

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO. E003 OF 2025

GESTERED PROFESSIONAL SERVICES LIMITED.....
PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT
REGENT AUCTIONEERS2ND
DEFENDANT

RULING

1. This is a suit that was initially filed at the Environment and Land Court at Busia, before it was transferred to the High Court, for disposal, on grounds that the Environment and Land Court lacked jurisdiction, and that it is the High Court with the requisite jurisdiction. I still do not see how the High Court comes to have jurisdiction, over mortgages and charges, while the Environment and Land Court does not. I believe it should be the other way round, that the Environment and Land Court has jurisdiction, but the High Court does not.
2. The suit herein seeks to restrain the exercise of the statutory power of sale, conferred upon the mortgagee and chargee, by the relevant land legislation. The principal prayer, in the plaint, “prayer a”, is for: “A permanent injunction restraining the 1st and 2nd Defendant/Respondents whether by themselves, their agents, workers and or servants from alienating selling or in any way interfering with land parcel number LR No. Bukhayo/Mundika/2538.”
3. The statutory power of sale is provided for under the Land Act, Cap 280, Laws of Kenya. The processes, of how it is to be exercised, and the reliefs against it, inclusive of the court to grant the relief, are all set out in the said Act. The court,

under the Land Act, that ought to grant that relief, of stopping the exercise of the statutory power of sale, is the Environment and Land Court, according to sections 2 and 150 of the Land Act.

4. Sections 2 and 150 of the Land Act state as follows:

“‘Court’ means the Environment and Land Court established under the Environment and Land Court Act (Cap. 8D).”

*“150. Jurisdiction of the Environment and Land Court
The Environment and Land Court established in the Environment and Land Court Act (Cap. 8D) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”*

5. According to *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others* [2012] KESC 8 (KLR) [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung’u, SCJJ) and *Kibos Distillers Limited vs. Benson Ambuti Adega & 3 others* [2020] eKLR (Makhandia, Kiage & Odek, JJA), the courts draw their jurisdiction from the Constitution and statute. The statutory power of sale is exercised so as to cause transfer of title from the owner, that is the chargor or mortgagor, to the person buying the property, upon the statutory sale. It is about alienation of title to land. The suit, to restrain the exercise of that power, is intended to protect the title.

6. Article 162(2) of the Constitution reserves jurisdiction over disputes around title to land, occupation of land and land use to the Environment and Land Court. The Land Act confirms that jurisdiction, to the Environment and Land Court, and extends it to the Magistrate Court, under section 150. The Magistrate Court Act, Cap 10, Laws of Kenya, taps from section 150, to confer jurisdiction on magistrates over title

to land, its use and occupation. Article 165(5) of the Constitution states that the High Court has no jurisdiction over that subject matter. Since the Constitution and the Land Act confer jurisdiction over that area of law on the Environment and Land Court, going by the principle stated in *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others* [2012] KESC 8 (KLR) [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ), the court with jurisdiction ought not be the High Court, but the Environment and Land Court.

7. *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others* [2012] KESC 8 (KLR) [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) and *Kibos Distillers Limited vs. Benson Ambuti Adegga & 3 others* [2020] eKLR (Makhandia, Kiage & Odek, JJA) have emphatically stated that jurisdiction is not to be conferred, upon the court, by consent or agreement of the parties, or their acquiescence, or by judicial craft, or by arrogation of jurisdiction by the court itself.
8. For quite some time, after the coming into force of the current Constitution, in 2010, jurisdiction over restraint of exercise of the statutory power of sale was exercised by the Environment and Land Court, until *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR)(Visram, Karanja & Koome, JJA) came along, which pronounced that jurisdiction, over such issues, lay with the High Court, and not the Environment and Land Court. With respect, I do not agree.
9. The statute, which creates charges, the statutory power of sale and the remedy against exercise of that power, is the Land Act. The courts, according to the Land Act, to which disputes around the processes provided for by the Land Act, inclusive of creation of charges, exercise of the statutory power of sale, and its restraint, are the Environment and

Land Court and the enabled subordinate courts. That statute makes no mention of the High Court. Consequently, the High Court would have no jurisdiction over such, and the courts with jurisdiction over the same would be the courts provided for under the Land Act, specifically in sections 2 and 150, as read with the Magistrate Court Act, and that is the Environment and Land Court and the Magistrate Court. Jurisdiction has not been vested in the High Court by the said statute, instead it has been extended to it by judicial craft, by *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR)(Visram, Karanja & Koome, JJA), contrary to the spirit of *Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others* [2012] KESC 8 (KLR) [2012] eKLR (Mutunga C), Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) and *Kibos Distillers Limited vs. Benson Ambuti Adega & 3 others* [2020] eKLR (Makhandia, Kiage & Odek, JJA).

