

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NUMBER 33 OF 2012

JANE WANJIRU MWOBE (*Suing as Administrator of the estate of the late Lucy Wambura Mwobe (deceased)*)

.....**PLAINTIFF**

VERSUS

CO-OPERATIVE BANK (k) LTD.....1ST
DEFENDANT

GARAM AUCTIONEERS.....2ND
DEFENDANT

JUDGMENT

1. The Plaintiff initiated the present suit by way of a Plaint dated 20th March 2007. It was the Plaintiff's case that the Defendants advertised for sale by public auction land parcel Inoi/Kaitheri/688 belonging to David Mwobe who had died on 20th January 2007 without following due process. The Plaintiff contended that no statutory notice was issued and that the deceased family was not afforded the opportunity to redeem the property. The initial Plaintiff suing on behalf of the estate of David Mwobe died and her

daughter, Jane Wanjiru Mwobe, was substituted to proceed with the suit on behalf of the estate.

2. By an Amended Plaint dated 17th October, 2022 filed in Court on 26th October, 2022 the Plaintiff prays for orders:-

a) This Court to order the Land Registrar Kirinyaga to lift the charge registered over Land Parcel No. Inoi/Kaitheri/688 and cancel entries number 3 and 4 in the green card of land parcel No. Inoi/Kaitheri/688.

b) A permanent injunction do issue the Defendants from advertising and selling land parcel No. Inoi/Kaitheri/688 and the Defendants to supply the Plaintiff with information concerning the deceased indebtedness to them/claiming any money from the Plaintiff.

c) Cost and interest.

3. The 1st Defendant filed a statement of defence dated 5th May 2007 filed in Court on 7th May 2007. The 1st Defendant averred that the deceased was advanced a loan of Kshs 750,000/- and that a charge was registered against land parcel number Inoi/Kaitheri/688 belonging to

the deceased on 16th October 1995 to secure the loan. The 1st Defendant contended the responsibility and liability to pay the outstanding loan balance extended to the legal representatives, assignees and successors of the deceased.

4. The suit was heard on 19th March 2025 when both the Plaintiff, Jane Wanjiru Mwobe and the 1st Defendants witness, Faith Muriungi testified in support of the Plaintiff's case and the 1st Defendant's case respectively.

5. The Plaintiff testified that she was substituted in the suit in place of her mother who had passed on. She relied on her recorded statement and filed witness statement and further relied on the Plaintiff's bundle of documents produced as PEX1-8 as listed. In her statement she asserted that her late father was the owner of land title Inoi/Kaitheri/688 and that the 1st Defendant had threatened to sell the property allegedly to recover a loan that her father had failed to pay. She stated that when she conducted a search on the property it showed the 1st

Defendant had in 1995 registered a charge over the land to secure a loan of Kshs 750,000/-.

6. The Plaintiff stated her mother and herself were not aware that her father had borrowed any loan from the 1st Defendant and/or had charged the land as security. She said that their efforts to obtain the copy of the charge and loan account statements from 1995 to 2002 from the 1st Defendant were unsuccessful. She stated the Land Registrar Kerugoya equally never furnished her a copy of the charge in spite of being requested to do so. The Plaintiff stated that she subsequently learnt from the 1st Defendant that the loan documents and security documents relating to her late father's loan account were destroyed in the 1998 terrorist bomb blast that damaged the 1st Defendant's building in Nairobi where the documents were held in custody. The Plaintiff stated that the 1st Defendant was at the present moment claiming an aggregate sum of over Kshs 21,000,000/- which the security could not realise. She urged the Court to lift the charge and award her the costs of the suit.

7. In Cross examination the Plaintiff stated her father was the owner of land parcel No. Inoi/Kaitheri/688. She stated she did not know whether their father had taken a loan in 1995 but when they conducted a search at the Lands Office, the charge confirmed the title was charged to Co-operative Bank of Kenya Ltd. She admitted her mother visited Co-operative Bank Ltd severally but did not know what was discussed. She stated for her part she has had no communication with the Bank and she had not paid any money to the Bank. On inquiry by the Court she affirmed that she, her sister and her brother were residing on the suit land with their families.

8. DWI Faith Muriungi testified on behalf of the 1st Defendant. She adopted her witness statement as her evidence and relied on the bundle of documents tendered in evidence by the 1st Defendant. It was her evidence that the suit property LR No. Inoi/Kaitheri/688 was charged by David Mwobe Kangangi to secure a loan of Kshs 750,000/- in 1995. The loan had not been repaid and was outstanding in the sum of about Kshs 17,000,000/-. She explained that

the Bank demanded payment and statutory notice dated 16th May 2003 (**“DEX 2”**) was issued to the chargor. As payment was not made the Bank instructed the 2nd Defendant to realise the security.

9. The witness confirmed that the original title was lost in 1998 during the 1998 bomb blast that damaged the Co-operative Bank building in Nairobi. She stated that as the date of giving evidence the outstanding balance was about Kshs 21.3 Million as per the Bank statements (**“DEX 4”**).

