

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E065 OF 2024

JARED MASINI ICHWARA - **APPELLANT**
VS
UNITED NATIONAL SAVINGS &
CREDIT COOPERATIVE SOCIETY LIMITED - **1ST**
RESPONDENT
PHILIPS INTERNATIONAL AUCTIONEERS - **2ND RESPONDENT**

RULING

(In respect of the 1st Respondents' Preliminary objection dated 9/10/25 and the Appellants Preliminary objection dated 21/10/2025)

1. The 1st Respondent filed a Preliminary Objection dated 9/10/25 on the grounds that the court lacks jurisdiction to hear and determine the appeal, arguing that the court does not have authority over disputes related to mortgages, charges, collection of dues, and rents, as these matters are exclusively within the jurisdiction of the High Court. The 1st Respondent in its objection, relied on the case of Cooperative Bank of Kenya Limited and Patrick Kangethe Njuguna & 5 others [2017]
2. The appellant's preliminary objection is based on res judicata. That the court, in a similar matter, namely ELCA NO E041 of 2023 - Jared Masini Ichwara Vs United National Savings & Credit Cooperative Society Limited, in the Ruling delivered on 20/3/24, held that the court is seized of jurisdiction.
3. Parties elected to canvass the Preliminary objections by way of written submissions which I have read and considered.
4. The key issue is whether the objections are merited.
5. The test in determining a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd -Vs- West End Distributors Ltd [1969] EA 696** 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.

Further that:

“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 had to be ascertained or if what is sought is the exercise of discretion.

6. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
7. The basis of the dispute between the parties before the Cooperative Tribunal is outlined in the statement of claim dated 28/9/2021. In this document, the applicant sought declaratory relief, asserting that the 1st Respondent lacks the authority to exercise its statutory power of sale over the subject property due to non-compliance with the provisions of the Land Act governing the issuance of statutory notices. Accordingly, the applicant also sought an injunction to prevent the respondent from selling or otherwise dealing with the property in a manner that would interfere with his quiet possession and enjoyment.
8. It is the applicant's case that he was a member of the 1st Respondent and the registered owner of the suit land, namely NAIROBI/BLOCK 139/99. The applicant was advanced a loan amounting to Kshs 10 Million, secured by the suit property, and that, in the ensuing default, the 1st Respondent commenced the process of exercising its statutory power of sale. The applicant has contended that the action of the 1st Respondent in attempting to sale the property by way of a public auction

is unlawful on account of the failure to comply with the statutory notices and the provisions of section 97(2) of the Land Act with respect to the proper valuation of the suit property.

9. His other grievance with the 1st Respondent can be gleaned from para 9 of his statement of claim that;

“The claimant further avers that despite demand, the 1st Respondent has adamantly refused to supply him with a statement of account in respect of the loan herein, hence shrouding the whole matter of the loan in a mystery.”

10. The first Respondent's statement of defence, dated 6 June 2022, asserts that the applicant was granted a loan of Kshs 10 million secured by the suit land, which was charged to the first Respondent. In this instance, the character of the property was transformed to commercial in nature. The security interest was duly registered in accordance with applicable legal provisions. By 2019, the applicant had defaulted on the repayment of the loan amounting to Kshs 12.0 million, thereby entitling the first Respondent to sell the charged property held as security via public auction, in compliance with statutory provisions. As of 2022, the remaining loan balance of Kshs 18.9 million was unpaid, prompting the recovery process through public auction, with the relevant notices duly issued to the applicant. Concerning the statement of account, it was argued that members of the first Respondent had direct access to the accounts through their personal portals, and, furthermore, the applicant did not request the loan statements at any time, indicating that he has never contested the outstanding balances.
11. In light of the above, it is evident that the dispute before the Tribunal concerns the monies advanced by the 1st Respondent to the applicant and the alleged failure of the 1st Respondent to issue lawful statutory notices in the exercise of its statutory power of sale.
12. In addressing this objection, the court will be guided by the decision of Court of Appeal in Cooperative Bank of Kenya Limited and Patrick Kangethe Njuguna & 5 Others [2017] above cited;

“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 fulfillment 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. 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 the **Constitution** fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.

13. The court further clarified the issue of jurisdiction succinctly as thus;

"To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under **Section 2** of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

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."

14. From the foregoing, it is clear that the dispute concerns the contested exercise of the statutory power of sale as well as the accounts. I need not add more except to state that this court lacks the jurisdiction to hear and determine this appeal. The matter falls within the jurisdiction of the High Court, and for that reason, I down my tools. I find that the objection has merit.
15. Having upheld the 1st Respondent's objection, I find no need to determine the Appellant's objection. By its very nature, this objection requires the court to examine the evidence regarding the nature of the Ruling and whether the current application is res judicata. Courts have held that such
16. objections are best raised through a notice of motion to allow the party to present evidence for the court's determination. The same is therefore dismissed.
17. In the end, I uphold the objection dated 9/10/24 and dismiss the one dated 21/10/25.
18. Each party to meet the costs of their objections.
19. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY
OF MARCH 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered Online in the presence of:

1. Ms. Wamukore for Appellant
2. N/A for Respondents
3. CA – Ms Yvette Njoroge