



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 123 OF 2019**

PAUL GATETE WANGAL.....1<sup>ST</sup> PLAINTIFF  
MICHAEL KANYI WAMBUGU.....2<sup>ND</sup> PLAINTIFF  
ANNE STELLA ONYANGO.....3<sup>RD</sup> PLAINTIFF  
JANE WANJIRA NJOGU.....4<sup>TH</sup> PLAINTIFF  
SAMUEL MWANGI NDUATI.....5<sup>TH</sup> PLAINTIFF  
RUTH KWALI.....6<sup>TH</sup> PLAINTIFF  
DANIEL STEPHEN OUMA.....7<sup>TH</sup> PLAINTIFF  
LUCY KATILO WAMWANDU.....8<sup>TH</sup> PLAINTIFF  
DOROTHY ACHIENG OMOLO.....9<sup>TH</sup> PLAINTIFF  
CHARLES WAHOME MURIUKI.....10<sup>TH</sup> PLAINTIFF  
JOHN WAWERU KARANJA.....11<sup>TH</sup> PLAINTIFF  
SULWE AGENCIES LIMITED.....12<sup>TH</sup> PLAINTIFF  
DAMUMA INVESTMENTS LIMITED.....13<sup>TH</sup> PLAINTIFF  
WILLIAM KIMANI AND GRACE TITO LEKASI...14<sup>TH</sup> PLAINTIFF

**VERSUS**

CAPITAL REALTY LIMITED.....1<sup>ST</sup> DEFENDANT  
HOUSING FINANCE COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT

**RULING**

1. This Ruling is in respect to the 2<sup>nd</sup> Defendant's Notice of Preliminary Objection dated 17<sup>th</sup> December, 2019. In the said Notice of Preliminary Objection, the 2<sup>nd</sup> Defendant has averred that the jurisdiction of this court has been erroneously invoked.
2. It has been averred that the cause of action herein is the exercise of the chargee's Statutory Power of Sale; that the suit pertains to Settlement of amounts due and owing to the 2<sup>nd</sup> Defendant on account of contractual relationship between the chargee and the chargor and that the suit is a commercial matter and should be tried by the High Court.
3. The 2<sup>nd</sup> Defendant averred in the Notice of Preliminary Objection that the exercise of a chargees' Statutory Power of Sale does not constitute a dispute relating to the environment, use and occupation of and title to land within the meaning of Article 162(2) (b) of the

Constitution as read with section 13 of the Environment and Land Court Act and that the Plaintiffs' Notice of Motion and Plaint should be struck out with costs to the 2<sup>nd</sup> Defendant. The Notice of Preliminary Objection proceeded by way of written submissions.

4. The 2<sup>nd</sup> Defendant's advocate submitted that the 2<sup>nd</sup> Defendant is a mortgage financier which advanced a loan facility of Kshs. 350,000,000 to the 1<sup>st</sup> Defendant for the purpose of constructing 76 maisonettes on L.R. No.12715/11742; that the said facility was secured by a revolving charge and a Further charge over the suit property and that the 1<sup>st</sup> Defendant also executed Debentures, Personal and Corporate Guarantees and Escrow Agreements.

5. It was submitted by the 2<sup>nd</sup> Defendant's advocate that the purpose of the Escrow Agreements was that all monies in respect of the sale of the 76 maisonettes were to be deposited in the 1<sup>st</sup> Defendant's Escrow Account with the 2<sup>nd</sup> Defendant; that as early as 2015, the 1<sup>st</sup> Defendant defaulted in the terms of the Escrow Agreement, the charge and further charge and that the 1<sup>st</sup> Defendant failed to provide proof of payment of the purchase price so that the sub-lessees and partial discharges would be registered.

6. Counsel submitted that the 2<sup>nd</sup> Defendant served the 90 day's Statutory Notice to the chargor to perform its obligations under the charge; that the said notice period expired and that on 7<sup>th</sup> October, 2019, the 2<sup>nd</sup> Defendant issued a Notice to sell the charged property.

7. Counsel submitted that the jurisdiction of this court flows from Article 162 (2) (b) of the Constitution as read with Section 13 of the Environment and Land Court Act; that the jurisdiction of this court is limited to the hearing and determination of disputes, relating to the environment and the use and occupation of title to, land and that the jurisdiction of the court has been erroneously invoked. Counsel relied on the cases of the owners of the *Motor Vessel Lillian "S" vs. Caltex Kenya Limited [1989] eKLR* and *Ernest Kevin Luchidio vs. Attorney General & 2 Others (2015) eKLR*.

8. The 2<sup>nd</sup> Defendant also relied on the circular of the Chief Justice which directed that all proceedings in which an injunction is sought to restrain the realization of securities, whether debentures or charges, are deemed to be commercial matters and should be heard by the High Court.