10. In cross-examination the witness confirmed they presently did not hold the title and the charge as they were destroyed in the bomb blast. She stated that in August 1999 the outstanding loan balance was Kshs 3,743,917/-. She agreed the bulk of the loan balance was accumulated interest. The witness confirmed as at the death of the chargor the loan was already overdue. She said debts were only written off after all recovery efforts

had been exhausted. In the case of the death of a chargor the next of kin or legal representative takes over the debt.

11. The parties filed final closing submissions following the closure of the trial. The Plaintiff's submissions were dated 25th April 2025 and those of the 1st Defendant were dated 23rd May, 2025.

12. The Plaintiff submitted that the 1st Defendant was estopped from claiming money from the deceased family following the death of David Mwobe in 2007 as the charge was insured and a mortgage Protection Policy was in force. The Plaintiff however did not adduce evidence of such insurance having been in force. The Plaintiff further argued the 1st Defendant was in breach of the duplum rule which forbid the recovery of interest in excess of the amount of loan advanced and in support of this submission the Plaintiff placed reliance in the Court of Appeal cases of **Kenya Hotels Ltd -vs- Oriental Commercial Bank Ltd (formerly Delphis Bank Ltd) (2019) eKLR** and **Housing Finance Company of Kenya**

Ltd -vs- Scholastica Nyaguthii Muturi & Another (2020) eKLR. The Court in the Kenya Hotels Ltd case (supra) explained the duplum rule thus:-

“In duplum” is a latin phrase derived from the word “induplo” which loosely translates to “in double”. Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May 2007 it has been applied by the Courts with reasonable degree of consistency. See Lee G. Muthoga -vs- Habib Zurich Finance (k) Ltd & Another (2016) eKLR, Mwambeja Ranching Company Ltd & Another -vs- Kenya, National Capital Corporation (2019) eKLR, along a host of many others where it has been invoked. The rationale for the rule was elucidated in the latter decision by this Court in the following passage:

“The Induplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the

equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides.”

13. The Plaintiff argued the suit land was charged in 1995 to secure Kshs 750,000/-, yet as at 10th August 1999 according to the inter office branch Memorandum issued by the bank, the Principal debt was indicated to be Kshs 249,45/-, and the interest accrued was Kshs 3,743,917.95/-. This the Plaintiff contended was in clear breach of the in duplum rule.

14. The Plaintiff further submitted no valid statutory notice had been served by the 1st Defendant to entitle them to exercise their statutory power of sale. For the proposition that there ought to have been proof of service of the statutory notice before the exercise of power of sale, the Plaintiff placed reliance on the Court of Appeal case of **Nyangilo Ochieng & Another -vs- Fannuel B. Ochieng & 2 Others (1996) KECA 205 (KLR)**.

15. The 1st Defendant in its written submissions submitted the late David Mwobe Kangangi borrowed Kshs 750,000/- from the bank and provided a charge over LR Inoi/Kaitheri/688 as security. The 1st Defendant stated the deceased defaulted in repayment and on 16th May 2003 the 1st Defendant issued a Statutory Notice of the Bank's intention to exercise its power of sale to recover the debt. The 1st Defendant submitted that though the title and the charge instrument were destroyed in the 1998 terrorist attack that affected its bank building in Nairobi, the search issued by the Lands Office confirmed a charge was registered in its favour over the suit land on 16th October 1995 to secure a sum of Kshs 750,000/-. The 1st Defendant thus submitted there was a valid charge and that the Plaintiff had not proved the loan was repaid to entitle them to have the charge discharged.

16. As regards the Induplum rule, embodied in **Section 44A of the Banking Act**, the 1st Defendant argued the Plaintiff was not invoking the same in good faith noting that the recovery process had been initiated before the

actual borrower's death, who had not raised any issue regarding the terms of the loan. The 1st Defendant submitted the Plaintiff was attempting to run away from the obligations placed on the deceased estate, as at the time of David Mwobe's death he was indebted to the bank under the charge. The 1st Defendant asserted the Plaintiff never proved there was a mortgage protection insurance policy of insurance and hence any debts that the deceased had were payable by the estate pursuant to the provisions of **Section 83(d) of the Law of Succession Act, Cap 160 Laws of Kenya** which provides that amongst the duties of personal representatives was:-

(d) to ascertain and pay, out of the estate of the deceased, all his debts.

17. The 1st Defendant in concluding its submission took the position that having had a valid charge securing the loan advanced to the deceased, it was entitled to pursue recovery of its debt through realization of the security held.

18. The 1st Defendant placed reliance on the cases of **Jopa Villas -vs- Overseas Private Investment & 2 Others (2009) eKLR, Stephen Michuki Kiunga -vs- National Bank of Kenya Ltd (2018) eKLR;** and **Stanley Mbaabu Ruluti -vs- Kingdom Bank Ltd (2024) KEHC 2138 (KLR).**

19. Having reviewed and considered the pleadings, the evidence adduced by the parties and the submissions made on behalf of the parties the issues that arise for determination are as follows:-

- (i) Whether the deceased before his death had registered a charge over LR. No. Inoi/Kaitheri/688.**
- (ii) Whether there was default in the repayment of the loan advanced to the deceased by the 1st Defendant?**
- (iii) Whether a valid statutory Notice had been served by the 1st Defendant and whether the 1st**

Defendant right to exercise its power of sale had accrued?

