



**African Budget & Executive Homes Company Limited & another v
Middle East Bank Kenya Ltd & another (Environment & Land Case
E010 of 2023) [2025] KEELC 4513 (KLR) (17 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E010 OF 2023**

FM NJOROGE, J

JUNE 17, 2025

BETWEEN

**AFRICAN BUDGET & EXECUTIVE HOMES COMPANY
LIMITED 1ST PLAINTIFF
DAVID MUREITHI KANYI 2ND PLAINTIFF**

AND

**MIDDLE EAST BANK KENYA LTD 1ST DEFENDANT
SUSAN WAWERU T/A TREVO AUCTIONEERS 2ND DEFENDANT**

RULING

1. Following the ruling dated 23rd January 2025 the parties appeared before Court on 4th February 2025 and Mr Ismail told the court that he had filed an application dated 10th January 2025. The court ordered that Mr Egunza for the plaintiffs be served first with that application and that the application be placed before the court for directions. On the 5th of February 2025 the court ordered Mr Ismail to file and serve an affidavit in support of his application and ordered that the application shall be disposed of alongside the Preliminary Objection dated 18 December 2023 in so far as the objection therein is relevant to the issue of jurisdiction contained in the motion dated 10th January 2025. The application and the motion were to be disposed of by way of written submissions. On 25th March Mr Egunza confirmed that he had filed his submissions and so did Mr Ismail. Mr Kirui indicated that he would rely on the submissions filed by the first defendant. In the afternoon of the same day the submissions were highlighted. The ruling on the said application was scheduled for 29th May 2025 but the same could not have been delivered because on that day the court was having an official function that lasted the whole day.



2. The Notice of Motion dated 10th January 2025 brought under Article 165 (3) of *the Constitution*, Order 2 Rule 15 of the Civil Procedure Rules seeks that a suit be dismissed or struck out and the first defendants' costs of the suit and this application be paid by the plaintiffs on the following grounds:
 - i. This Honourable Court does not have any jurisdiction to determine the amount due and owing by the Plaintiffs on the security of a charge;
 - ii. This Honourable Court does not have jurisdiction to determine whether the First Defendant has duly exercised its statutory power of sale under the charge in its favour nor whether it has given due statutory notices;
 - iii. Nor does this Honourable Court have any jurisdiction to determine whether the Second Defendant is acting in accordance with the provisions of the *Auctioneers Act* and has given to the Plaintiffs notices of sale; and
 - iv. This suit is otherwise an abuse of the process of this Honourable Court.
 - v. Under article 165 3A of *the constitution* it is the high Court of Kenya which has the exclusive and unlimited jurisdiction to consider their legend causes of functions pleaded in the plaint hand or to Grant relief salt by the plaintiffs in respect thereof.
3. The application proceeds to further particularize at its foot this court does not have any jurisdiction to determine the amount due and owing by the plaintiffs on the security of a charge and that it does not have jurisdiction to determine whether the first defendant has duly exercise its statutory power of sale under the charge in its favor nor whether it has given due statutory notices. Also it is stated that the court does not have any jurisdiction to determine whether the second defendant is acting in accordance with a provisions of the Auctioneer's Act and has served upon the plaintiffs the notices of sale.
4. At the foot of the application, the applicant has clearly indicated that he will rely specifically on the decisions of the court in Cooperative Bank of Kenya Versus Patrick Kangethe Njuguna 2017 eKLR 2017 and Bank of Africa Kenya Limited Versus TSS Investments Limited 2024 KECA 410 eKLR.
5. This court has perused the Notice of Preliminary Objection dated 18th September 2023 filed by the first defendant and it has found that there is nothing in it relating to the issue of the jurisdiction of the court as framed and conceived in the application dated 10th of January 2025. Consequently, there is no need for this court to set out the terms of that Preliminary Objection herein. In my view it was restricted to the applications filed on 11th August 2023 and 7th September 2023 which are not the subject of this ruling. Not much has come out of the affidavit in support of the application save that the court does not have jurisdiction to hear and determine this suit or any of the causes of action pleaded therein. Indeed, it merely reiterated word for word a contents on the face of the application dated 10th January 2025.
6. What matters in this matter is that the issue of jurisdiction has been brought to the fore by the parties and through an application and in a manner that it had not been presented before, and the court has taken it up and asked the parties to make their representations on it; whatever other applications or objections that may be or have been raised in the suit, the importance of the question of jurisdiction now relegates them to the back seat. They must await the determination of this court on the issue of jurisdiction.

