



Milele Funeral Burial & Benevolent Services Limited v Business Partners International Kenya (II) Limited & another (Environment and Land Case E037 of 2025) [2025] KEELC 6956 (KLR) (8 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E037 OF 2025
EK MAKORI, J
OCTOBER 8, 2025**

BETWEEN

MILELE FUNERAL BURIAL & BENEVOLENT SERVICES LIMITED PLAINTIFF

AND

BUSINESS PARTNERS INTERNATIONAL KENYA (II) LIMITED 1ST DEFENDANT

KENYA SHIELD AUCTIONEERS 2ND DEFENDANT

RULING

1. Before the Court is the Plaintiff/Applicant's Notice of Motion Application dated May 16, 2025, which seeks injunctive orders.
2. The Application is supported by the Supporting Affidavit of Moses Furaha Kea, sworn on the same date.
3. The 1st Defendants/Respondents opposed the Application and filed a Replying Affidavit dated May 21, 2025, sworn by Jenipher Wanjiku Odek.
4. This court issued instructions that the motion should be resolved through written submissions. I acknowledge the parties' submissions, which greatly assisted the court in determining the issues raised in the motion.
5. From the materials before me, the issues this court must determine are whether the Applicant has met the threshold for granting an interlocutory injunction and who should bear the costs of the current application.



6. A preliminary argument was made that this court lacks jurisdiction to hear this matter since the issues raised in the application and the main suit (which was transferred from the Lower Court) relate to the 1st Respondent's statutory power of sale created under a charge, which falls within the jurisdiction of the Commercial Division of the High Court.
7. Whenever a question of a court's jurisdiction comes up, the issue is addressed quickly. Jurisdiction is everything. When a court determines it has no jurisdiction, it downs tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. Without proper jurisdiction, a court lacks the legal power to hear or decide a case, and any decisions made without jurisdiction are invalid. Jurisdiction is granted by law - the Constitution or Statute and cannot be established through the parties' agreement or judicial craft. It is a fundamental aspect that can be raised at any point during the case, even on appeal, and a court must halt all proceedings if it finds it lacks jurisdiction.
8. Based on the presented materials, the Plaintiff/Applicant borrowed twenty-six million four hundred thousand Kenyan Shillings (Kshs. 26,400,000/=) from the 1st Defendant/Respondent under specific terms outlined in a Loan Agreement dated May 27, 2021. Through a First Ranking Legal Charge registered on June 2, 2021, over Land Reference Number KILIFI/VIPINGO/642, the 1st Defendant/Respondent, in accordance with the Loan Agreement, disbursed the full amount of Kshs. 26,400,000/= to the Plaintiff/Applicant, secured by the property in the Plaintiff's/Applicant's name.
9. Under Clause 8.2.2 of the Loan Agreement, the Plaintiff/Applicant entered into a Royalty Agreement with the 1st Defendant/Respondent, agreeing to pay a royalty of 1.834% on the higher of the actual or projected monthly turnover, starting October 1, 2021, until the loan was fully repaid or the term ends.
10. As of May 20, 2025, the outstanding balance in the Plaintiff's/Applicant's loan account with the 1st Defendant/Respondent was Kshs—39,266,517.21, which continues to accrue interest under the contractual terms.
11. It is undisputed that the Plaintiff/Applicant owes the 1st Defendant/Respondent, and this debt is overdue. The Plaintiff/Applicant has repeatedly defaulted on their obligations, breaching the agreements between the parties.
12. Under Clause 14 of the demised Loan Agreement on Default, the parties covenanted that:
 - “The Loan shall become immediately due and payable together with interest and all other charges calculated up to the end of the term set out in Clause 6 above (being the repayment installments) upon the occurrence of either of the following events;
 - 14.1 The Borrower failing to pay on the due date any amount payable by it on that date and in the currency expressed to be payable; or,
 - 14.2 The Borrower failing to comply with any other provision of this Agreement and, if such failure is capable of remedy, failing to remedy the breach within a period of thirty (30) days following receipt of written notice from Business Partners notifying the Borrower of the breach.”
13. The 1st Defendant claims that the Plaintiff/Applicant failed to pay the installments when they were due, which forced the 1st Defendant/Respondent to exercise its legal right of sale. This was done in accordance with the law. The 1st Defendant/Respondent's lawful right under Section 90 of the Land Act (No. 6 of 2012) had properly arisen, and acting in line with applicable law.



14. The 1st Defendant/Respondent avers it properly issued all necessary statutory notices to the Plaintiff/Applicant Company. These notices were issued well in advance, giving ample opportunity for the Plaintiff/Applicant to address its obligations under the demised Charge in accordance with the law.
15. 1st Defendant /Respondent further states that after the notice periods expired, the Plaintiff/Applicant only belatedly sought to approach this Court on 16th May 2025, requesting injunctive orders to stop the 1st Defendant/Respondent's right of sale.
16. Based on the above, I agree with the 1st Defendant/Respondent that the main issue before this court concerns the exercise of the 1st Defendant's statutory power of sale under a Loan Facility agreement with the Plaintiff, secured by a Charge over the Suit Property known as LR. No. KILIFI/VIPINGO/642.
17. In the case of Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna and 5 others [2017] eKLR, the Court Appeal held:

“Further, Section 2 of the *Land Act* recognizes a charge as a disposition in land. A disposition is distinguishable from land use. 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 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 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.”

18. The learned Judges added that:

35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, the 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 fulfilment 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.”



19. Further, the Superior Court emphasized that:
40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.
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 mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”
20. From the foregoing, the main issues raised in the application and the matter that was in the Lower Court involved a charge that is the jurisdiction of the High Court. I down tools.
21. It is also noted that a similar application for an injunction was denied in the Lower Court by Hon. J.M. Nangea, (CM as he then was) who issued a ruling on February 6, 2024, dismissing the application with costs awarded to the Defendant/Respondent.
22. Having found that I lack jurisdiction to proceed further, it will be futile to discuss the merits and demerits of the application for an induction dated May 16, 2025.
23. In short, the application dated May 16, 2025, is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 8TH DAY OF OCTOBER, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Okoth for the 1st Respondent

In the Absence of:

Mr.Kea for the Applicants

Happy: Court Assistant

