

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E008 OF 2025

DANIEL WAMBUA NZAU.....APPELLANT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....RESPONDENT

(Being an appeal against the Ruling of Hon. Gatheru (PM) delivered on 9th January 2025 in Mombasa Chief Magistrate’s Court Civil Suit No. E219 of 2024, *Daniel Wambua Nzau v Faulu Microfinance Bank Limited*)

JUDGMENT

1. The background of the appeal is a suit filed in the trial court through a Plaint dated 23rd September 2024 where the Plaintiff alleged that the intended public auction of property known as L.R MN/1/2068 used as security in respect to defaulted loan repayment was marred with illegalities as he was never served with the 90-days’ notice as required by law.
2. The Plaintiff prayed for judgment against the Defendant that the purported auction sale of the property namely L.R MN/1/2068 situated in Serena, Shanzu

area be declared null and void ab initio, a permanent injunction restraining the Defendant by itself, its agents and/or servants from selling the Plaintiff's aforesaid property in pursuance of the Defendant's purported statutory power of sale, and for costs of the suit.

3. The Defendant filed a Notice of Preliminary Objection on the jurisdiction of the court, and the trial court in its ruling held the court had no jurisdiction but the High Court. The preliminary objection was upheld and the suit struck out with costs to the defendant.
4. Being dissatisfied, the Appellant appealed the ruling through the Memorandum of Appeal dated 13th January 2025 on the following grounds that: -
 - i. *The Trial court erred in law and in fact in its finding that it lacked the jurisdiction to hear and determine the suit.*
 - ii. *The Trial Court erred in law and in fact by finding that the illegal alienation of land by a chargee does not fall within the ambit of 'use of land'.*
 - iii. *The Trial Court further erred in law and in fact by upholding the Preliminary Objection dated 7th October, 2024 yet the same was not grounded on a pure point of law.*
 - iv. *The Trial Court erred in law and in fact in that by upholding the Preliminary Objection dated 7th October, 2024, the Appellant was denied the opportunity of being heard.*

v. *The Trial Court also erred in law and in fact in that it failed to give effect to the law as contained in Articles 50 & 159 of the Constitution of Kenya, 2010. 30*

vi. *The Trial Court further erred in law and in fact in rendering of a decision that was wholly against the weight of the law and the evidence.*

5. The Appellant prayed for orders that the court do allow the appeal with costs to the Appellant.

6. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 2nd July 2025 argued that the issue for determination is whether the Chief Magistrate's Court sitting as an Environment and Land Court has jurisdiction to determine a matter involving a dispute between a borrower and lender on the exercise of statutory power of sale.

7. That the trial court erred in holding that it did not have jurisdiction as any matter falling under charges and mortgages could only be heard by the High Court. The Appellant submitted that the matter had initially been filed in the High Court but the court directed that the same be filed before the Chief Magistrate's court. That according to the holding in *Patrick Kangethe's* case, the Environment and Land Court did not have jurisdiction to deal with the issue of statutory power of sale. That the subordinate court therefore made an error in overruling the decision of the High Court.

8. As at the time of writing the judgment herein, the Respondent had not filed their submissions.

Analysis

9. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in ***Selle v Associated Motor Boat Co. (1968) E.A 123*** as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”

10. I have considered the Record of Appeal dated 14th April 2025 and submissions by the Appellant. The issues for determination are: -

- (a) Whether the preliminary objection raised a pure point of law.*
- (b) Whether the trial court erred in finding that it lacked jurisdiction.*
- (c) Whether the suit ought to have been struck out.*
- (d) What orders should issue.*

11. On whether the preliminary objection raised a pure point of law, the court in ***Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*** held that: -

“... A Preliminary Objection 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 ...”

12. The Respondent’s preliminary objection challenged the jurisdiction of the trial court. Jurisdiction is a pure point of law and can properly be raised as a preliminary objection.
13. The Supreme Court emphasized the importance of jurisdiction in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012) eKLR***, holding that a court can only exercise jurisdiction conferred upon it by the Constitution or statute as follows: -

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law ... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be

within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

14. The trial court was therefore correct in entertaining the preliminary objection.
15. On whether the trial court erred in finding that it lacked jurisdiction, the core issue in the present appeal is whether the Chief Magistrate’s Court sitting as an Environment and Land Court had jurisdiction to determine a dispute concerning the exercise of a statutory power of sale.
16. The trial court relied heavily on the Court of Appeal decision in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)***.
17. It is on record that the suit was initially filed in the High Court. The court directed that the matter be heard by the Chief Magistrates Court. The Appellant went ahead and filed the matter in the ELC division of the Magistrate’s court. It is important to note that subject to pecuniary jurisdiction, the Magistrates sit as Environment and Land Courts, Employment and Labour Relations Courts, Family Courts, Criminal Courts, Civil and Commercial Courts.
18. Upon the High Court directing that the matter be filed in the Chief Magistrates Court, the Plaintiff/ Appellant ought to have filed the suit before the Chief Magistrate’s Court but registered as a civil matter not environment and land matter.

19. The trial court was in order in striking out the matter for lack of jurisdiction. The appeal lacks and is hereby dismissed. Nevertheless, the Appellant is at liberty to file the suit before the Chief Magistrates court, Civil Division.
20. On costs, considering the strained relationship between the Appellant and the Respondent, I exercise the court's discretion and order that each party to bear its own costs.

Determination

21. Accordingly, this court makes the following orders: -

(a) The appeal lacks merits and is hereby dismissed.

***(b) The ruling delivered on 9th January 2025 in Mombasa MCELC
Case No. E219 of 2024 is hereby upheld.***

***(c) The Appellant is at liberty to file a fresh suit in the Chief
Magistrates Court, Civil Division.***

(d) Each party to bear its own costs.

Dated and delivered virtually at Mombasa this 19th day of March, 2026

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Ms. Gwahalla Advocate h/b for Mr. Gikandi Advocate for the Appellant

Ms. Moige Advocate h/b Ms. Muthoga Advocate for the Respondent

Ms. Gertrude, Court Assistant