10. Ideally, I should down my tools, in obedience to *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] KLR 1 [1989] eKLR [1989] KECA 48 (KLR) (Nyarangi, Masime & Kwach, JJA), for want of jurisdiction. However, since *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR) (Visram, Karanja & Koome, JJA) is a decision of a higher court, I am bound by it, much as I disagree with it. I will exercise jurisdiction, over these matters, not because any statute has conferred that jurisdiction upon me, sitting as High Court, but because *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR) (Visram, Karanja & Koome, JJA) says so.
11. There is a Motion, dated 8th July 2024, which seeks injunctive orders, to restrain exercise of the statutory power of sale, over Bukhayo/Mundika/2538, pending hearing and disposal of the suit herein. The principal argument is that

the applicant, who is the plaintiff herein, was extended a loan of Kshs. 20,000,000.00, by the 1st respondent/defendant, repayable in monthly instalments, over a period of 48 months, and that it has been faithfully servicing that loan, save for a few instances. It is averred that the property, offered to secure the loan, has been advertised for sale, yet no proper notices were served, and that the applicant stood to lose his matrimonial home.

12. The suit herein was brought by a limited liability company, the plaintiff herein. The affidavit, in support, was sworn by Gaspar Ouma Opiyo, who is a director of the plaintiff. He blames the corona virus for crippling his finances. He avers that his matrimonial or residential premises stand on the land, and so does a family shrine. He asks for accounts to be rendered, and deductions and accrual of interest suspended.

13. The 1st defendant raised a preliminary objection, dated 2nd August 2024, founded on Articles 162(2) and 165(5) of the Constitution, and *Co-operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR) (Visram, Karanja & Koome, JJA). That preliminary objection was canvassed, and culminated in the ruling of 25th March 2025, which was the basis for the transfer of the suit from the Environment and Land Court to the High Court. I have addressed the issues around jurisdiction of the Environment and Land Court and the High Court, over suits of this kind, in the foregoing paragraphs of this ruling, and I have expressed my views on the same, which I hereby reiterate.

14. After the transfer, the 1st defendant replied to the application, vide an affidavit, sworn on 14th July 2025, by Auma Jillo, a loans recovery manager. She confirms that a loan was extended to the plaintiff, which was secured with the property, the subject of the suit, and personal guarantees

signed by the directors. There was default by the plaintiff, which prompted a demand from the 1st defendant, under section 90(1)(2)(3) of the Land Act. It was followed by a statutory notice, under section 96(2)(3) of the Land Act, and a redemption notice, under Rule 15(d) of the Auctioneers Rules, 1997. Valuation was done, and the plaintiff was dutifully notified. Despite all that, the plaintiff did not make good, hence the action to realise the security.

15. The suit herein is by a limited liability company. Yet, in the affidavit in support of the application, the deponent speaks in his personal capacity, for he argues that exercise of the statutory power of sale would render him destitute, for his residential and matrimonial homes are on the land in question. I find that surprising, given that the land in question, Bukhayo/Mundika/2538, is actually registered in the name of the company. The deponent is worried about his personal loss, rather than that of the plaintiff, yet the company has a separate legal existence from him. See *Salomon vs. Salomon & Company* [1897] AC 22 (Lord McNaughten).

16. He and the plaintiff oppose exercise of the statutory power of sale, on grounds that the loan is substantially repaid, and there was minimal default. Yet, he has not presented a statement of accounts, detailing how the plaintiff has been repaying the loan. One would suppose that the plaintiff is a business entity, which keeps accounting records. It should have proper accounts of how much it has repaid so far, to demonstrate that it is not in default, and that the 1st defendant was acting rather rashly and hastily, instead of affording it time to sort out its finances, given that it has paid a substantial part of the loan. There is no evidence of that. The plaintiff appears shy about disclosing what it has paid, towards settling the loan, and what the balance of the loan is, according to it.

