Section 13(2) of the Environment & Land Court Act, Section 101 of the Land Registration Act and Section 150 of the Land Act, the Environment & Land Court has the sole and exclusive jurisdiction to hear and determine issues raised in this suit.



Plaintiff's Replying affidavit

5. The Plaintiff, Benjamin Clay Mbutu swore the Replying affidavit dated 17th February 2021 in opposition to the application. The nub of the affidavit is that the main suit as disclosed in the Amended Plaint dated 21st January, 2021 is based on the Charge and Further Charge dated 14th September, 2016 and 12th July, 2017 between the parties herein.
6. The Plaintiff states that the suit raises the following issues, namely, (i) unlawful deductions in the loan account; (ii). Irregular calculation of interest on the loan amount; (iii). Undervaluing of the property to achieve a fraudulent sale; (iv). Reimbursement of money unlawfully deducted from the account; and (v). Breach of chargee's obligation to secure best price during statutory sale. The Plaintiff states that the above issues do not relate to matters listed in section 13 of the Environment and Land Act, hence the application lacks merits and it should be struck off with cost.
7. Further, the Plaintiff states that this suit is purely commercial dispute falling within the jurisdiction of this court as envisaged in the Court of Appeal decision *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others*.¹

The applicant's advocates submissions

8. The applicant's advocate submitted that the cause of action pleaded in the Plaint are within the exclusive jurisdiction of the Environment and Land Court, and hence this suit is null and void ab initio, and of no legal effect. Counsel argued that the core causes of action are based on the registered Charges on the suit property, granted by the Plaintiff to the defendant, and the exercise of the statutory power of sale by the defendant. Further, the counsel argued that in the Plaint the it is pleaded -
 - i. That the Plaintiff is the registered proprietor of Title number Nairobi Block 112/95 ("the suit property") which was duly charged by the Plaintiff to the defendant as a security for a loan;
 - ii. The Plaintiff defaulted in repayment of this loan, and the defendant, as the Chargee, served a statutory notice to sale the suit property;
 - iii. The defendant without complying with the applicable laws, had the suit property auctioned, and sold it for Shs. 91.5 million;
 - iv. The defendant fraudulently undervalued the suit property in order to arrive at a predestined sale price;
 - v. The defendant forcefully took over possession of the suit property prior to completion of sale;
 - vi. The defendant deliberately breached its statutory obligations by failing to obtain the best price for the property; The defendant ignored its statutory obligations in selling the suit property to the detriment of the Plaintiff; The defendant did not act in good faith to obtain the best forced sale value of the suit property which it was obliged by law to get;
9. Counsel also argued that the Plaintiff Prays for a declaration that sale of the suit property by the defendant was in breach of statutory provisions and at a grossly undervalued price; Cancellation of all entries at the Lands Registry regarding transfer of the suit property to third parties by the defendant;

¹ {2017} e KLR.



and Damages of Shs.110,500,000.00 arising from the said sale at an undervalue, and in breach of statutory obligations.

10. Additionally, the defendant's counsel cited Articles 162(2)(b) and 162(3) of the Constitution and section 13(1) of the Environment and Land Court Act, section 101 of Land Registration Act, and Section 128 of the Land Act and relied on *In Re the Matter of the Interim Independent Electoral Commission*² which held that assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. Counsel also cited *Lilian S" v Caltex Oil (K) Ltd*³ which held that questions 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. The defendants counsel submitted from the above provisions the jurisdiction to determine the dispute disclosed in the Plaintiff is exclusively vested in the Environment and Land Court. He argued that this court has no jurisdiction to determine the issues raised in the Plaintiff.
11. The defendant argued that the Plaintiff amended its Plaintiff after it filed its defence and grounds of opposition objecting to this court's jurisdiction. He argued that the amended Plaintiff is incompetent because it was filed after the expiry of time without court's leave. Further, he argued that the amended plaintiff cannot cure pleadings which were incurably bad and of no legal effect. Counsel relied on *Joseph Gicheru v Michael Gicheru*⁴ in which the the Court of Appeal held that where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio.
12. Counsel also cited *Omega Enterprises v Kenya Tourist Development Corporation*⁵ in which the Court of Appeal dealing with an injunction granted without jurisdiction held that the order made was null void and of no legal effect citing Lord Denning in *Macfoy v United Africa co. Ltd*⁶ that "if an act is void, then it is in law a nullity. It is not only bad, but incurably bad." He also cited *Republic v Karisa Chengo*⁷ in which the Supreme Court cited *The Owners of Motor vessel Lilian v Caltex Oil Kenya Ltd*⁸ that jurisdiction is everything and without it a court cannot make a move.
13. Additionally, counsel cited *Boniface Waweru Mbiyu v Mary Njeri*⁹ which held that if a court determines a matter without jurisdiction, its decision will be a nullity. Lastly, the applicant's counsel argued that the Amended Plaintiff pleads the same facts as the original Plaintiff, except that the Plaintiff now does not seek cancellation of entries at the Land Registry.

