

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

CIVIL APPEAL NO. E013 OF 2023

FAULU MICROFINANCE BANK LIMITED

APPELLANT

VERSUS

JOSEPH NCHORE OBONYO 1ST

RESPONDENT

WATTS AUCTIONS 2ND

RESPONDENT

JUDGEMENT

(Being an Appeal from the Ruling of Hon. V. Kachuodho, Principal Magistrate, delivered on 11th April 2023 in Kajiado CMELC Case No. E128 of 2022)

Introduction

1. This appeal arises from the Ruling and Orders of Hon. V. Kachuodho, Principal Magistrate at Kajiado dated 23rd March 2023 and delivered on 11th April 2023 in **Kajiado CMELC Case No. E128 of 2022**. Vide the impugned ruling, the learned Trial Magistrate granted a temporary injunction in favour of the 1st Respondent, effectively restraining the Appellant from exercising its statutory power of sale over the suit property pending hearing and determination of the suit.
2. Aggrieved by the said decision, the Appellant, **Faulu Microfinance Bank Limited**, approached this Court via a Memorandum of Appeal dated 26th April 2023, filed pursuant to **Section 65(1)(b) of the Civil Procedure Act and Order 42 Rule 1 of the Civil Procedure Rules**.

3. The Appellant seeks to have the decision of the subordinate court set aside and substituted with an order dismissing the 1st Respondent's application before the trial court. The appeal is premised on seven (7) grounds which may be summarized as follows:

- i. **Threshold for Injunction:** That the learned Magistrate erred in law and fact by granting an injunction when the 1st Respondent's application failed to meet the established threshold for the grant of such equitable relief.
- ii. **Application of Principles:** That the trial court failed to appreciate and apply the correct principles governing the grant of temporary injunctions, specifically by issuing orders without actionable or probable grounds.
- iii. **Interference with Contract:** That the court misdirected itself by issuing orders that contravened the express terms of the security documents, thereby effectively rewriting the negotiated contract between the parties.
- iv. **Admission of Indebtedness:** That the trial Magistrate failed to appreciate the weight of evidence, particularly that the 1st Respondent had admitted indebtedness and had not faulted the recovery process, rendering them undeserving of the equitable relief.
- v. **Statutory Power of Sale:** That the court erred in arriving at a conclusion that denied the Appellant its statutory right of sale.
- vi. **Failure to Give Reasons:** That the learned Magistrate erred by failing to provide reasons for the finding that the 1st Respondent had met the threshold for the grant of the orders sought.
- vii. **Consideration of Submissions:** That the trial court failed to consider the submissions filed by the Appellant, leading to an erroneous conclusion.

4. The central issue that the appellant wants determined in this appeal is whether the learned Trial Magistrate exercised her discretion constitutionally in granting the temporary injunction and whether the principles set out in the locus classicus case of *Giella vs. Cassman Brown & Co. Ltd* were properly applied to the facts before the lower court.
5. At this juncture, it is important that I narrate the history of the dispute. The suit before the trial court was commenced by the 1st Respondent herein, as the Plaintiff against the Appellant and 2nd Respondent herein, as the 1st and 2nd Defendants respectively vide a **Plaint dated 25th November 2022**.
6. The Plaintiff's cause of action, as set out in the Plaint, was founded on a banking relationship where he had initially borrowed from the Appellant, **Kshs. 500,000/-** in 2017, securing the same with his property known as **MOLO/MAU SUMMIT/2354** ('the Molo property'). He averred that he repaid this initial sum but did not collect the collateral. Subsequently, in 2019, he was advanced a second loan of **Kshs. 1,500,000/-** by the Appellant, this time charging a different property known as **KAJIADO/KITENGELA/12663** ('the suit property' in this appeal).
7. The dispute crystallized when the Plaintiff defaulted on the second facility due to financial constraints. He contended that he found a buyer for the Molo property to offset the arrears but the Appellant unlawfully withheld the title deed to the Molo property, allegedly consolidating it with the loan secured by the Kajiado property (Kajiado/Kitengela/12663) without his consent. The Plaintiff averred that the Appellant's refusal to release the Molo title frustrated his repayment plans, leading the Appellant to issue a statutory notice to sell the suit property (Kajiado/Kitengela/12663) by public auction that was scheduled for 1st December 2022.
8. Consequently, the Plaintiff approached the trial court seeking, *inter alia*:

a) A permanent injunction restraining the Defendants from selling the suit property
KAJIADO/KITENGELA/12663;

b) b) An order compelling the 1st Defendant to release the Title Deed for
MOLO/MAU SUMMIT/2354, which he pleaded was illegally charged.