Plaintiffs' Response.

7. The Plaintiffs filed grounds of opposition dated 17/3/2025 and a replying affidavit sworn on the even date by the 2nd Plaintiff. The grounds were framed as follows:



1. That application dated the 10th day of January 2025 fails the requisite threshold as enunciated by the provisions and definition of an application by dint of Order 51 Rule 3 Of the Civil Procedure Rules which proviso is couched in mandatory terms;
 2. That the lack of a supporting affidavit to the application dated the 10th day of January 2025 is not a mere technicality that can be cured by the discretion of the Honourable Court, suo motto the application ought to be struck out for want of form;
 3. That even if the said application was to be granted a cursory glance the same application invites the Honourable Court to preclude a Constitutional misnomer by sitting on its own appeal; a position the 1st and 2nd Plaintiff reiterate is frowned upon by Constitutionalism;
 4. That the application dated the 10th day of January 2025 does not raise new issues as to be within the threshold of an application for jurisdictional dismissal as the said application is word for word similar as the Preliminary Objection raised by the 1st Defendant, further it does not establish any error apparent on the face of the record and the same fails in its entirety.
8. In his replying affidavit, the 2nd Plaintiff contends that the said application is an abuse of the court process, constitutionally untenable, and amounts to the court sitting on its own appeal.
 9. The 2nd Plaintiff argues that the application is res judicata, as it replicates a previously filed Preliminary Objection dated 18th September 2023. He further asserts that both Article 165 of *the Constitution* and Section 13 of the *Environment and Land Court Act* bestow upon the court original and appellate jurisdiction, particularly where alleged violations of rights and freedoms are raised. He further contends that the Defendants have contravened provisions of the *Land Act*, matters which fall within the exclusive jurisdiction of the Environment and Land Court. He maintains that the threshold for granting the orders sought in the impugned application has not been met and that the court should not be invited to prematurely dismiss the suit.
 10. Mr. Kanyi emphasizes the right to a fair hearing, the need to uphold the rule of law, and the public interest in allowing the matter to proceed to full hearing. He prays that the application be dismissed to allow the matter to be determined on its merits.

1st Defendant's Written Submission

11. In the first defendant's written submissions dated 10th March 2025, it is stated that the plaintiff's principal causes of action or complaints made in the plaint are against the first defendant bank. It is submitted that under Article 162 (2)(b) and 165 (5)(b) of *the Constitution*, this court does not have jurisdiction to hear and determine this suit or any of those courses of action or complaints afore mentioned. It is further submitted that under Article 165 (3)(a) of *the Constitution*, it is the High Court which has the exclusive and unlimited jurisdiction to determine all civil matters including those causes of action.
12. The applicant cites a number of cases including Cooperative Bank of Kenya Limited Versus Patrick Kangethe Njuguna & 5 Others 2017 eKLR; Joel Kyatha Mbaluka Trading as Mbaluka & Associates Advocates Versus Daniel Ochieng Ogolla T/A Ogola Okello and Company Advocates and on the strength of the holdings thereof, they aver that this court has no choice but to strike out or dismiss this suit as against the defendant bank with costs including the costs of the application.



Plaintiff's Written Submission

13. The Plaintiffs oppose the application dated 10th January 2025 on both constitutional and statutory grounds. They submit that the Environment and Land Court derives its jurisdiction from Article 162(2) of *the Constitution* and the *Environment and Land Court Act*, 2011, and is therefore the proper forum to hear disputes concerning land use, occupation, and title.
14. The Plaintiffs contend that the dispute involves complex matters beyond a mere contractual or recovery dispute, citing that the 1st Defendant has already received Kshs. 31 million from the Plaintiffs and is in the process of acquiring an additional Kshs. 18 million from a transaction involving property listed for auction. They argue that the Defendant is misusing the statutory power of sale based on privileged transactional knowledge involving L.R. No. MN/I/6660 and MN/I/9990 Links Road.
15. They further argue that the application seeks to retroactively apply legal principles to a suit that was properly filed on 11th August 2023, prior to the judicial pronouncements referenced by the Defendant. They invoke the principle of non-retrogression, asserting that vested legal rights cannot be impaired retroactively, and that legitimate expectation demands a progressive, not retrospective, application of the law.
16. In support, the Plaintiffs distinguish the cited case of Bank of Africa Kenya Ltd v T.S.S Investments Ltd (2024) KECA 410 (KLR) and assert that their case does not fall within the scope of the Superior Court's ruling limiting jurisdiction. Should there be any doubt regarding jurisdiction, they argue that the proper course would be a transfer of the matter rather than dismissal.
17. Finally, the Plaintiffs urge the Court to apply the oxygen principle (just, expeditious, proportionate resolution of disputes) and the inherent jurisdiction of the Court to strike out the application and allow the matter to proceed to full hearing.

