



REPUBLIC OF KENYA



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**Akecth v Njer & 2 others (Environment and Land Case E096 of 2025)
[2025] KEELC 8191 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE E096 OF 2025**

CK YANO, J

NOVEMBER 27, 2025

BETWEEN

ELSA ADHIAMBO AKECTH PLAINTIFF

AND

RICHARD AKETCH NJER 1ST DEFENDANT

KENYA COMMERCIAL BANK LTD 2ND DEFENDANT

SADABRI AUCTIONEERS 3RD DEFENDANT

RULING

1. The Plaintiff herein commenced this suit by way of a Plaint dated 2nd October, 2025 against the Defendants seeking the following reliefs:-
 - a. An order that the additional charge of KShs. 5,730,000 = and the charge of Kshs. 4,000,000 = created on land parcel number Uasin Gishu Kimumu 2694 without the Plaintiff's consent are unlawful, illegal, null and void.
 - b. An order directing the land registrar Uasin Gishu County to cancel the registration of additional charge of KShs. 5,730,000 = and charge of 4,000,000 = created on Land Parcel number Uasin Gishu Kimumu 2694 in favour of the 2nd defendant.
 - c. An order directing the 2nd defendant to table any breakdown and or reconciliation for the charge amount remaining on Maisonette Number 19 L.R. No. 209 19518 (I.R. 12983) pursuant to the charge created on 5 7 2012 prior to any notice to sale the property.
 - d. An order setting aside the redemption notices and notification for sale of Maisonette Number 19 L.R. No. 209 19518 (I.R. 12983) dated 30 07 2025.



- e. Permanent orders of injunction restraining the 2nd and 3rd Defendants from offering for sale Maisonette Number 19 L.R. No. 209 19518 (I.R. 12983) to offset accrued debts due to the 2nd Defendant by the 1st Defendant.
 - f. Costs of the suit.
 - g. Interest on (g) (sic) from the date of filing.
2. Contemporaneous with the filing of the suit, the Plaintiff also filed a Notice of Motion application seeking an order of injunction to restrain the 2nd and 3rd Defendant from selling Maisonette Number 19 L.R. No. 209 19518 (I.R. 12983) pending the hearing and determination of the application and thereafter the main suit.
 3. The 2nd Defendant filed a Preliminary Objection dated 24th August, 2025 seeking to have the suit and the application struck out with costs on the grounds that:-
 - I. This Honourable Court lacks jurisdiction to entertain both the Application and suit, as the dispute falls outside the scope of matters contemplated under Section 13 of the *akn ke act 2011 19 Environment and Land Court Act*.
 - II. The dispute in question stems from a commercial transaction between a chargee and a chargor, and therefore properly falls within the jurisdiction of the High Court.

Submissions:

4. The Preliminary Objection was heard orally on 28th October, 2025.

Defendants Counsel's Submissions;

5. Mr. Mwangi for the Defendants argued in support of the PO challenging the jurisdiction of this court to determine the dispute outside the provisions of Section 13 of the Environment and Land Court (ELC) Act. Mr. Mwangi submitted that the dispute arises from a Charge, and is thus a commercial dispute for which the High Court is the one clothed with jurisdiction. Counsel argued that Section 13 of the ELC Act does not extend the court's jurisdiction to determining matters referring to a charge.
6. Counsel for the Defendants pointed out that in the application, the Plaintiff seeks an injunction to stop the Defendants from selling the suit property on grounds that the relevant statutory notices were not served. He referred to prayer no. 1 in the Plaint which claimed that the additional charge of KShs. 5,730,000 - and the charge of KShs. 4,000,000 - were created without her consent and are thus unlawful, null and void. He also referred to prayer (c) and (d) of the Plaint for a breakdown of the charge amount and challenging the statutory notices respectively.
7. Counsel asserted that the dispute revolves around a charge which is a commercial transaction that should be determined by the High Court. Counsel cited the Court of Appeal decision in *Diamond Trust Bank vs FHH*, CA No. 18 of 2020 where it was held that the matter is a commercial dispute that should be determined by the High Court. Counsel also referred to the Court of Appeal decision in *Co-operative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & Others*, CA 83 of 2016. Counsel argued that this court is by virtue of the principle of *stare decisis* bound by the two decisions. He concluded that the question presented by the Plaintiff falls outside the jurisdiction of the court, thus the court should down its tools.



Plaintiff's Counsel's Submissions;

8. In response to the above arguments, Mr. Ogotu for the Plaintiff submitted that the claim is rightly before this court. Counsel submitted that the jurisdiction of this court is found at Section 13 of the ELC Act, which allows it to determine any other dispute. Counsel explained that the dispute herein originates from a charge that was created pursuant to a contract over matrimonial properties. Counsel stated that the Plaintiff, who is the wife to the 1st Defendant was not involved in the creation of the charges. Counsel argued that they were not seeking orders of accounts per se, but they wanted the charges cancelled for having been registered without consent of the Plaintiff.
9. Counsel submitted that apart from the prayers cited by Mr. Mwangi, the Plaintiff has also included a prayer for invalidation of the charges. Counsel cited the case of Co-operative Bank vs Patrick Kangethe (Supra). Counsel specifically referred to paragraph 17 thereof in which it was held that where the dispute is a charge, the ELC has jurisdiction. Counsel added that it is on the issue of accounts that the High Court has jurisdiction. Counsel contended that the dispute is on the validity of the charges and the court has the jurisdiction. Counsel urged that the PO was unmerited and prayed that the same be struck out.

