



Obara t/a Obara & Obara Advocates v Kanyi & another (Environment and Land Case E035 of 2025) [2025] KEELC 6163 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E035 OF 2025
SM KIBUNJA, J
SEPTEMBER 24, 2025**

BETWEEN

JAMES ODUOR OBARA T/A OBARA & OBARA ADVOCATES PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT

STANBIC BANK KENYA LIMITED 2ND DEFENDANT

RULING

1. The plaintiff filed the notice of motion dated 26th March 2025 seeking for among others an order of injunction restraining the defendants, their servants, agents and or anybody claiming through them from selling, disposing or in any other manner dealing, or interfering in any manner howsoever with the suit property known as Subdivision No. 907 Section 1V/Mainland North, described as Maisonettes Nos. 1, 2 and 3, pending the hearing and determination of this suit. The application is based on the seven (7) grounds on its face and supported by the affidavits of James Oduor Obara, sworn on the 26th March 2025 and 10th April 2025 in which he inter alia deposed that on 29th October 2015, he entered into a sale agreement with the 1st defendant over Maisonettes numbers 1, 2, & 3 on land parcel Subdivision No. 907 Section 1V/Mainland North, suit property, at a consideration of Kshs.5,200,000; that the Maisonettes were upon completion handed over to him, and have been following up with the 1st defendant for the lease documents without avail; that his advocates wrote to the 1st defendant on or about 14th August 2023, to perform his part of the contract but no action or reply was forthcoming; that on 3rd March 2024, the 2nd defendant advertised its intention to sell the suit property among others through the Daily Nation of that date; that the 1st defendant had used the suit property as security for a loan of Kshs.21,000,000 from the 2nd defendant while knowing he was technically not the legal owner; that the 2nd defendant failed to do due diligence as it could have realised that the suit property had been sold to him and he was in possession; that the actions of the defendants have put his investment at risk and injunction order prayed should be granted.



2. The application is opposed by the 2nd defendant through the replying affidavit of Angela Njeri, Manager, Non-performing loans, sworn on the 2nd April 2025, in which she among others deposed that this court has no jurisdiction as the dispute herein arises from the 2nd defendant's exercise of statutory power of sale in respect of a loan facility to 1st defendant; that the suit property is situated at Mtwapa, Kilifi County and suit should have been filed before High Court Malindi; that there is no privity of contract between the 2nd defendant and the plaintiff; that under facility letter dated 28th August 2017, 1st defendant had obtained from the 2nd defendant a loan of Kshs.42,000,000, out of which Kshs.21,000,000 was secured by a first ranking legal charge created by the 1st defendant in favour of 2nd defendant over several properties including the suit property herein, and the balance was secured by other properties; that the purpose of the charge was to secure repayment of the principal amount and other monies accruing hereon pending payment in the prescribed manner; that the 2nd defendant did due diligence, had valuations done and confirmed the suit property was registered in the name of 1st defendant, and no encumbrances had been registered against the title; that the 2nd defendant is not a party to the agreement between the plaintiff and 1st defendant and was not involved in their transactions; that the alleged sale agreement between the plaintiff and 1st defendant cannot be admitted in evidence as it has not been stamped contrary to the *Stamp Duty Act* chapter 480 of Laws of Kenya; that a sale agreement is not a transfer and does not transfer legal rights to a purported purchaser and cannot supersede the legal rights of a chargee; that the 1st defendant has defaulted in the repayment of the loan facilities, which as at 18th February 2025 stood at Kshs.99,406,809.72, Kshs.56,721,367.06 and Kshs.46,461,742.22 respectively, and has been served with the 90 days' notice, as well as the 40 days' notice dated 5th June 2023, and the 2nd defendant is entitled to exercise its power of sale; that the 2nd defendant risks suffering immeasurable loss and damage if the application is granted; that the plaintiff has not demonstrated that he would suffer irreparable injury that cannot be compensated in damages by the 1st defendant.
3. The court issued directions on filing and exchanging submissions on 3rd April 2025, and subsequently, the learned counsel for the plaintiff and 2nd defendant filed theirs dated the 23rd April 2025 and 30th April 2025 respectively, which the court has considered.
4. The main issues for the court's determinations in the application are as follows:
 - a. Whether the court is with jurisdiction to hear and determine the issues in this suit.
 - b. Whether there is a privity of contract or cause of action between the plaintiff and the 2nd defendant.
 - c. Whether the plaintiff has met the threshold for temporary injunction order to issue at this interlocutory stage.
 - d. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior court's decisions cited thereon, and come to the following conclusions:
 - a. The learned counsel for the plaintiff has submitted that the Court has jurisdiction in this suit as it is about land that the 2nd defendant proposes to sell by public auction, and on which sits the three maisonettes purchased he purchased from the 1st defendant. As rightly cited by the counsel the Court's jurisdiction, is as set out in section 13 of the *Environment and Land Court*



Act No. 11 of 2011. To understand that section properly, it is important to start with Article 162(2)(b) of the Constitution of Kenya 2010 which provides that:

- “(2) Parliament shall establish courts with 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.”

b. To actualize or operationalize the said provision of the Constitution, Parliament enacted the Environment and Land Court Act No. 19 of 2011, which at section 13 provides as follows:

“13(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 and fundamental freedom relating to a clear 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 tribunals in respect of matters falling within the jurisdiction of the Court.

