

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. E004 OF 2024

BETWEEN

CAROLINE KEMUNTO NYANGERI 1ST APPELLANT

ALFAXARD MOBISA GWAKO 2ND APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST

RESPONDENT DAVID WANDERI T/A TAIFA AUCTIONEERS

2ND RESPONDENT

(Being an Appeal from the Ruling of Honourable A. Makau, Senior Principal Magistrate, delivered on 9th October 2024 at the Chief Magistrate's Court at Ngong in Civil Suit No. E018 of 2022)

JUDGEMENT

Background

1. This appeal arises from the Ruling of the Senior Principal Magistrate, Honourable A. Makau, delivered on the 9th of October 2024 in **Ngong CMCC No. E018 of 2022**. In the impugned ruling, the trial court upheld the Respondents' Notice of Preliminary Objection and dismissed the Appellants' Notice of Motion application dated 9th August 2024.
2. Being dissatisfied with the said outcome, the Appellants, **Caroline Kemunto Nyangeri** and **Alfaxard Mobisa Gwako**, approached this Court via a Memorandum of Appeal dated 23rd October 2024 raising seven (7) grounds of appeal, as follows:

- a. **THAT** the Learned Magistrate erred in law and in fact by allowing the Respondents' Notice of Preliminary Objection without hearing and determining the Appellants' Notice of Motion filed before the lower court dated 9th August 2024.
 - b. **THAT** the Learned Magistrate erred in law and in fact by determining that the Appellants' Notice of Motion filed before the lower court dated 9th August 2024 amounted to *Res Judicata*.
 - c. **THAT** the Learned Magistrate erred in law and in fact by failing to properly evaluate the evidence presented before her prior to the pronouncement of the Ruling.
 - d. **THAT** the Learned Magistrate erred in law and in fact by failure to note that the Appellants' Notice of Motion dated 9th August 2024 raised triable issues.
 - e. **THAT** the Learned Magistrate erred in law and in fact by failure to invoke proper principles and guidelines in determining the matter before her.
 - f. **THAT** the Learned Magistrate erred in law and in fact for failure to note that the issues which were raised in the Appellants' Notice of Motion dated 9th August 2024 filed before the lower court were different from the issues canvassed earlier on in respect to the Notice of Motion dated 28th January 2022.
 - g. **THAT** the Learned Magistrate erred in law and in fact for failure to consider the Appellants' Application in totality.
3. Based on the foregoing grounds, the Appellants pray for judgment against the Respondents for orders that:

- a. The ruling delivered by the Honourable A. Makau, Senior Principal Magistrate, delivered on 9th October 2024 be quashed and/or set aside.
 - b. The Notice of Motion dated 9th August 2024 filed in the lower court be allowed in terms of prayers 3, 5, and 6 and the Respondent's Notice of Preliminary Objection dated 21st August 2024 be dismissed with costs.
 - c. In the alternative, this Honourable Court be at liberty to issue any order as it may deem fit.
 - d. Costs of the Appeal be awarded to the Appellants.
4. The genesis of this appeal lies in the Notice of Motion application dated **9th August 2024**, filed by the Appellants (then Applicants/Plaintiffs) against the Respondents (then Respondents/Defendants) under Certificate of Urgency.
5. In the said application, brought principally under **Orders 40 and 51 of the Civil Procedure Rules, 2010**, the Appellants sought the following substantive orders from the trial court:
- a. **THAT** pending the inter partes hearing of the Application, the Honourable Court be pleased to grant an interim order restraining the Respondents, their agents, or servants from selling the Applicants' property known as **Ngong/Ngong/3860** in a public auction slated for **30th August 2024** or interfering with the subject property in any manner.
 - b. **THAT** the Honourable Court be pleased to order that the subject property **Ngong/Ngong/3860** is a condemned structure, and hence the intended sale by the 1st Respondent infringes the Applicants' proprietary rights and amounts to an illegality.