9. The 2<sup>nd</sup> Defendant's Counsel also relied on the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others [2017] eKLR* where the court held as follows:

***"Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to "use" of land as discussed herein above. Such contracts, in our view, ought to be incidental to the "use" of land; they do not include Mortgage, Charger, collection of dues and rents which falls within the Civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act, none of which concur the determination of accounting questions. Consequently, this dispute does not tilt within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, under Article 165(3) of the Constitution."***

10. The 2<sup>nd</sup> Defendant's Counsel submitted that since the dispute touches on whether or not the 2<sup>nd</sup> Defendant should exercise its Statutory Power of Sale over the suit property, the same is a commercial dispute in nature and that the same should be heard by the High Court.

11. It was submitted by the 2<sup>nd</sup> Defendant's advocate that under the charge, the 1<sup>st</sup> Defendant did not have authority to engage in any transaction over the suit property, including registering of Leases, without getting a written consent of the 2<sup>nd</sup> Defendant; that the transactions between the Plaintiffs and the 1<sup>st</sup> Defendant never received the 2<sup>nd</sup> Defendant's approval and that the purchase price was never deposited in the Escrow account as agreed.

12. Counsel finally submitted that the key prayers in the Plaint are subject to the overriding interest of the 2<sup>nd</sup> Defendant and that the dominant issue in this matter is settlement of the amount owed to the financier, the 2<sup>nd</sup> Defendant.

13. On his part, the Plaintiffs' advocate submitted that this suit goes well beyond the 2<sup>nd</sup> Defendant's charge; that the suit involves more than just the exercise of the 2<sup>nd</sup> Defendant's Statutory Power of Sale and that the suit is concerned with the performance of the Sale Agreements.

14. Counsel submitted that the 2<sup>nd</sup> Defendant's Statutory Power of Sale is but one of the aspects challenging the Plaintiff's possession of the maisonettes and that the exercise of Statutory Power of sale is not an action beyond this court's jurisdiction. Counsel relied on the case of *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another [2018] eKLR* where the court held that if the issue is collateral to the process of sale, and not severable, the ELC would still have jurisdiction to hear the whole of the dispute including related issues such as the amounts payable, where those cannot be severed from the dominant issue.

15. Counsel submitted that the exercise of the 2<sup>nd</sup> Defendant's Statutory Power of Sale is a collateral issue in this dispute; that the predominant issue is the enforcement of Sale Agreements and the protection of the Plaintiffs' possession of the maisonettes and that the High Court does not have the same dexterity as this court to determine the suit.

16. The 1<sup>st</sup> Defendant's Counsel adopted the submissions made by the Plaintiffs' advocate. Counsel submitted that the predominant issue in this matter is whether the Plaintiffs met their bargain and that none of the Defendants have filed their Defences.

17. The only issue the court is supposed to determine in the current Notice of Preliminary issue is whether this court has jurisdiction to determine the dispute before it. While doing so, the court will confine itself to the Plaintiff filed in this matter, and not to the various Affidavits filed by the parties. This is because the depositions in those Affidavits are in support of Applications, which Applications have not been heard by this court, or at all.

18. It is trite that the jurisdiction of this court is derived from the Constitution, the Environment and Land Court Act, and other statutes. The other statutes that confer jurisdiction on this court are the Land Act and the Land Registration Act. The requirement that a court or Tribunal can only deal with a dispute in respect of which it has the requisite jurisdiction cannot be overemphasized. In the case of *Lillian "S" vs. Caltex Kenya Limited [1989] eKLR*, the Court of Appeal held as follows:

***“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance 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 cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.***

19. This court’s jurisdiction emanates from the provisions of Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act (*the ELC Act*). Article 162(2)(b) of the Constitution provides as follows:

***“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.”***

20. Parliament enacted the ELC Act in compliance with the provisions of Article 162(3) of the Constitution which provides as follows:

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

21. Article 165(5) of the Constitution divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the Constitution.

22. The Supreme Court delved into the issue of the jurisdiction of this court in great detail in the case of *Republic vs. Karisa Chengo & 2 Others [2017] eKLR* in which it held as follows:

***“[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act... From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa...”***

23. In the Plaintiff, the Plaintiffs have averred that between the years 2012 and 2017, they were issued with letters of offer by the 1<sup>st</sup> Defendant to purchase maisonettes situated on Land Reference number 12715/11742, which they accepted; that they entered into Agreements of Sale for the said maisonettes with the 1<sup>st</sup> Defendant and that they transmitted the purchase price as per the Agreements to the 1<sup>st</sup> Defendant.

24. The Plaintiffs have averred that they were granted vacant possession of the Units they bought and have been residing in the said houses with their families; that they have invested in the suit properties by sinking a borehole, building a bio-digester plant and renovated their respective maisonettes to the tune of Kshs. 1,822,002.

25. The Plaintiffs’ case is that in breach of its obligation under the Agreements, the 1<sup>st</sup> Defendant has from the date of purchase to date neglected, refused and/or failed to grant them the Lease Agreements, Title Deeds and the relevant completion documents for the maisonettes.

26. The Plaintiffs have further averred in the Plaintiff that due to the 1<sup>st</sup> Defendant’s breach of the Sale Agreements, they have suffered and continue to suffer enormous loss and damages to the tune of over Kshs. 141,000,000.