Analysis and Determination:

10. The singular issue for determination by this court is whether it has jurisdiction to hear and determine the present suit and the application filed thereunder. On this matter of jurisdiction, the Supreme Court, in Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 Others (2012) eKLR, was clear that:

“(68) A Court’s jurisdiction flows from either *akn ke act 2010 constitution the constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *akn ke act 2010 constitution the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the Court cannot entertain any proceedings...Where *akn ke act 2010 constitution the constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

11. For the ELC Court, it was established under Article 162(2)(b) of *akn ke act 2010 constitution the Constitution*, which provides that:-
 - (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.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
12. Pursuant to Article 162(3), Parliament enacted the Environment and Land Court (ELC) Act, which at Section 13 prescribes the jurisdiction of the ELC as:-
13. Jurisdiction of the Court



- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *akn ke act 2010 constitution 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 *akn ke act 2010 constitution 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 or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *akn ke act 2010 constitution 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 local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) 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;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.

13. In this instance, Counsel for the Defendants who raised the PO claims that this court has no jurisdiction to determine the suit and the Application filed thereunder. According to the Defendants, the dispute in question stems from a commercial transaction between a chargee and a chargor, and therefore properly falls within the jurisdiction of the High Court. Counsel relied on the case of Co-



operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others (2017) KECA 79 (KLR), where the court of Appeal held that:

“ 32. As for land use, the Black’s Law Dictionary, 9th Edn; gives the basic definition of the word ‘use’ as being:-

‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.

33. ...

34. While the National Land Commission is already operational, the land use policy envisioned under (b) above is yet to be passed. The same is still at the drafting stage with the latest draft having been published in 2016; titled ‘Land Use Policy’ While not binding on this Court, the same may provide some insight and guidance as to the proposed definition of ‘land use’. According to that draft, ‘land use’ is defined under part 2.3.1 as:

“ ..the activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land. Emphasis added.

35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, 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 *akn ke act 2012 6 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 *akn ke act 2012 6 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.

37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. 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 the 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 ever 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.

38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *akn ke act 2010 constitution the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.”
14. Counsel for the Plaintiff sought to distinguish this suit from the above authority. Counsel claimed that the suit herein concerns the validity of the charge, and that the High Court only has jurisdiction when the suit is on the issue of accounts.
15. I note that at paragraph 19 of the Plaintiff, it was pleaded that to the Plaintiff’s knowledge the cumulative loan amount was KShs. 13,500,000 -, thus the principal amount and interest thereon cannot have risen to KShs. 70,014,973.39 currently claimed to be due and owing, and the Plaintiff cited the in duplum rule. At prayer (c) of the Plaintiff, the Plaintiff sought an order of breakdown and or reconciliation of the charge amount remaining on Maisonette Number 19 L.R. No. 209 19518 (I.R. 12983).
16. In my view however, this issue is only raised for the reason that the Plaintiff did acknowledge that her consent had been sought for the previous facilities granted to her husband for which her consent was issued and given. The Plaintiff clearly seeks to understand how the loan amount could have risen from the amount for which she consented to the amount currently being claimed.
17. I am convinced by the persuasive holding of Justice Munyao Sila in *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & another* [2018] KEELC 1599 (KLR), where referring to the decision of the Court of Appeal in *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others* (supra) he stated that:-
- “ 14. My own understanding of the above decision, is that the Court of Appeal was of opinion that the particular dispute was more in relation to accounts of which the High Court had jurisdiction to hear.
15. I do not think that the Court of Appeal was holding the position that once the Environment & Land Court (ELC) sees the word “charge” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what *akn ke act 2010 constitution the Constitution* under Article 162 (2) (b), and parliament under Section 13 of the *akn ke act 2011 19 Environment and Land Court Act* No.19 of 2011, have prescribed as being the jurisdiction of the ELC. This would also go contrary to the Supreme Court



decision in the case of R vs Karisa Chengo & 2 others (2017) eKLR where the Supreme Court stated as follows at paragraph 51 of its decision:-

“...In this instance, the jurisdiction of the specialized courts is prescribed by parliament, through the said enactment of legislation relating, respectively, to the ELC and ELRC’.”