9. Contemporaneous with the Plaint, the Plaintiff filed the Notice of Motion application seeking temporary injunctive reliefs, which resulted in the impugned ruling delivered on 11th April 2023 and that is the subject of this appeal.

Directions

10. The court directed the parties to canvass the appeal by way of written submissions. None of the parties complied with the directions within the prescribed timelines. Nonetheless, the court will proceed to consider the issue of jurisdiction to entertain this appeal in view of the pleadings filed before the trial court which the court has had occasion to peruse and appraise.

Analysis and Determination

11. I have carefully considered the Memorandum of Appeal, the Record of Appeal and the pleadings filed in the lower court. While the Appellant has raised seven grounds of appeal touching on the merits of the temporary injunction granted by the trial court, there is a fundamental threshold issue that this Court must address before delving into the merits of the application or the appeal. That issue is of **Jurisdiction**.

12. It is settled law that jurisdiction is the lifeblood of any suit. Without it, a court has no power to take any more steps. As famously stated by Nyarangi, JA in the *locus classicus* case of **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1:**

"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 down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. The question that arises is whether this Court, sitting as the Environment and Land Court (ELC), has the requisite jurisdiction to determine a dispute centered on a borrower-lender relationship, the enforcement of a charge, and the exercise of the statutory power of sale.

14. The jurisdiction of this Court is derived from **Article 162(2)(b)** of the Constitution of Kenya, 2010, which limits the mandate of the ELC to disputes relating to:

"...the environment and the use and occupation of, and title to, land."

15. Conversely, the High Court retains unlimited jurisdiction in civil matters (other than those specifically reserved for the specialized courts created under article 162 of the Constitution). The demarcation between these jurisdictions has been the subject of extensive judicial interpretation. I am guided by the reasoning of the Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)*, which addressed this precise issue of whether disputes involving charges fall within the ambit of "land use."

16. The Court of Appeal clarified that charging land does not constitute "use" of land within the meaning of Article 162(2)(b) of the Constitution. The Court held that:

*"Neither the *cujus* doctrine nor Article 262 whether expressly or by implication recognizes charging land as connoting land use... 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."*

17. The Court of Appeal further distinguished between a "disposition" and "land use," noting that:

"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... 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."

18. Applying these principles to the instant appeal, the dispute before the subordinate court and now before this Court is purely a commercial dispute. It arises from the advance of a loan facility of Kshs. 1,500,000/- by the Appellant to the 1st Respondent. The core grievances raised in the Plaintiff are the tabulation of accounts, the alleged failure to restructure the loan, and the procedural propriety of the intended statutory sale.

19. While the security for the loan is land (Title No. KAJIADO/KITENGELA/12663), the cause of action is not about the "use" or "occupation" of that land, nor is it about the validity of the title itself. As stated in the *Patrick Kangethe* case:

"The creation of that relationship [a Charge] therefore, has nothing to do with use of the land... Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor."

20. Further, although **Section 13(2)(d)** of the Environment and Land Court Act empowers this Court to hear disputes relating to "instruments granting any enforceable interests in land," the Court of Appeal in the *Patrick Kangethe* case clarified that this applies where the instrument itself is the cause of action. In this case, the charge instrument is not in dispute; rather the claim concerns the debt recovery process.

21. Consequently, I find that this dispute falls squarely within the realm of a commercial/civil dispute, which is the preserve of the High Court (or the Magistrate's Court exercising civil

jurisdiction), and not the Environment and Land Court. The mere fact that land was offered as security does not convert a simple contract debt claim into a land dispute under **Article 162(2)**

(b).

22. Since this Court lacks jurisdiction to hear the subject matter of the dispute, it equally lacks the

23. *Vessel M.V Lillian S.*, I must down my tools at this juncture. I will proceed to strike out this appeal but with costs to the 1st Respondent against the Appellant.

24. For the reasons set out above, I make the following orders:

(a) This court lacks jurisdiction to hear and determine this Appeal, as the subject matter concerns a commercial banking dispute and not the use, occupation, or title to land.

(b) The Appeal is hereby struck out but with costs to the 1st Respondent against the Appellant.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 22nd Day of January 2026.

M.D. MWANGI
JUDGE

In the virtual presence of:

Ms. Mageto for 1st Respondent

N/A for the Appellant and the 2nd Respondent

Court Assistant: Mpoye

M.D. MWANGI
JUDGE