Analysis and determination

18. The plaintiffs filed this suit on 11th August 2023. The plaintiffs claim that the second defendant is the registered and the beneficial owner of title number Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259 Kilifi/ Mtwapa/3260, LR No MN/I/6600, LR No 29965 LR No. Mainland North/IV/906 and LR No. Mainland North/908. The first and second plaintiffs desired to develop off plan real estate housing projects and approached the first defendant for financial facilities which first defendant approved. The first defendant advanced Kenya Shillings 50, 500,000/- to the plaintiffs which credit facility was guaranteed by the second plaintiff vide a charge registered as against the properties number Kilifi/ Mtwapa/3259 and Kilifi/Mtwapa/3260. Personal guarantees for the same were provided by each of the first plaintiff's directors, being the second plaintiff and one Yvonne Wangari Karanja. The first and second plaintiffs received the loan facility in two tranches. The first tranche comprised of Kenya Shillings 29, 250,000 and was advanced for a period of 60 months effectively indicating that the due date for the payment is 30th September 2026. There is silence as to the second tranche.
19. The plaintiffs state that they were emboldened by that loan facility and they embarked on mobilization implementation and development of housing units on the properties known as Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260, LR No. Mainland North/IV/906 and LR No. Mainland North/908 for which 40 units so far have been sold to third parties with the due sanction and knowledge of the first defendant.
20. The plaintiffs aver that it is from the process of the sale of the off-plan housing units and fully developed housing units premised on the low cost housing model that they have progressed repayments of the



loan facility to the tune of Kenya Shillings 31,000,000/= which moneys have been acknowledged by the first defendant.

21. The plaintiffs further aver that they commenced the sale of LR No MN/I/6600, with the knowledge and involvement of the first defendant to shore up finances and at the same time exercise redemption of the loan facility advanced by the first defendant. That sale was to generate an additional Kenya Shillings 18,000,000 which was to be paid directly to the first defendant.
22. However, it happened that the first and second defendants advertised to the suit property known as LR number 29965 and the public auction was scheduled for that 31st July 2023. It is the plaintiff's claim that prior to the advertisement of this suit property for sale no requisite statutory notice to the first and second plaintiffs and/or to the guarantors was issued.
23. Later on, the plaintiffs learned that the defendants had advertised for sale by public auction or private treaty of the properties known as Kilifi/Mtwapa/3258 give him Kilifi/ Mtwapa/3259 Kilifi/ Mtwapa/3260, LR No MN/I/6600, LR No 29965 LR No. Mainland North/IV/906 and LR No. Mainland North/908 on 17th August 2023.
24. The plaintiff's further stated that the sale scheduled for that 31st July 2023 was rescheduled to 17th August 2023 and that it was riddled with anomalies.
25. It is alleged that the defendant clustered the suit properties as available securities for sale via public auction or private treaty scheduled for 17th August 2023 yet the only securitization and charge is solely in respect of two properties that is, Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260,
26. It is pleaded that for the above reasons the intended sale is riddled with fraud and criminal enterprise wholesome disenfranchisement of property contrary to the provisions of the constitution and the law, tainted with unorthodox commercial practice and contrary to the legitimate expectation, and also contrary to the terms of the charge registered over all the properties no Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259, Kilifi/Mtwapa/3260, LR No MN/I/6600, LR No 29965 LR No. Mainland North/ IV/906 and LR No. Mainland North/908.
27. It is alleged that the issuance of the notification of sale of immovable property in respect of the stated properties is illegal null and void ab initio since the charge instrument anticipates a repayment period of 60 months from the date of execution; as such, the notification of sale of immovable property can only be issued after the expiry of the said repayment, which extends to the 30th September 2026.
28. The plaintiffs accused the defendant of clogging their equity of redemption.
29. Some of the particulars of fraud misrepresentation and illegality expressed against the defendants are that they concealed material facts by failing to disclose of the separate and distinct contractual obligations between the first second plaintiff and themselves over the Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260, LR No MN/I/6600, LR No 29965, LR No. Mainland North/ IV/906 and LR No. Mainland North/908, that they have not issued the requisite 3 months' notice demand in respect of the charge to the suit properties, that they have failed to carry out valuation and establish the forced sale value, that they have failed to disclose the loan amount drawn out in respect of the charge and that they have lumped the loan accounts into one. It is also alleged that the first defendant has failed to disclose the existence of a separate letter of offer in the aggregate sum of Kenya Shillings 90,000,000 that was never advanced, and that they have consequently amalgamated all the loan facilities including the amounts that have never been advanced into a single account, and that thus the interest rate charged has increased contrary to express provisions of Sections 39 And 44 of the Banking Act Cap 488.



