

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC APPEAL NO. E028 OF 2025

GETRUDE ATIENO OLWALO1ST
APPELLANT/APPLICANT
JOHN KENNEDY O. ONYANGO.....2ND
APPELLANT/APPLICANT
MAURICE AUMA ONYANGO3RD
APPELLANT/APPLICANT
DAVID OGUTU.....4TH
APPELLANT/APPLICANT

VERSUS

SIDIAN BANK LIMITED1ST
RESPONDENT
NAIROBI CHANNELS AUCTIONEERS2ND
RESPONDENT
JAMES OMONDI ONYANGO3RD
RESPONDENT

RULING

(On whether the applicants' Preliminary Objection should be allowed)

Introduction

- 1.** The Appellants herein filed a Memorandum of Appeal dated 15th September 2025. It was in regard to the ruling of Hon. M. Okuche (SPM) delivered on 11th September, 2025 in Migori CM ELC NO 037 of 2025 of which they were aggrieved.
- 2.** On 6th October 2025, the 1st and 2nd Respondents filed a Notice of Preliminary Objection seeking to have the Appellants'

application dated 23rd September 2025 dismissed with costs.

The Preliminary Objection is based on the GROUNDS THAT:

a) This Honourable Court is divested of jurisdiction to hear and determine the application dated 23rd September 2025 in so far as the said application seeks to restrain the 1st Respondent from exercising its statutory power of sale; and

b) This Honorable Court is divested of jurisdiction to hear and determine the application dated 23rd September, 2025 by a dint of the ***Court of Appeal*** decision in the case of ***Co-operative Bank of Kenya vs Patrick Kangethe Njuguna & 5 Others (2017) KECA 79 eKLR.***

3. The Preliminary Objection was canvassed by way of written submissions. The Respondents did not file their submissions. The Appellants filed theirs dated 14th October 2025. They framed three issues for determination by this court, being: whether the appellants herein are privy to the charge instrument between the 1st and 3rd respondents herein; whether this Honourable court has jurisdiction to determine a

claim of customary trust over land that has been charged and subject to statutory power of sale; and whether the Court of Appeal decision in **Co-operative Bank of Kenya limited v Patrick Kang'ethe Njuguna & others [2017] KECA 79** applies to the matter herein.

4. On whether the appellants are privy to the charge instrument between the 1st and 2nd respondent, the appellants submitted that they were not party to the said charge since they did not take part in its creation and registration.
5. As to whether this court has jurisdiction to determine a claim of customary trust over land that has been charged and subject to statutory power of sale, the appellants submitted that the 3rd respondent holds the suit property in trust for the appellants. To this end, they argued that there exists a customary trust which need not be noted on the register as provided in section 28 of the land registration Act. The appellants further argued that it was only after conducting a search that they discovered the charge against the suit property, and maintained that the 3rd respondent cannot claim sole ownership of the suit property, the same being held in trust for himself and the

appellants who have been living on the said property. The appellants concluded that the issue of the alleged customary trust can only be determined by this court when the matter is finally heard on its merits.

6. Lastly, on the issue of whether **Co-operative Bank of Kenya limited v Patrick Kang'ethe Njuguna & others [2017] KECA 79** applies in the instant case, the appellants distinguished their case from the above stated case. They argued that the said case relates to a charger-chargee relationship while in the instant matter, they are not parties to the charge which the subject of the application.
7. Further to the appellants submitted that customary land rights are within the jurisdiction of this court pursuant to section 13 (2) of the Environment and Land Court Act and section 150 of the Land Act.

Issues, Analysis and Determination

8. The issues for determination in this application are whether the preliminary objection is merited and, who should bear the costs of the preliminary objection. The guiding principles governing determinations on preliminary objections were settled in the

celebrated authority of **Mukisa Biscuits Manufacturing Limited v Westend Distributors (1969) EA 969** where the Court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Example is an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A preliminary objection is in the nature of that used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. The preliminary objection raised by the 1st and 2nd respondents is premised on jurisdiction. Jurisdiction of any court is always a legal point since it flows from either the Statute or the constitution. As such the instant Preliminary Objection meets

the threshold set out in the Mukhisa Biscuits case (*supra*) regarding what the Court should look at, which are only the pleadings and the law.

