



**Muithya v Kenya Women Microfinance Bank Plc (Environment & Land
Case E091 of 2023) [2024] KEMC 32 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEMC 32 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
ENVIRONMENT & LAND CASE E091 OF 2023
CN ONDIEKI, PM
APRIL 18, 2024**

BETWEEN

LYDIA MWIKALI MUIITHYA PLAINTIFF

AND

KENYA WOMEN MICROFINANCE BANK PLC DEFENDANT

RULING

1. On 16th November 2023, the Applicant filed a Notice of Motion dated 15th November 2023 seeking orders: (a) Spent. (b) Spent. (c) That pending hearing and determination of the suit herein a temporary Order of injunction do issue restraining the defendant, its agents and/or assigns or any person or entity claiming under it from advertising for sale, disposing of, selling or otherwise interfering with the land title number Machakos/kiandani/31575. (d) That costs of this Application be paid by the Respondent.
2. Although the Applicant admits that she fell behind in servicing the loan and that she was duly served with the statutory notice of sale of Machakos/Kiandani/31575 (the suit property) the Application is based on the ground the Respondent issued an inadequate notice and it thus about to unlawfully sell the suit property based on the said inadequate notice.
3. In response, the Respondent strenuously opposed this Application on grounds that the Applicant was advanced a facility which was secured by creation of a charge and a further charge over the said suit property. The Respondent states that the Applicant has failed to service the facility from 2020, hence falling in arrears.
4. In this regard, the Respondent exhibited inter alia the said charge, further charge, and a bundle of demand letters dating back to 2020 and 2021.
5. The Applicant filed written submissions dated 2nd March 2024 and filed on 4th March 2024.



6. This Court has considered the Application, the response thereto, and the Applicant's said written Submissions.
7. Although it was not formally raised in their response, this Court finds the issue of jurisdiction so central that it cannot be disregarded and in this connection, it's instructive to underline that in the locus classicus on matters jurisdiction, namely the Court of Appeal decision in Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, it was observed that the issue of jurisdiction can either be raised suo moto or by a party to the suit.
8. Further, an issue of jurisdiction does not fall under the issues which can be categorized as an undue procedural technicality contemplated under Article 159(2) (d) of *the Constitution*, since flows from either *the Constitution* or legislation or both. See the Supreme Court decisions in Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.
9. A court cannot, consequently, make up for the lack of jurisdiction. The impact of proceeding without jurisdiction is so deleterious that no Court should ever imagine to so do. In Sir Ali Salim vs. Shariff Mohammed Sharray 1938 KLR, it was held that: "If a court has no jurisdiction over the subject matter of the litigation, its judgements and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction."
10. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, per Nyarangi, JA.
11. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorised under this Constitution.
12. It follows that jurisdiction being everything, it should be the first business of the Court to undertaken an inquiry onto its jurisdiction, before delving into the merits of the matter for without it, a Court should not make one more step into the merits of the matter but it should instead down its tools, the very moment it holds a judicial view that it lacks it. See the said Owners of Motor Vessel "Lillian S" case.
13. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.



14. Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169.
15. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1) (a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates' Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof.
16. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates' Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates' Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus "AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and for connected purposes". The pre-ambule clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates' Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates' Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates' Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court.
17. Although the matter was filed as and so characterized as a Land and Environment Case - over which this Court has jurisdiction - gleaned from the material placed before this Court, it is conspicuous, incontrovertible and beyond any grain of doubt that the dispute revolves around the period of time presented to the Applicant by the said statutory notice of sale of the charged suit property, in exercise of the Respondent's power of sale following the Applicant's default in serving the said loan facility. And so, both the suit and Application seek to question the exercise of the statutory power of sale by the Respondent. It is thus improper to characterize this suit as a Land and Environment suit since its true character is commercial in nature.
18. The jurisdiction to hear and determine disputes over charges - seeking to question the exercise of the statutory power of sale of the charged land - is reposed in the High Court. See the Court of Appeal holding in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR, where Karanja, JJA; Koome & Visram, JJA (as they then were) pronounced themselves as follows: "42. 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 concern the determination of accounting questions. Consequently, this dispute does not fall 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, for under Article 165(3) of *the Constitution* provides inter alia, that; 1. subject to clause (5), the High Court shall have - a. unlimited original jurisdiction in criminal and civil matters. For the above reasons, the appellant's objection on jurisdiction was rightly dismissed." This holding has been followed by the ELC decisions in *Muvokanza Limited vs. Muri Mwaniki Thige & Kageni LLP & another* [2022] KEELC 2275 (KLR), per JA Mogeni, J.; *Alphose Yankulije vs. One Twiga Road Limited & 2 others* [2019] eKLR, per C.K. Yano, J.; *Private Development Co. LTD vs. Rebecca Ngunyo & 2 other* [2019] eKLR, per M. Sila, J.; *Innocent Enoce Omboko vs. County Assembly of Busia & another* [2021] eKLR, per A. Omollo, J.; *Alice Chelangat Ngeny vs. National Bank of Kenya Ltd* [2020] eKLR, per A.K. Kaniaru, J.; *Thomas Mutuku Kasue*



vs. Housing Finance Company Ltd (HFC) & another [2021] eKLR, per A.O. Angote, J.; Samuel Gikuru & 2 others vs. HFC Limited [2020] eKLR, per C.K. Yano. J.; Martin Luther Mc Were vs. James Mabango Ambundo [2022] eKLR, per E.K. Wabwoto, J., et alia.

19. Having been filed before a Court of incompetent jurisdiction, it follows that this suit is incompetent and void ab initio. I thus down my tools.
20. On force of the foregoing principal reason, both the suit and Application are struck out, with costs to the Defendant/Respondent.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 18TH DAY OF APRIL, 2024

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C.N. ONDIEKI

Principal Magistrate

Applicant:.....

Advocate for the Respondent:.....

Court Assistant:.....