30. The prayers sought in the plaint are as follows:
- a. A declaration that the notification of sale of immovable property and sale of immovable property in exercise of statutory power of sale issued by the second defendant on instructions of the first defendant is untenable void and illegal ab initio;
 - b. A permanent injunction barring the first and second defendant jointly and severally either by themselves agents, servants, workers, employees, proxies and/or any other person whomsoever claiming through them from further precipitate action, disposition, wasting, further advertisement in any of the local dailies, selling by public auction or private treaty trespassing unto property and/or in any manner disposing (of) or dealing with the properties known as Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260, LR No MN/I/6600, LR No 29965, LR No. Mainland North/IV/906 and LR No. Mainland North/908;
 - c. A complete and independent forensic audit of the charge in respect of the charges floating over to all that property known as title numbers Kilifi/Mtwapa/3258, Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260, LR No MN/I/6600, LR No 29965, LR No. Mainland North/IV/906 and LR No. Mainland North/908;
 - d. Such further relief as this court may deem fit to grant;
 - e. Costs and incidentals thereto.
31. The defendants apparently having been served, A. A. K. Esmail, advocate, filed a Notice of Appointment on 20th September 2023. They filed the replying affidavit of Elizabeth Ongare, Manager, Credit Department of the first defendant, on 12th October 2023. In that affidavit it is stated that the plaintiffs were offered a banking facility to the tune of 50,000,000 by the first defendant. This facility was secured by a charge over plots number Kilifi/Mtwapa/3258 give him Kilifi/ Mtwapa/3259 Kilifi/Mtwapa/3260, LR No MN/I/6600,
32. Later, the parties in terms of a letter by the first defendant dated 14th September 2021, varied the terms of the facility agreement to include addition of properties as security for the banking facility agreed to be given to the borrowers, namely, LR No 29965 LR No. Mainland North/IV/906 and LR No. Mainland North/908;
33. The terms and conditions as amended were that the entire facility was repayable by the borrower on demand in writing by the bank, availability of the facility of subject to absence of the event of default as defined in the facility agreement, the statements of the bank relating to the facilities in the absence of manifest error were to be conclusive and binding on the borrower, the granting of the facilities was subject to the bank receiving all security and other documents listed in the facility agreement, the failure of the borrower to perform any of its obligations under the facility agreement would constitute an event of default, and that on the occurrence of any event of default the banks' obligation to provide the facilities would be terminated.
34. The first defendant states that bank charges securing an aggregate facility of Kenya Shillings 50,000,000 were registered at Mombasa over all the said 7 properties all belonging to the chargor and that the chargor executed them all. It is stated that the charges secured continuing securities for amounts lent or to be lent to the borrower by the bank which were recallable in demand in writing by the bank.
35. Subsequently the plaintiffs drew down the approved facilities in two tranches of Kenya Shillings 21,250,000 on 22nd October 2021 and Kenya Shillings 27,350,000 on 20th December 2021 respectively to make the total disbursed facilities to be Kenya Shillings 48,600,000.