The Plaintiff's advocates submissions

² {2014} 1 EA 1, at page 9.

³ {1986-1989} 1 EA 305.

⁴ {2013} e KLR.

⁵ {1998} e KLR.

⁶ {1961} 3 All E.R. 1169.

⁷ {2017} e KLR.

⁸ {1989} KLR 1.

⁹ {2005} eKLR.



14. The Plaintiff's counsel argued that in the amended Plaintiff it seeks the following reliefs:
- a. A declaration that the Sale by public auction of the property to wit Nairobi Block 112/95 by the defendant breached the duty of care to the Plaintiff by selling the property at a value that was grossly undervalued.
 - b. The defendant to pay the Plaintiff Kes. 110,500,000.00 being the damages assessed as the difference between the sale value of the property and the actual price that the defendant sold the property for.
 - c. Reimbursement of Kes. 5,000,000/= that was illegally deducted by the defendant on account of legal fees.
 - d. Interest at the prevailing lending rate from 1st October, 2020 until payment is made in full.
 - e. Costs of the suit.
15. Counsel argued that the entire suit is predicated on a charge and a further charge and the exercise of the defendant's statutory power of sale. He argued that a suit arising from a charge is a commercial dispute which falls within the jurisdiction of this court and that the prayers sought in the amended Plaintiff do not remove the matter from this court's jurisdiction. He cited Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others¹⁰ in which the court declined to uphold the argument that a charge constitutes use of land within the meaning of Article 162 of the Constitution. He argued that the dominant issue in the present case is breach of the chargees'
16. Regarding the question whether the amended Plaintiff is properly on record, he argued that whereas Order 2 Rule 13 of the Civil Procedure Rules provides that pleadings shall close 14 days after service of reply to defense, no defense was served upon the Plaintiff. Further, he pointed out that the Plaintiff filed a request for judgment in default of defense. He argued that a party may amend his pleadings before the close of pleadings. Counsel argued that the application lacks merit. He urged the court to dismiss it with costs.

Determination

17. The nub of the defendants' application is that this court has no jurisdiction to entertain the case. This argument is premised on the provisions of Article 165(5) of the Constitution which claws back the vast jurisdiction conferred upon the High Court by Article 165(1). Article 165 (5) provides in mandatory terms that the high court shall not have jurisdiction in respect of matters: - (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).
18. It is important to categorize with military precision the matters contemplated in the above Article which admittedly fall outside the ambit of this court's wide jurisdiction. For starters, the preamble

¹⁰ {2017} e KLR.



to the Environment and Court Act¹¹ provides that the act was enacted to give effect to Article 162(2) (b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes. Section 13 of the Act provides that: -

19. The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2) (b) of the Constitution and Section 13 of the Act. In this regard, the intention of the Constitution is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this court has no jurisdiction. In *Republic v National Land Commission & another Ex parte Cecilia Chepkoech Leting & 2 others*¹² the court stated that since the determination of the *R v Karisa Chengo & 2 Others*¹³ it has become clear the matters contemplated in the above provisions ought to be dealt with by the specialized courts.

¹¹ Act No. 19 of 2011.

- (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 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.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

¹² {2018} e KLR.

¹³ Supreme Court in *Petition No. 5 of 2015*.