27. The Plaintiffs have averred that the 2<sup>nd</sup> Defendant had notice of their interest on account of the letters dated 29<sup>th</sup> August, 2019 and 10<sup>th</sup> September, 2019; that vide the two letters, the 2<sup>nd</sup> Defendant informed the Plaintiffs that they had financed the construction of the suit property and that the 2<sup>nd</sup> Defendant asked the Plaintiffs to provide proof of payment of the purchase price.

28. It is the Plaintiffs’ case that their advocate provided to the 2<sup>nd</sup> Defendant proof of payment of the purchase price; that the 2<sup>nd</sup> Defendant’s advocate asked for additional sums towards stamp duty and legal fees from the Plaintiffs, which the 2<sup>nd</sup> and 5<sup>th</sup> Plaintiffs paid and that on

14<sup>th</sup> October, 2019, the Plaintiffs were served with a 40 day statutory demand letter dated 7<sup>th</sup> October, 2019, by the 2<sup>nd</sup> Defendant and addressed to the 1<sup>st</sup> Defendant.

29. The Plaintiffs averred that they are strangers to any agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. The Plaintiffs prayed for an order of specific performance directing the 1<sup>st</sup> Defendant to complete the Sale Agreements, and in the alternative, the 1<sup>st</sup> Defendant to pay them a total sum of Kshs.146, 617,800 as special damages for breach of contract.

30. The Defendants have not filed Defences in response to the Plaintiffs, meaning that the averments by the Plaintiffs remain uncontroverted. The 2<sup>nd</sup> Defendant's counsel submitted that this court does not have the requisite jurisdiction to resolve the dispute herein because the cause of action, namely, the exercise of a chargee's Statutory Power of Sale, does not constitute a dispute relating to the environment, use and occupation of and title to land within the meaning of Article 162(2) (b) of the Constitution as read with section 13 of the Environment and Land Court. Counsel cited the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others [2017] eKLR* in which the Court of Appeal held as follows:

**“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to “use” of land as discussed herein above. Such contracts, in our view, ought to be incidental to the “use” of land; they do not include Mortgage, Charges, collection of dues and rent which falls within the Civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”**

31. The ratio *decidendi* in the *Co-operative Bank case (supra)*, as I understand it, is that where the dispute concerns the contractual relationship between a chargor and a chargee, it is the High Court that has the jurisdiction to determine the issues arising out of such a contractual relationship, and not the Environment and Land Court.

32. Indeed, while considering if the court has jurisdiction in a matter where cross-cutting issues have been raised, like in this case, the court ought to look at the predominant issue at play, so as to establish if it has jurisdiction to deal with the matter or not. As pointed out by the Court of Appeal in the *Co-operative Bank case (supra)*, the dominant issue in that matter was the settlement of accounts, which is in the province of the High Court.

33. Considering the ratio *decidendi* in the *Co-operative Bank case (supra)*, the question that arises in this case is whether the only issue before the court is the contractual relationship between the 1<sup>st</sup> Defendant, who is the chargor, and the 2<sup>nd</sup> Defendant, the chargee.

34. The perusal of the Plaintiffs shows that the issues raised by the Plaintiffs go beyond the contractual relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Indeed, as alluded in the preceding paragraphs, the Plaintiffs have averred that they entered into specific Sale Agreements with the 1<sup>st</sup> Defendant in respect to the maisonettes that have been constructed on L.R. NO.12715/11742.

35. The Plaintiffs' case is that having paid to the 1<sup>st</sup> Defendant the purchase price as stipulated in the Sale Agreement, they are entitled to their houses, and if not, they should be reimbursed the purchase price together with other damages that they have incurred.

36. To show that they are not parties in the dispute between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiffs have averred that they were not parties to the arrangement that the 1<sup>st</sup> Defendant entered into with the 2<sup>nd</sup> Defendant.

37. Although the 2<sup>nd</sup> Defendant's exercise of Statutory Power of Sale is one of the issues in this matter, from the Plaintiffs, the 2<sup>nd</sup> Defendant will still have to address the issue of the validity or otherwise of the Sale Agreements that the Plaintiffs entered into with the 1<sup>st</sup> Defendant, and the role, if any, it played in respect to those Agreements.

38. Indeed, considering that the Plaintiffs have averred that they validly purchased the suit property, and that the Defendants should be compelled to transfer to them the suit properties, the predominant issue in this matter is the validity of the Sale Agreements the Plaintiffs entered into with the 1<sup>st</sup> Defendant, and not the contractual relationship between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant *per se*. Where a third party claims that he is entitled to land which is charged to a bank, the issue ceases to be purely of a commercial nature, but rather, the use, occupation and title to land.

39. That being the case, I find and hold that this court has the requisite jurisdiction to deal with this suit. The 2<sup>nd</sup> Defendant's Notice of Preliminary Objection dated 17<sup>th</sup> November, 2019 is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**