.....

(7) 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;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs.
- c. The learned counsel for the 2nd defendant has referred to the above provisions of *the Constitution* and legislation and submitted that the Court is without jurisdiction. The learned counsel cited the following two decisions to buttress his position:
- i. Co-operative Bank Limited versus Patrick Kangethe Njuguna & 5 Others (2017) eKLR, where the Court of Appeal held that:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under section 13 of 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 mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.
 - ii. Thomas Mutuku Kasue versus Housing Finance Company Limited (HFC) & Another [2021] eKLR, in which the ELC held that:

“The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with the dispute in which the predominant issue is the exercise of statutory power of sale by the charge has since been settled by the Court of Appeal in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 Others [2017] eKLR,.....

The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the charge, it is my finding that this court does not have jurisdiction to hear and determine this suit.”
- d. The counsel further submitted that as the intention of the plaintiff through prayers (2) and (3) of the application dated 26th March 2025, is to stop the 2nd defendant from exercising its statutory power of sale, then he has approached the wrong court as it is High Court that is with jurisdiction. I am in agreement with the 2nd defendant on that position, which ideally could have been enough to settle the application and the suit through striking it out, had the 2nd defendant been the only defendant. However, in view of the plaintiff’s averments and prayers



in the plaint against the 1st defendant, I find the order that will serve the justice of the case is to strike out the 2nd defendant from the suit as the plaintiff has failed to establish a cause of action against it and the two had no privity of contract.

- e. That from the averments at paragraphs 4 and 7 of the plaint the plaintiff bought the suit property from 1st defendant in 2015, but the latter fraudulently charged it to the 2nd defendant in 2017 for a loan facility of Kshs.21million. That prayers (2) & (3) of the instant application seeks for “an order of injunction restraining the defendants, their servants, agents and or anybody claiming through them from selling, disposing or in any other manner dealing, or interfering in any manner howsoever with the suit property known as Subdivision No. 907 Section 1V/Mainland North, described as Maisonettes Nos. 1, 2 and 3, pending the hearing and determination” of the application and the suit respectively. I agree with the 2nd defendant’s contention that these two prayers if granted have the effect of stopping it from exercising its statutory power of sale in respect of a loan facility it offered the 1st defendant in 2017 that is in arrears. The 1st defendant has not filed any defence or reply in opposition to the application, and I take the 2nd defendant’s deposition that the 1st defendant is arrears and has been served with the appropriate notices as uncontested. The considering that the court has already come to the finding that the plaintiff suit against the 2nd defendant is for striking out, then the injunction prayer sought is to stop the sale of the suit property that was primarily aimed at the 2nd defendant cannot be granted.
 - f. That the 2nd defendant’s deposition that it did diligence and among others confirmed the suit property was registered in the name of 1st defendant, and that no encumbrances had been registered against the title, before accepting it a security for the loan facility is also not rebutted. That considering the 2nd defendant is not a party to the alleged sale agreement between the plaintiff and 1st defendant over the suit property, and as the plaintiff’s interest under the said agreement was not registered or noted on the register of the said property by the time the charge in favour of the 2nd defendant was registered, then I find the plaintiff has failed to meet the threshold set in the case of *Cassman Brown & Company Limited (1973) 1EA 258*, and subsequently approved in the cases of *Nguruman Limited versus Jan Bonde Nielsen & 2 Others CACA No. 77 of 2012* and *Mrao Limited versus First American Bank of Kenya Limited & 2 Others CACA No. 39 of 2002*, among others, for temporary injunction order prayed to issue. The plaintiff can still pursue for relief against the 1st defendant with whom he apparently has a cause of action against. However, his claim against the 1st defendant can easily be ascertained and a financial award made if he is successful. The court therefore finds the plaintiff has simply failed to establish the test of prima facie case with a probability of success, irreparable loss and to show that the balance of convenience tilts in his favour.
 - g. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for could cause the court orders otherwise. In this instant, as the plaintiff has failed in his application, he will pay the 2nd defendant’s costs as it has successfully defended it.
6. Flowing from the foregoing, the court finds the plaintiff’s application dated the 26th March 2025 is without merit and orders as follows:
- a. That the said application is dismissed with costs to 2nd defendant.
 - b. That the court is without jurisdiction in the plaintiff’s claim against the 2nd defendant, and the same is struck out with costs.



- c. That the plaintiff be at liberty to proceed with his claim against the 1st defendant and leave to file and serve amended plaint in view of order (b) above in 21 days is hereby granted.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF SEPTEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : No Appearance

Defendants : Mr Wafula For 2Nd Defendant Only.

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