20. The applicant's argument is attractive. However, it ignores one fundamental issue, which is, jurisdiction is determined on the basis of pleadings and not the substantive merits of the case, a position best elucidated by the South African Constitutional Court¹⁴ as follows: -

FOOTNOTE 15

Fraser vs ABSA Bank Ltd {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

21. The applicant appears to have drawn and filed its application reacting to the original Plaintiff. However, the Plaintiff was amended and the Plaintiff dropped some prayers and introduced new prayers. By amending the Plaintiff, the Plaintiff by a stroke of the pen cut the ground upon which the defendants application stood. Simply put the ground shifted. Ironically, the Plaintiff never appreciated this fundamental shift and its impact on its application.
22. The Plaintiff's case is now as enumerated in the amended Plaintiff. The moment the amended Plaintiff was filed, the original Plaintiff ceased to exist, and as explained later, the argument that it as filed without leave does not help the Plaintiff at all because the instant application is specific on the prayers sought. It is not challenging the amended Plaintiff. A reading of the amended Plaintiff particularly the prayers sought leave no doubt that the Plaintiff's claim is strictly a commercial dispute.
23. The Plaintiff's claim raises the following issues, namely, (i) unlawful deductions in the loan account; (ii). Irregular calculation of interest on the loan amount; (iii). Undervaluing of the property to achieve a fraudulent sale; (iv). Reimbursement of money unlawfully deducted from the account; and (v). Breach of chargee's obligation to secure best price during statutory sale. None of these issues relate to matters listed in section 13 of the Environment and Land Act, hence the application lacks merits and it should be struck off with cost.
24. The authorities cited by the defendant's counsel are distinguishable to the facts of this case. They all relate to clear absence of jurisdiction as opposed to the instant case where the dispute is clearly commercial in nature.
25. The other ground cited by the Plaintiff is that the amended Plaintiff was filed out of time without leave. As stated above, the application before me seeks to strike out the suit for want of jurisdiction. The application does not challenge the amended Plaintiff for being filed out of time. This argument was only introduced by way of submissions. Even if the application was to strike out the amended Plaintiff, I would still be reluctant to unleash such drastic orders. This is because decided cases are in agreement on the applicable principles in striking out pleadings. The principles were set out with sufficient clarity in D.

¹⁴ In the matter between *Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

" Jurisdiction is determined on the basis of the pleadings,¹⁵

¹⁵ *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) para 40. "... and not the substantive merits of the case... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by...{another court}, the High Court would lack jurisdiction..."



T. Dobie & Company (K) Ltd v Muchina.¹⁶ No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. The amended Plaintiff allegedly filed without leave cannot be said to be incurable because if need be the Plaintiff can seek leave or the court on its own motion can order that the amended Plaintiff be deemed as duly filed.

26. The rationale for the above reasoning is due to a realization that the exercise of the powers of summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.
27. A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment¹⁷ or where a pleading is vague or frivolous. An argument that a pleading is vague and embarrassing strikes at the formulation of the cause of action and its legal validity. It need not be directed at a particular paragraph within a cause of action but it is directed at the cause of action as a whole which must be demonstrated to be vague and embarrassing.
28. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.¹⁸ A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.¹⁹
29. In *Madison Insurance Company Limited v Augustine Kamanda Gitau*²⁰ the court stated:

¹⁶ {1982} KLR 1.

¹⁷ See *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* Civil Appeal No. 54 of 1999.

¹⁸ See *Kivanga Estates Limited v National Bank of Kenya Limited* {2017} e KLR.

¹⁹ See *Trust Bank Limited v Amin Company Ltd & Another* (2000) KLR 16.

²⁰ {2020} e KLR.

11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.



30. In Yaya Towers Limited v Trade Bank Limited (In Liquidation)²¹ the court stated: -
31. The amended Plaintiff is already on record. It is not beyond redemption. The alleged defect is curable by extension of time and an order that it be deemed to be properly filed.
32. In conclusion, in view of my analysis and conclusions herein above, it is my finding that the defendant's Notice of Motion dated 25th January 2021 lacks merit. Accordingly, I dismiss the said application with costs to the Plaintiff.

Orders accordingly

Signed, dated and delivered via e-mail at **Nairobi** this 7th day of **September** 2021

John M. Mativo

Judge

²¹ Civil Appeal No. 35 of 2000.

“ A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

