



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 194 OF 2016

KSC INTERNATIONAL LTD (UNDER RECEIVERSHIP)

....PLAINTIFF

-VERSUS-

BANK OF BARODA (KENYA) LTD.....

DEFENDANTS

RULING

- 1.** The question I must address in this matter is whether this court has jurisdiction to adjudicate the matter, given that the plaint dated 27 July 2016 concerns a charge and the recovery of monies owed by the plaintiff as a result of that charge.
- 2.** To address that question, based on previous pronouncements from higher courts and this court, disputes concerning charges, mortgages, and the collection of dues and rents are more

appropriately treated as commercial disputes within the jurisdiction of the commercial division of the High Court rather than the ELC. See **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)**. See also **Bank of Africa Kenya Limited and Another v TSS Investments Limited and Two Others (Civil Appeal Number E055 of 2022)**. In the latter case, the Court of Appeal held:

"In Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, this Court held that:

"25. The respective jurisdictions of the ELC and the High Court are well spelt out by our Constitution. With regard to the ELC, article 162(2) & (3) of the Constitution requires inter alia, that:

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

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 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.

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

41. 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."

17. This position was affirmed by this court in Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR in the following words:

"(11) It is evident from Article 162(2) of the Constitution that the intention of the framers of the Constitution was the creation of special courts to determine disputes relating to the environment and the use and occupation of, and title to, land. This is confirmed by the preamble to the ELC Act wherein it is stated that the purpose of the ELC Act is:

'To give effect to article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.'

(12) We reiterate the position taken in Co- operative Bank of Kenya Limited v 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."

18. In view of the foregoing, the only question that falls to be determined is whether the respondents' suit against the appellants involved "... matters relating to environment and the use and occupation, and title to land". We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant's exercise of its statutory power of sale over the suit

properties on the basis of the alleged tenancy relationship with the 3rd respondent.

19. Accordingly, we do not share the learned Judge's view that the issues in contention between the respondents and the appellants were matters relating to "... the environment and the use and occupation, and title to land" as contemplated in article 162 of the Constitution, section 13 of the Environment & Land Court Act, and in section 150 of the Land Act. To our mind, such matters could only be subject to litigation between the 1st and 2nd respondents as lessees, and the 3rd respondent as lessor.

20. We form this view taking to mind this Court's decision in the afore-cited case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (supra) where it was held that the ELC only has jurisdiction to deal with disputes connected to "use" of land and contracts incidental to the "use" of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to "use" (by a tenant or licensee) as in this case, of a chargor's land. In view of the foregoing,

we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents' suit as pleaded."

3. Given the foregoing and the fact that this matter involves a charge, I down tools.

4. As a result, the present suit is hereby struck out with costs.
Costs.

**Dated, signed, and delivered electronically in Malindi on
December 17, 2025.**

E. K. MAKORI

JUDGE

In the presence of:

Mr. Ondego for the Defendant

Happy: Court Assistant

In the absence of:

The Plaintiff