36. In July 2022 the plaintiff approached the bank to restructure the facility to give the plaintiffs additional financial facility and to pay off the amount due by the borrower to Rafiki Microfinance Bank Limited and the first defendant bank agreed and sent the borrowers an offer dated 18th July 2022 offering facilities in aggregate amounting to Kshs 139, 600,000 which included the amounts already disbursed in the year 2021 and which was also subject to the terms and conditions mentioned in that offer, which included a requirement that the facilities be also secure by charges over the properties specified there in.
37. The plaintiffs accepted the offer of additional facilities and the terms specified herein above in respect of the earlier facility were applied to the new facility.
38. Still in July 2022, the bank requested the borrower and the borrower agreed to provide a first and floating debenture over all the plaintiff's assets as an additional security for the entire facility. A debenture dated 15th September 2022 was executed and registered.
39. The deponent states that the facilities were due upon written demand by the bank, and if not so demanded they were repayable within a period of 60 months by way of monthly installments and consequently the statutory sale initiated by the bank was neither premature nor contrary to any of the express contractual terms agreed between the parties. In addition, the deponent stated, neither the borrower or the chargee at any time ever serviced the said facilities granted by the bank diligently or on time or at all. Consequently, by its letter of 21st December 2022 the bank demanded from the borrower the total amount repayable by it and pointed out at the borrower had failed to perform a number of its obligations. The bank's demand was for immediately payment of the total sum of Kenya Shillings 46, 834,643/58. In response the chargor, on behalf to the borrower, sent a communication dated 30th December 2022 indicating that he was expecting payments of the funds in the first week of January 2023 after which he would regularize their account. However, no payments were made as promised and the bank issued to the chargor a 90 days' statutory notice dated 17th January 2023 demanding Kenya Shillings 47,462,936/50 and called for the regularization of all the events of default; it further notified the chargor that it would exercise its statutory power of sale or resort to any other remedy available to it. A similar letter was sent to the borrower. Both letters were forwarded to the chargor or together with the email of 17th January 2023 and also delivered to the chargor and the borrower at their places of business in Mombasa. On 25th January 2023 the said letters were forwarded to both the borrower in the chargor respectively by way of registered post.
40. On 19th April 2023, the bank issued the charge or with a notice to sell the charge properties in exercise of its rights and copied the said letter to the borrower.
41. By a letter dated 26th April 2023 the bank instructed an independent valuer to carry out valuation of the suit property in accordance with Section 97 of the Land Act. Valuation reports were prepared.
42. On 2nd May 2023 the chargor again informed the Mombasa Branch Manager of the bank that he was discussing a joint venture partnership and would be able to pay off the debt.
43. On 31st May 2023 the bank instructed the second defendant who is a licensed auctioneer to sell the property by public auction at the best price obtainable subject to the reserve price. To the bank's knowledge the auctioneer personally served the notification of sale dated 2nd June 2023 upon the chargor who acknowledged receipt thereof by signing on its copy.
44. Vide letter dated 6th June 2023 the chargor requested the bank not to sell the charged properties by public auction and to let them be sold by private treaty, and indicated the prices of each one of them at which he could get buyers.



45. That the sale of the property in Tana River that is LR Number 29965 had not been barred by this court's injunction order issued on 22nd July 2023 and it was sold by public auction on 17th August 2023.
46. The deponent states that there is a suit ELC E008 of 2023 Mombasa seeking to injunct the defendants from selling plot number Mainland North /IV/906 and that an injunction was issued in the form of a status quo order in that case on 17th August 2023; that there is also another suit ELC E009 of 2023 Mombasa seeking to injunct the sale of Mainland North /IV/908. An injunction was issued in that suit on 17th August 2023.
47. The defendant bank denies that the bank received 31,000,000/= in repayment into the two accounts which were secured by the charges on the suit properties and avers that only the sum of Kenya Shillings 11,966,004.80 was received from the plaintiff in respect to accounts leaving a balance of 51,947,765/67.
48. Regarding the proposal by the plaintiffs to sell one of the charged properties being Mainland North/ I/6660 for Kenya Shillings 18,000,000 it is stated that the bank agreed to it, and placed the condition that the buyer paid the deposit of 5,000,000/= before the Auction date of 17th August 2023 and if the buyer's advocate give to the bank an undertaking for payments for the balance. However, no such deposit was ever made to the bank, and it is not known whether there was any sale agreement that was executed between the plaintiffs and the proposed buyer.
49. It is alleged that the plaintiff failed disclose to Court existence of the other litigations and issuance of injunctive orders in those litigations, or that they had been aware of the planned sale by way of public auction to be held on 17th August 2023. Such concealment is said to have been made in an attempt to obtain injunctive orders before this court, and that the plaintiffs have come to court with dirty hands.
50. This court has taken the pains to set out all the particulars of the plaint at great length in order that it may be easy to see the nature of the plaintiff's cause of action in while dealing with an application that may have great ramifications. Since there is no defence on the record this court has also taken time to set out the claims of the 1st defendant contained in a replying affidavit already set out in the court record because of the presumption that it has the kernel of what would later form the defence in the case if it were to proceed to hearing.
51. The current quest is to establish if this court is possessed of jurisdiction in the matter in view of the cause or causes of action expressed in the plaint.
52. It is clear that the dispute at hand between the plaintiffs and the defendants revolves around the issue of legal charges registered over land securing credit facilities offered by the defendant bank and accepted and drawn down by the borrower, and a floating debenture over all the assets of the 1st plaintiff. The dispute is over how much the plaintiffs owe the 1st defendant and whether the defendants issued the appropriate notices under the law before they commenced the process of realization of the 1st defendant's security in the charged lands. There is clearly no dispute regarding who owns the suit lands or the validity of the titles thereto.
53. The provisions of Article 162(2)(b) and (3) of *the Constitution* of Kenya 2010 read as follows:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and
- (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).