10. This court has considered the preliminary objection as well as the grounds of the Memorandum of Appeal and the submissions filed by the appellants. Notably, the 1st and 2nd Respondents refer to an application dated 23rd September 2025. The application has not been availed to the court: it is not part of the record of Appeal as of now. The Court cannot, thus, make a finding as to the facts therein. Be that as it may, if the court were to venture into analyzing the contents of the application to determine whether it has or does not have jurisdiction, it would be delving into the merits of the application.

11. The jurisdictional mandate of this court as provided under Article 162 (2) (b) of the Constitution, 2010 is to hear and determine matters relating to the environment, including its use, occupation and title to land. When the Court, established pursuant to that Article was brought into existence, its

jurisdiction was set out in Section 13 of the Environment and Land Court Act which provides as follows:

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.

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 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.*

12. With this clear legal background on the matters the Court is supposed to handle, this Court then sets out to analyse the pleadings herein vis-à-vis the law. The appeal, as it appears to me arises from a decision of the trial magistrate over an auction of a property which was to be sold upon a default of repayment of a loan. This is borne out specifically in Ground one (1) of the Memorandum of Appeal which is as follows:

‘the learned trial magistrate erred in law and in fact by failing to appreciate the facts of the case and not granting interim orders to stop auction of the suit parcel LR. No. Kanyamkago/Kawere I/737 pending the hearing and determination of the suit therein thus would render the whole suit nugatory.’

13. It is clear from the said ground of appeal that subject matter of the dispute herein is an intended auction of a property which

was alleged to be matrimonial property, in the 3rd ground of appeal. The question that arises then is, given the provisions of the law on the jurisdiction of this court and the facts as pleaded, does this court have the requisite jurisdiction to entertain a dispute which involves an auction due to a default of loan repayment?

14. It is now nine (9) years since the above question was settled by the Court of Appeal. This court need not belabor the point. Thus, in the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)** stated as follows:

“23. Whereas the appellant contends that this was a land matter, whose jurisdiction lay with the ELC, the Kang’ethes have always advanced the view that this was a commercial dispute that could only be determined by the High Court.

24. At the outset, it is without doubt that jurisdiction is everything, without which the court can do nothing else and must down its

tools. See Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1.

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. Emphasis added.”

And that

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

26. To this end, parliament passed the ELC Act which establishes the ELC Court as well as the

Land Act whose Section 150 stipulates that the ELC

“....shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

27. The jurisdiction of the High Court on the other hand has been broadly set out under Article 163(3) which states that the High Court shall among others, have;

a) Unlimited original jurisdiction in criminal and civil matters.

28. Both before this Court and the court below, the appellant has contended that charging the suit land constituted ‘use’ of land, thus bringing the dispute within Article 162 (2) (b) aforesaid. In order to affirm or reject this assertion, it is perhaps pertinent to ascertain the real cause of action herein while also revisiting the definition of land, land use and Charges.

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.

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."

15. In the circumstances, this court finds that for the reasons that the instant appeal arises from a dispute that involved an intended auction of the suit land due to a loan taken over it whose default the 1st Respondent wished to realize, that initial activity of charging the property could not grant this court the basis to claim jurisdiction over the dispute: a civil debt and not land use or the use of land as envisaged in the Environment and Land Act. But as to whether the trial Court handled the application as an environment and land matter or a civil one, it is for the parties and that trial court to clarify. Thus, the preliminary objection is merited and it is upheld: the court does not have jurisdiction to hear the application herein. The interim orders granted earlier on are hereby discharged forthwith.

16. The Appellants shall bear the costs of the Objection and the Application. Since jurisdiction goes to the root of a cause of action including appeals where it is found to be successful, the entire appeal has to be dismissed because it would be an absurdity for the court to find that it lacks jurisdiction to hear the application and leave the appeal hanging' in here. Thus, like father like son the appeal must be dismissed. It is

dismissed. As a reminder to all and sundry, the way one drafts pleadings determines in many ways the manner in which their matter goes. Thus, since the 1st Respondent did not, by the objection, train its arsenal to the entire appeal, it cannot reap costs from where it has not sown. Each party shall, thus, bear their own costs of the appeal.

17. The original file of the trial court to be transmitted to the lower court registry forthwith for further action.

18. Orders accordingly.

Ruling Dated, Signed and **Delivered** virtually via the Teams Platform this **14th day of January 2026**.

HON. DR. IUR NYAGAKA

JUDGE

From 14:20 PM, in the presence of,

Md. Lola court Assistant

Ms. Agade holding brief for Ms. Ooro for the Appellants (online)

Mr. Oduor for the 1st Respondent (online)

3rd Respondent present in person in open Court