17. Secondly, it is claimed that the 1st defendant had granted the plaintiff some reprieve, and the plaintiff expresses surprise about the steps taken, by the 1st defendant, to realise the security, against the face of that reprieve. I have not seen any evidence of the reprieve, allegedly sought by the plaintiff, and extended to it by the 1st defendant, which could be used as a basis to require the 1st defendant to go slow on the exercise of the statutory power of sale.
18. Thirdly, the issue of the land holding matrimonial and residential homes, and family shrines, cannot possibly be an excuse to stop exercise of the statutory power of sale. It was the plaintiff who offered the property as a security. The 1st defendant did not force itself on that property. When it was offered as security, those making the offer, knew that it had a family shrine and residential/matrimonial homes, and they knew that by so offering it, they were exposing it to statutory sale, upon default on the loan obligations. That has not just been discovered, after the 1st defendant began to make steps towards realising the security. It was a risk that was taken consciously, and the plaintiff cannot be heard to raise that issue now.
19. In the affidavit in reply, the 1st defendant has detailed the notices given to the plaintiff, and the opportunities extended to him, through the notice under Rule 15 (d) of the Auctioneers Rules, 1997, to redeem the property. There is no response to that affidavit, of 14th July 2025. I shall take it that what is deponed in it is not contested. No good reason has been given, for the failure to clear the balance. I have not seen efforts to negotiate, to buy more time to raise the moneys demanded, neither have I seen an offer for payment of some amount, towards reducing the indebtedness.
20. The order sought is for injunction, to stop the 1st defendant exercising its statutory power of sale. There are

principles upon which an injunction could be granted. One, existence of a suit, with probability of success. Two, the unlikelihood of the plaintiff, being compensated in damages, should he succeed in his suit, after the property has been disposed of vide the statutory sale. Three, balance of probability favouring the plaintiff. See *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 (Sir William Duffus P, Spry VP & Law JA) and *Nguruman Limited vs. Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) (Ouko, Kiage & M'Inoti, JJA).

21. Does the plaintiff have a suit, with probability of success? I do not think so. The principal reason he raises, for seeking to stop exercise of the statutory power of sale, is that it has been servicing the loan, suggesting that the action, taken by the 1st defendant, to realise the security, should be treated as malicious, in the circumstances. Yet, the plaintiff has not presented a statement of accounts, on what has been paid by it so far, as testimony of what it claims. It can only be on the basis of its own accounts, that it can be concluded that there is a dispute on accounts, if they differ from what has been presented by the 1st defendant, which could provide a foundation for a conclusion that the suit has probability of success. In the absence of such accounts, it would be extremely difficult to assess the probability of success of the suit.

22. On the possibility of suffering irreparable harm, should the injunction not be granted, there are 2 possible arguments. One, that the security offered is not unique. It is a piece of land, with some structures on it. Land is a commodity, saleable in the land market, and it was its saleability that made it an attractive security. The plaintiff was aware of that fact, when it offered it as collateral. In the event the suit succeeds, if at all, the plaintiff would be able to get equivalent land in the market. Two, that the 1st defendant is a commercial bank. No material has been placed before me to raise doubts on its financial standing, as to be unable

to make good, should it be required to make good any judgment obtained against it by the plaintiff.

23. The last principle applies as an alternative to the first two. I have no doubt, at all, that the suit stands little chance of success, based on the material filed so far, and that any damage suffered, if at all the injunction is denied, the land is sold and the suit succeeds, would be reparable. There should be no reason, therefore, for me to evaluate the said ground.

24. Consequently, it is my conclusion that the application herein, dated 8th July 2024, is not merited, and I hereby dismiss it. The 1st defendant shall have the costs. To move the matter forward, there shall be a mention, on 3rd February 2026, for directions on the disposal of the suit itself. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA, ON THIS 4TH DAY OF DECEMBER
2025.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

**Mr. Obimba, instructed by BM Ouma & Company, Advocates
for the plaintiff.**

**Mr. Wafula, instructed by Wekesa & Simiyu, Advocates for the
1st defendant.**