18. But even if it were to be argued that the prayer seeking a breakdown and or reconciliation of the charge amount was essentially one for accounts, it cannot be denied that this is but one aspect of the dispute, with the rest falling under the jurisdiction of the ELC. Court’s have held that in such a scenario, the suit is to be determined in the court with jurisdiction to hear the pre-dominant issue. Sila J. in Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited (supra) further explained that:-

“ 25. But then, one may ask, what if I have a matter which brings forth various issues, some of which fall within the jurisdiction of the High Court or Employment and Labour Relations Court (ELRC) and some falling within the jurisdiction of the ELC, and yet such dispute cannot be severed for the different issues to be heard in different courts? That is a case with mixed issues, some falling within the jurisdiction of the ELC and some falling within the jurisdiction of the High Court or ELRC, the three superior courts with equal status. In such instance one needs to find out what the predominant issue in the case is, and file suit in the court which has jurisdiction to hear the predominant issue. I am aware of the decision of my brother, Ngugi J, in the case of Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) eKLR, where the learned judge, when faced with an objection to jurisdiction, was of the view that what is important in determining which court would have jurisdiction, is the “pre-dominant purpose test”, which the judge elaborated as follows :

“23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation,



the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.

26. Going back to the issue at hand, in cases revolving around a charge, and the chargee's exercise of its power of sale, where the predominant issue is whether the statutory right of sale has arisen; or whether a statutory notice was issued; or whether the property has properly been advertised; or whether generally, the process of sale is in accordance with the provisions of the *akn ke act 2012 6 Land Act* and *akn ke act 2012 3 Land Registration Act*, then the matter would fall under the jurisdiction of the ELC, for these processes are laid down in the *akn ke act 2012 6 Land Act* and *akn ke act 2012 3 Land Registration Act*, for which it is the ELC which is the court with jurisdiction. It should also not be forgotten that this is a process of acquisition of title to land. However, if the predominant complaint is whether the bank has properly calculated its figures, and not how the bank is proceeding to sell the property, then this could be a High Court matter, but again, as I have stated above, if this issue is collateral to the process of sale, and not severable, the ELC would still have jurisdiction to hear the whole of the dispute including related issues such as the amounts payable, where these cannot be severed from the dominant issue.”
19. As can clearly be seen from the Plaintiff, the issue of breakdown and or reconciliation of the charge amount is only but one aspect of the suit. The case majorly revolves around the validity of the two charges for lack of spousal consent. By virtue of this, the Plaintiff seeks to have the two charges cancelled for reason that they are unlawful, null and void. The suit also challenges the redemption notices issued and the Plaintiff prays for a temporary injunction to stop the sale of the suit properties herein. From the facts pleaded in the Plaintiff, the predominant issue is not the accounts or reconciliation of the amounts, but the validity of the charge.
20. Besides, the Plaintiff stakes her claim on the allegation that her consent as the 1st Defendant's spouse was not sought. Spousal consent is a mandatory requirement under Section 79(3) of the *akn ke act 2012 6 Land Act*, which provides as follows:-
- A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.
21. The statute that is relied on to determine the validity of the charge or the redemption notices issued are the *akn ke act 2012 6 Land Act* and *akn ke act 2012 3 Land Registration Act*. Thus the dispute falls squarely within the jurisdiction of the ELC.



22. This then distinguishes this suit from the Court of Appeal decision in the Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others (Supra), where the court expressly found that:-

“... By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.”

23. In contrast, the instant suit is not on the settlement of the amounts owing but the validity of the charge itself. In addition, the Plaintiff has no banker-lender contractual relationship with the 2nd and 3rd Defendants. She claims as a person with an interest in the land though appears at this stage to be an equitable one.

24. This brings me to the second authority cited by the Defendants' Advocate. That is the case of Diamond Trust Bank Kenya Limited vs FHH (Civil Appeal 18 of 2020) (2022) KECA 769 (KLR), where the Court of Appeal held that:-

“31. In the present case, although the respondent is not privy to the instrument of legal charge, there is no doubt that what the respondent is seeking before the ELC, is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others (above), is a commercial matter for adjudication before the High Court. In our view therefore, the Judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.

32. There is another reason why we think this matter should have been filed before the High Court. As already noted, there is already pending before the High Court, Civil Case No. 131 of 2014 over the same subject matter in which the respondent's husband had made two previous failed attempts failed to obtain injunctive relief to restrain the appellant from exercising its power of sale under the charge. In one of those failed applications, the husband had asserted in the certificate of urgency that one of the grounds on which he was seeking restraining orders on basis of urgency was that he did not "Seek his wife (sic) consent to charge the property.”

25. In this authority, the court of Appeal noted that there was already another suit filed in the High Court where the Chargor himself had indicated that he had not sought his wife's consent in creating the charge. Notably, in the said suit, the pre-dominant issue was the injunctive relief against the bank exercising its statutory power of sale. But whereas the issue of spousal consent in that case was raised by the Chargor himself who ought to have ensured that spousal consent was obtained, in this suit the Plaintiff, who has no contractual relationship with the bank, is the one raising the issue of consent.

Orders:-

26. In the end, I am not convinced that the Defendants' Preliminary Objection has any merit. The same is therefore dismissed with costs to the Plaintiff.

27. Orders accordingly.

DATED , SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 27TH DAY OF NOVEMBER , 2025 VIDE MICROSOFT TEAMS.



HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Wanyonyi holding brief for Mr. Kango for 2nd Defendant.

Mr. Cheruiyot holding brief for Mr. Ogutu for Plaintiff.

Court Assistant - Laban.

