

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELCL MISC E067 OF 2025 (OS)

GUARANTY TRUST BANK (KENYA)
LIMITED.....PLAINTIFF

VERSUS

HIBO MOHAMUD MOHAMED

{as of the estate of the late the personal representative

YUSUF MOHAMUD MOHAMED (Deceased)}1ST
DEFENDANT

COLT PETROLEUM LIMITED.....2ND
DEFENDANT

JUDGMENT

Introduction

1. Guaranty Trust Bank (Kenya) Limited, the Plaintiff herein instituted this matter through an Originating Summons dated 9th October, 2025 seeking for the following orders.

- I. *THAT the Plaintiff be at liberty to exercise its statutory power of sale over the property known as Title Number KJD/DALALEKUTUK/12556 and to sell the said property at the best obtainable price, and to conclude such sale by accepting the highest bid even if such bid falls below the forced-sale value previously obtained, having due regard to the prevailing market conditions and the history of several unsuccessful auction attempts.*
- II. *THAT costs of this application be provided for.*
- III. *THAT the Court grants any further or alternative relief deemed just and equitable in the circumstances.*

2. The Summons is brought under *Articles 40(1) and 159 of the Constitution; Sections 90, 96, 98, 99 and 104 of the Land Act, 2012; Sections 1A, 1B & 3A of the Civil Procedure Act; Sections 3, 13 and 19 of the Environment and Land Act, 2011 and Order 37 rule 4 of the Civil Procedure Rules.* It is premised on 19 grounds restated in the Affidavit of Kristie Mukobi sworn on 9th October, 2025 who deposes as follows.

3. On 12th March, 2020, the Plaintiff advanced a **loan** facility of **Kshs. 35,000,000/=** to the 1st Defendant, Colt Petroleum Limited (borrower) which was secured by the title of **KJD/DALALKMUTUK/12556** registered in the name of the 2nd Defendant Yusuf Mohamud Mohamed (Chargor). Consequently, the Plaintiff, borrower and Chargor executed a charge instrument dated 15th June, 2020 over the charged property later registered on 6th July, 2020. When the Defendants failed to **service** the loan in spite of it falling into tremendous **arrears**, they were **served** with a 90 days' statutory **notice** by the Plaintiff in June, 2021 in line with Section 90 of the Land Act.
4. According to the Plaintiff, as at the time the chargor passed away on 25th September, 2022, it had not yet issued a 40 days' notice to sell the property under **Section 96(2) of the Land Act** even though the loan was in arrears. It is asserted that the Plaintiff regularized this position by serving a 90 days' statutory notice and a 40 days' notice to sell upon the Defendants via registered post. The Plaintiff affirms that it instructed Phillips International Auctioneers (Auctioneers) to issue a 45 days' redemption notice and notice for sale and similarly advertise the property for sale by public auction on 16th October, 2024. Despite obtaining market and forced sale valuation of

Kshs. 80,000,000 and Kshs. 60,000,000/= respectively, based on Gimco Ltd valuation report dated 9th August 2024, the highest bid during the public auction conducted on 16th October, 2024 was Kshs. 30,000,000/= only. Upon re-advertising again, the highest received bid received during the auction conducted on 14 July, 2025 was Ksh.28,000,000/=.

5. The Plaintiff contends that afterwards, Messr. Phillips International Auctioneers issued a courtesy notice re-advertising the property. Additionally, a second valuation conducted by Gimco Ltd pursuant to Rule 11(1)(b)(x) of the Auctioneers' Rules indicated that as at 17th September,2025, the forced sale value of the property was Kshs. 54,750,000/=. It is alleged that the third public auction conducted on 24th September,2025 was unsuccessful as the highest received bid of Kshs. 34,500,000/=, below the forced sale value of Kshs. 54,750,000/=.

6. The Plaintiff implores the court to issue the orders sought because the Defendants' refusal and negligence to offer any viable solution has led to escalating interests on the outstanding loan and further continues to increasingly expose it. Additionally, given that the Plaintiff has made every effort in good faith to reduce the outstanding loan amount, failure to grant

and issue the order sought will unjustly prevent it from realizing its security and suffer great prejudice to the detriment of its depositors.

7. Even though the Defendants were duly served with summons to enter appearance and the Plaintiff's pleadings electronically and through substituted service, they did not respond to the Plaintiff's case nor participate in the proceedings. When the matter came up for directions on 29th January, 2026, the court directed that the Originating Summons be dispensed with through affidavit evidence and written submissions.
8. Through its written submissions dated 4th September, 2026, the Plaintiff relying on the decision in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] KEELC 1599 (KLR)* submits that this court has exclusive jurisdiction to hear and determine this matter.
9. On whether the Defendant may lawfully sell the charged property below the forced sale value, the Plaintiff cites section 97 of the Land Act; the decisions in the case of *Equity Bank (Kenya) Limited v Maina [2024] KEELC 6786 (KLR)*; and *NCBA Bank Kenya PLC v Angran Limited [2021] KEHC 314 (KLR)* to demonstrate that courts have sanctioned sale at best appropriate prices after failed auctions. In concluding, the court is implored to issue the

orders sought because the Plaintiff has demonstrated that its securities and escalating costs shall be prejudiced because of the delay.

Issues for determination

10. One of the issues that the Plaintiff has rightfully identified in its submissions is the jurisdiction of this court. The Plaintiff submits that the court has the jurisdiction to entertain and determine the matter. The Applicant refers to the decision in *Lydia Nyambura Mbugua vs Diamond Trust Bank of Kenya Ltd & ano.* where Munyao J (as he then was) held that the court has the jurisdiction to regulate or sanction the exercise of the statutory power of sale.

Determination

11. 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.

12. 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.

13. 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."

14. 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.”

15. 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.”

16. The above decision is binding on this court.

17. What the Plaintiff in this case is seeking is the court's sanction to realize the security under the terms of the charge which has crystallized upon the default by the borrower but below the reserve price. Simply put; the

Plaintiff seeks leave of the court to permit him to enforce his right as a chargee to recover the debt owed by the borrower in the manner suggested in the OS.

18. This, from whatever angle one looks at it, has nothing to do with the use and occupation of, and title, to land. I respectfully disagree with the holding in the Lydia Nyambura case.

19. I do not see how the matter fits into the scope of the jurisdiction of this court. The relationship between the Plaintiff and the Defendants is a commercial relationship and the court vested with the jurisdiction is the High Court. Consequently, the court having arrived at the conclusion that it lacks the jurisdiction to entertain and determine this matter, the only option is to strike out the Plaintiff's OS which I hereby do but with no orders as to costs considering that the Defendants had not entered appearance or participated in these proceedings.

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:

Mr. Muga for the Plaintiff

N/A by the Defendants

Court Assistant: Mpoye

M.D. MWANGI
JUDGE

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