54. The *Environment and Land Court Act* enacted to give flesh to Article 162(2)(b) and (3) provides as follows at Section 13:

“ 13. Jurisdiction of the Court

- (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.
- (5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;



- (e) specific performance;
- (f) restitution;
- (g) declaration; or
- (h) costs.”

55. Does the cause of action herein, or the matters described in paragraph 50-52 herein above, above fall under the umbrella of the “environment and the use and occupation of, and title to, land” as envisaged in Article 162(2)(b)?
56. That question is answered by the holding in *Cooperative Bank of Kenya Versus Patrick Njuguna* 2017 eKLR 2017 where the court stated as follows:

- “ 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.
36. By definition, 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). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/ disposition over the property.



38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.”
57. Also, *Bank of Africa Kenya Limited Versus TSS Investments Limited* 2024 KECA 410 eKLR held as follows:
- “In view of the foregoing, the only question that falls to be determined is whether the respondents’ suit against the appellants involved “... matters relating to environment and the use and occupation, and title to land”. We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant’s exercise of its statutory power of sale over the suit properties on the basis of the alleged tenancy relationship with the 3rd respondent.”
58. *Joseph Gichero Versus Michael Gichero* 2013 eKLR Court of Appeal held as follows on the issue of jurisdiction:
- “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. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate, could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.”
59. Other numerous decisions exist on the same issue. The parties herein have engaged in this litigation for quite some time without any of them raising the issue of jurisdiction of the court. Does that bar the 1st defendant from raising the issue now? It is clear from *Lemita Ole Lemein Versus Attorney General & Others* 2020 eKLR that:
- “49. jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal.”
60. Finally, in the case in *In the Matter of the Interim Independent Electoral Commission (Applicant)* [2011] KESC 1 (KLR) the Supreme Court held as follows:
- “29. 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. The classic decision in this regard is the Court of Appeal decision in *Owners*



of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“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.”

30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”
61. In the light of the holdings in the Court of Appeal decisions cited above this court has no hesitation in holding that it has no jurisdiction to hear and determine the presents suit. In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) and Lemita Ole Lemein (supra) is demonstrative that though the issue of jurisdiction be raised late, the it can still be addressed at any stage in the proceedings. Consequently, this court is of the view that the objection based on of want of jurisdiction has been properly raised.
62. The next question raised by the submissions of both parties is whether the suit ought to be dismissed or struck out, or whether it should be transferred to the proper court having jurisdiction. Lillian “S” V Caltex Oil (K) Ltd 1986-1989 1 EA 305 dictates that at the point that the court finds it has no jurisdiction, it should just down its tools immediately. It is stated in that case as follows:

“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.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
63. The above case law calls for the conclusion that this court can not now make any other substantive or procedural order in this matter, and that in respect of this suit which has not been heard on its merits, the only recourse of the court is to strike it out.
64. The upshot of the foregoing is that I therefore strike out the plaint dated 11th August 2023. Defence had not been filed in the matter and I find it fit and just in the circumstances to order, which I hereby do, that each party shall bear its own costs of the suit. For the avoidance of doubt all the interim orders that had been granted and extended from time to time are hereby vacated. It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