- c. **THAT** the costs of the application be borne by the 1st Respondent.
6. The application was premised on the grounds that although the Applicants had charged the subject property to the 1st Respondent to secure a facility, the condition of the property had significantly deteriorated due to its location, rendering it unsuitable for dwelling. Consequently, after an assessment was conducted, the property was declared a "condemned structure," forcing the Applicants to relocate their families to a rented house for fear of their safety.
 7. The motion was supported by the Affidavit of the 2nd Appellant, **Alfaxard Mobisa Gwako**, sworn on **9th August 2024**. The deponent averred that: The Appellants faced financial difficulties during the COVID-19 pandemic which hampered their ability to service the loan facility. While a statutory power of sale notice had been issued earlier, the physical condition of the property had since deteriorated. The property was examined by qualified experts from the **National Buildings Inspectorate**, who found it unsuitable for dwelling (Annexure "CKN 1"). Despite being aware that the property is condemned and uninhabitable, the 1st Respondent proceeded to value the property at an exorbitant figure of **Kshs. 8,865,824.20**, disregarding a separate valuation which placed the value at **Kshs. 5,500,000/=** due to its bad state (Annexure "CKN 3").
 8. The 1st Respondent issued a notification of sale through its agent, **Taifa Auctioneers** (the 2nd Respondent), indicating an intention to sell the property on **30th August 2024** (Annexure "CKN 2"). The intended sale was unprocedural and illegal as the 1st Respondent allegedly failed to send a fresh Statutory Power of Sale notice to accord the Appellants an opportunity to redeem the property as provided in law.

9. The Appellants contended that it would be unfair for the 1st Respondent to enrich itself unjustly by selling a condemned property without addressing the crucial issues regarding its status and condition.

10. In response to the Appellants' Notice of Motion, the 1st Respondent/Defendant filed a **Notice of Preliminary Objection** dated **21st August 2024**. Through this objection, the 1st Respondent sought to have the application struck out *in limine* with costs on a full indemnity basis.

11. The Preliminary Objection was premised on two primary grounds:

A. Res Judicata The 1st Respondent contended that the Notice of Motion was *res judicata* pursuant to **Section 7 of the Civil Procedure Act**, arguing that: The Honourable Court had already determined a similar application through a ruling delivered on **26th June 2023** by Hon. A. N. Makau. In that previous ruling, the Court had issued a temporary injunction limited only to the period required for the Respondents to effectively serve Notices in compliance with the law. Citing the decision in ***Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR*** (which relied on ***Uhuru Highway Development Ltd vs. Central Bank of Kenya***), the Respondent argued that the Court lacked jurisdiction to re-try an issue where the matter directly and substantially in issue had essentially been heard and finally decided by the same court. The Respondent further asserted that principles of *res judicata* apply to interlocutory applications within a suit to ensure there is an end to litigation, and thus the application could not be resuscitated having been determined earlier.

B. Abuse of Court Process Secondly, the 1st Respondent argued that the application was frivolous, scandalous, vexatious, and an abuse of the court process under **Order 2 Rule**

15 of the Civil Procedure Rules, on the grounds that: The Appellants were merely seeking to re-open their previous application which had already been heard and determined on 26th June 2023. Relying on *Bullen & Leake and Jacobs Precedents of Pleading* and the case of *Ngokonyo & 2 others v Kenya Posts & Telecommunication Corporation [1992] KLR 567*, the Respondent submitted that the application was "frivolous" (groundless or fanciful) and "vexatious" (lacking *bona fides* and intended to cause unnecessary anxiety, trouble, and expense).

12. In the Ruling delivered on **9th October 2024**, the Learned Magistrate, Hon. A. Makau, proceeded to determine the Preliminary Objection first, noting that it touched on the jurisdiction of the court to hear the application.

13. After considering the rival submissions, the Trial Court identified the central issue for determination as whether the Appellants' Notice of Motion dated 9th August 2024 was *Res Judicata*.

14. In her analysis, the Learned Magistrate observed the following: Guided by **Section 7 of the Civil Procedure Act** and the decision in *Uhuru Highway Development Ltd vs. Central Bank of Kenya*, the Court held that it was precluded from trying any suit or issue in which the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties.

15. The Court noted that the Appellants had previously filed an application dated **28th January 2022** seeking similar injunctive reliefs. That application was heard and determined via a ruling delivered on **26th June 2023**, where the Court granted a temporary injunction for 45 days.

