



Mbugua & another v Family Bank Limited & another (Environment and Land Miscellaneous Case E010 of 2024) [2025] KEELC 6543 (KLR) (Environment and Land) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND MISCELLANEOUS CASE E010 OF 2024
MC OUNDO, J
OCTOBER 2, 2025**

BETWEEN

FRANCIS GITEHI MBUGUA 1ST PLAINTIFF

LUCY NYAMBURA WAMWAKI 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

NAIROBI CHANNEL AUCTIONEERS 2ND DEFENDANT

RULING

1. Vide an undated Notice of Motion Application, brought pursuant to the provisions of Article 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3A and 63(c) (e) of the *Civil Procedure Act* and Order 40 and 51 Rule 1 of the Civil Procedure Rules and all other enabling statutes the Plaintiffs sought for orders of temporary injunction restraining the Respondents by themselves, their servants, agents, employees or any other person authorized by them from transferring, selling, alienating, disposing or in any other way or manner whatsoever dealing with all that parcel of land known as Kijabe/Kijabe Block 1/9054 pending the hearing and determination of the suit. They also sought that the cost of the Application.
2. The said Application is premised on the grounds that the Applicants were the registered owners of the said property who had deposited with the 1st Defendant the original title to the parcel of land being Kijabe/Kijabe Block 1/9054 as collateral for a loan to guarantee their son Kevin Mbugua who operates a computer business, “connectors computers”
3. That subsequently a directive was made by the Government that directly affected Connectors Computers business which led to them incurring grave losses. That what followed was that the 1st



Defendant entered into an agreement with their son Kevin Mbugua to restructure the said loan at the agreed rate of Kshs.28,000/= per month wherein a total sum of Kshs. 70,000/= had since been paid. There had been no supporting affidavit to the Application.

4. In response and in opposition to the Applicant's Application, the Defendants/Respondents vide their Replying Affidavit dated 9th June 2025 sworn by Sylvia Wambani, an advocate of the High Court of Kenya and the 1st Defendant's Legal Services Manager deponed that the Application was fatally defective as drawn and should be struck out with costs for the reason that:
 - i. It had been drawn and filed by a person who lacked the capacity to represent the Plaintiff herein.
 - ii. The Notice of Motion was not supported by a sworn affidavit and therefore, there was no evidential basis upon which the court could assess the merits of the application.
 - iii. The Notice of Motion was also not dated or signed.
5. That the grounds of the application as had appeared on the face of the motion were not only unsubstantiated but were also untrue and would at any rate not formulate a basis for granting the prayers sought in the instant application.
6. That the 1st Defendant's right to sell the suit property as a Chargee had duly accrued and had been lawfully exercised by the Defendants. That indeed, the 1st Defendant had advanced to one Kevin Mbugua t/a Connectors Computers (Borrower) a loan facility in the sum of Kshs. 935,000/= on the terms contained in a letter of offer dated 8th February 2023 which the Borrower and the Plaintiffs herein as the guarantors had duly signed to signify their understanding of the terms contained therein and acceptance to be bound thereby.
7. That pursuant to the terms as to the security for the repayment of the loan facility, the Plaintiffs had created a legal charge duly registered on 24th March 2025 over the suit property securing the repayment of the principal sum of Kshs. 935,000/= together with costs, interests and other charges.
8. That contrary to the terms of lending, particularly the terms as to repayment of the facility, the Borrower had defaulted in the repayment of the loan facility. That pursuant to the expiry of the 3 months statutory notice dated 24th October 2023 without the Borrower or the Plaintiffs regularizing the default in compliance thereof, the 1st Defendant issued a 40 days' notice of intention to sell the suit property dated 26th January 2024 over the outstanding balance of Kshs. 835,118.19. There had been no compliance wherein the 1st Defendant instructed J.K Wanderi Auctioneers to schedule an auction sale of the suit property in exercise of its statutory power of sale after a valuation was done by Messrs. Kariasek & Company Limited.
9. That accordingly, the 2nd Respondent had served upon the Plaintiffs, a 45 days' redemptive notice and a notification of sale dated 26th March 2024 which notice had lapsed hence the 2nd Respondent had proceeded to advertise the suit property for sale.
10. That accordingly, the Plaintiffs had not satisfied the requirements for grant of orders of injunction sought in the application herein thus the same should be dismissed with costs.
11. Directions were issued for the disposal of the Application by way of written submissions wherein the parties complied. However, in the spirit of the overriding objective of the *Civil Procedure Act* under Sections 1A and 1B, I find that I must stop at this juncture from interacting with the either the arguments or written submissions herein so as not to pre-empt the parties right to be heard and or to oust the parties from the seat of justice if they so wish to pursue the matter further. I say so because:



- i. Both the Application and suit herein were instituted in the Senior Principal Magistrates Court at Naivasha which is subordinate to this court being the Environment and Land Court Naivasha.
- ii. Secondly, looking at the claim in contest, the same is for Kshs. 835,118.19 and although the Environment and Land Court has original jurisdiction in land and environment matters, this matter ought to have been filed in the Chief Magistrate’s Court as envisaged by Section 11 of the Civil Procedure Act (CPA) which provides that a suit be instituted in a court of lowest grade competent to try it, because Section 7 (1) (a) of the Magistrate’s Court Act 2015 grants the Chief magistrate’s court pecuniary jurisdiction of up to Kshs 20,000,000/= and not beyond this point.
- iii. Lastly, in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, the Court of Appeal had held as follows:

‘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.

..... 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.”

12. In the most recent case in Smith & another v Kenya Deposit Insurance Corporation (As receiver of Chase Bank Limited) & another [2025] KECA 294 (KLR) the Court of Appeal comprised of a different bench reiterated as follows;

‘We then ask a simple question: what then would a court presiding over such a dispute be required to do? The answer to the question is simple: the trial court would be expected to interrogate the terms of the loan facility, inspect the loan statements to be produced in court, further interrogate whether the borrowing party is in default or not, and if the lending party’s right to exercise its statutory power of sale over the charged property had crystallised. These issues are a clear pointer that none would amount to a determination of the ‘use’ and ‘occupation’ of, the charged property. To our minds, it matters not whether at the time when the charged property was being offered as security was developed or not, but that the parties to the loan agreement fulfilled their respective obligations. For all intent and purposes, and without any iota of doubt, that would be a commercial dispute.

.....In view of the foregoing, we disagree with the learned Judge’s view that the issues in contention related to the “...the environment and the use and occupation of, and title to, land” as contemplated in Article 162 of the Constitution and section 13 of the ELC Act. The



use of land does not include a situation whereby the charge instrument is put to test and/or where the chargor and chargee each claim interest from the charge instrument.”

27. Having considered the cause of action giving rise to the matter before this court, and without going into the depth of the arguments herein as earlier stated, I find that the dominant issue herein being settlement of amounts owing from the Applicant to the 1st Respondent on account of a contractual relationship of a banker and lender. Thus guided by the reasoning of the Court of Appeal in the above cited cases, I find that the Court of Appeal, whose decision is binding on this court, having 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, this court is bereft of the jurisdiction over the matter which can only lie with the Commercial Division of the High Court. To this effect, both the Application and the suit are herein struck out with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 2ND DAY OF OCTOBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