(iv) Whether the In duplum rule was applicable in the circumstances of this case?

20. Though neither the Plaintiff nor the 1st Defendant raised the issue of jurisdiction of this Court to hear and determine the matter, the issue of jurisdiction of a Court is a fundamental one as without jurisdiction a Court cannot make a determination and even if it did, it was in futility as both the proceedings and the decision are a nullity. The jurisdiction of the Court is conferred by the Constitution and the statute.

21. The issue of jurisdiction may be raised at any stage in the proceedings by any party or by the Court on its own motion.

22. This Court's jurisdiction is conferred by the Constitution under **Article 162(2) (b) of the Constitution and Section 13(1) and (2) of the Environment and Land Court Act, 2011.**

Article 162 (2)(b) of the Constitution provides:-

162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to -

(a) -----

(b) The environment and the use and occupation of, and title to, land.

Section 13(1) and (2) of the Environment and Land Court Act, 2011 provides:-

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.

23. The jurisdiction of this Court is hence limited to hearing and determining disputes that relate to the use, occupation of and title to land. Jurisdiction is the pedestal upon which Judicial authority is exercised by the Court and without jurisdiction a Court can only act in vain as anything done by it in the proceedings that it lacks

jurisdiction is null and void. The Court of Appeal in the case of the **Owners of the Motor Vessel “Lilian S” - vs- Caltex Oil (Kenya) Ltd (1989) eKLR** as per Nyarangi, JA put it emphatically as follows:-

“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. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.”

24. In the present matter having regard to the evidence adduced it is abundantly clear and apparent that issues relate to whether or not there was a valid charge

registered by the deceased over his land; and if so, whether the loan secured by the charge was repaid; and, further whether the 1st Defendant had issued a valid statutory notice of its intention to exercise its power of sale conferred under the charge before advertising the charged property for sale by public auction. There is also the issue whether the interest charged breached the In duplum rule enshrined under **Section 44A of the Banking Act**. These are not issues that relate to the use, occupation of, and title to land as envisaged under **Article 162 (2) (b) of the Constitution** and **Section 13(2) of the ELC Act, 2011**. The issues are of commercial nature and relate to enforcement of securities and it is the High Court that has jurisdiction to deal with such matters.

25. The Court of Appeal in the case of **Bank of Africa (k) Ltd -vs- TSS Investment (2024) KECA 410 (KLR)** and the case of **Co-operative Bank Ltd -vs- Patrick Kangethe Njuguna & Others (2017) KECA 79 (KLR)** has held where a dispute arises and the same touches on the enforcement of a charge created over land as security,

such dispute is of a commercial nature arising out of a commercial transaction and does not constitute **“use of land”** so as to fall within the jurisdiction of the Environment and Land Court. The Court of Appeal held it was the High Court that had jurisdiction to deal with such a matter as a commercial dispute.

26. In the case of **Co-operative Bank Ltd -vs- Patrick Kangethe Njuguna (supra)** the Court at paragraph 36 of the Judgment stated:-

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 land of another as security in exchange for money or money's worth. The rights so acquired are limited to 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 the chargee is assured of the repayment of the money he has advanced the chargor.

27. Further in the **Bank of Africa -vs TSS Investment (supra)** the Court of Appeal relied on the **Co-operative Bank of Kenya Ltd-vs- Patrick Kangethe Case (supra)** and the same Court's decision in the case of **Joel Kytha Mbaluka T/a Mbaluka & Associates Advocates -vs- Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates (2019) eKLR** where the Court in considering the jurisdiction conferred on the Environment and Land Court under **Article 162(2)(b) of the Constitution** at paragraph 12 of the Judgment held:-

12. "We reiterate the position taken in the Co-operative Bank of Kenya Ltd -vs- Patrick Kangethe Njuguna (supra) that in construing whether the ELC had jurisdiction in a matter,

the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of and title to land.”

28. The Court of Appeal decisions I have referred to as to the jurisdiction of the ELC bind this Court and applying the test enunciated in the said decisions, it is my determination that this Court lacks jurisdiction to determine the instant dispute as it without doubt relates to a commercial dispute. There is no question that the dispute relates to the enforcement of the security held by the 1st Defendant over land parcel Inoi/Kaitheri/688. Whether or not the loan was repaid and/or whether the in duplum rule was applicable are commercial issues that do not fall for determination by this Court. The dispute does not concern the use, occupation of and/or title to the suit land but rather whether the charge registered over the land ought to be discharged and the Bank restrained from realizing the security it holds over the property. It is my determination that I lack the jurisdiction to determine the

matter and for that reason I need not consider the issues that arise as set out herein above. I must down my tools as to proceed, I would be engaging in futility as any decision I may reach would be null and void and of no legal consequence.

29. In the premises, I strike out the Plaintiff's suit but given the attendant circumstances respecting the matter, I make no order for costs and each party shall bear their own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY
AT KERUGOYA THIS 12TH DAY OF NOVEMBER 2025.**

J. M. MUTUNGI
ELC - JUDGE