16. The Learned Magistrate found that filing a fresh application for injunction orders over the same suit property, after the previous application had been determined, amounted to an abuse of the court process. The Court emphasized the principle that litigation must come to an end.

17. Consequently, the Trial Court found merit in the Preliminary Objection and upheld it. The Appellants' Notice of Motion dated 9th August 2024 was struck out with costs awarded to the Respondent.

18. This appeal was canvassed by way of written submissions, the submissions of which have been duly considered in the writing of this judgement. The Respondents filed their submissions alongside an objection challenging the jurisdiction of this court necessitating the Appellants to file supplementary submissions with leave of the court, and which the court has also considered.

Issues for Determination

19. This Court has carefully considered the Memorandum of Appeal, the Record of Appeal, and the rival submissions by the parties and the critical issue of the jurisdiction of the court to entertain and determine this appeal features prominently.

20. The issue of jurisdiction is central and determinative and must therefore be handled promptly the moment it is identified as an issue. I must consider it first before looking into the merits of the appeal which I will only delve into if I find that I have the jurisdiction to entertain and determine this appeal.

Determination

21. By jurisdiction is meant the authority which court has to decide matters that are litigated before it. As noted in the case of **Owners of the Motor Vessel M.V Lillian S. v. Caltex**

Oil (K) Limited [1989] KLR 1, the limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by the like means.

22. The supreme court of Kenya in the case of Samuel Kamau Macharia & ano vs KCB & 2 others (2012) eKLR, emphasized that a court's jurisdiction flows from either the constitution or legislation or both. A court can only exercise jurisdiction conferred upon it by the constitution or other written law.

23. The jurisdiction of this Court is derived from **Article 162(2)(b)** of the Constitution of Kenya, 2010, and section 13(5) of the ELC Act which limits the mandate of the ELC to disputes relating to:

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

24. In respect to the appellate jurisdiction of the court, section 13(4) of the ELC Act is instructive that;

"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."

25. Therefore, in determining whether this court has the jurisdiction to entertain this appeal, the question then to consider is whether the subject-matter of the appeal falls within the scope of subsections (1) and (2) of section 13(5) of the ELC Act.

26. From a careful perusal of the record, the suit before the lower court and the application dated 9th August 2024 were challenging the 1st Respondent's (bank) exercise of the power of sale over the suit property Ngong/Ngong/3860 by way of a public auction that had been scheduled for 30th August 2024. The Appellants were seeking interim orders

restraining the Respondents from selling the suit property Ngong/Ngong/3860 in the public auction.

27. The Court of Appeal has authoritatively determined on the jurisdiction of the ELC in respect to mortgages and charges. In the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)*, the court was emphatic that;

“...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 hereinabove. 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.”

28. The Court of Appeal went further to look into the definition of a charge, noting that,

“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 the use of land. Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced to the chargor.”

29. The above decision is binding on this court.

30. In view of the foregoing, this court agrees with the Respondents' submissions that it lacks the jurisdiction to entertain and determine this appeal.
31. I note that this appeal had indeed been initially filed in the High Court at Kajiado being High Court Civil Appeal No. E104 of 2024. However, at the instance of the Appellants' advocates, Nyangito & Associates Company Advocates, the file was transferred to this court. The advocates vide their letter of 21st November 2024 requested for the transfer of the file to the ELC court.
32. The communication by the Court Administrator of the High Court, Kajiado indicates that the file was paced before Hon. Justice Lolwatan on 15th January 2025 who acceded to the request of the Appellants advocates and ordered that the file be placed before the ELC Court.
33. Be that as it may, this court finds and holds that it lacks the jurisdiction to entertain the appeal. It must don it tools at this point. Consequently, the appeal is hereby struck out with costs to the Respondents.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 5th Day of March 2026.

**M.D. MWANGI
JUDGE**

In the virtual presence of:

Ms. Okumu h/b for Mr. Nyangito for the Appellants

Mr. Muhizi for the Respondents

Court Assistant: Mpoeye

**M.D. MWANGI
JUDGE**

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