

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELCLC E033 OF 2025

REHEMA ACADEMY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

SIDIAN BANK LIMITED.....1ST DEFENDANT/RESPONDENT

KEYSIAN AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed the notice of motion application dated October 7, 2025, under the provisions of sections 1A, 1B, and 3A of the Civil Procedure Act and Order 40, Rules 1 and 2 of the Civil Procedure Rules. In it, the Applicant seeks orders;

a. Spent

b. Spent

c. A temporary injunction be and is hereby issued restraining the defendants either acting by themselves, servants and/or agents from alienating, advertising for sale, offering for sale, selling, transferring and/or otherwise disposing off and/or

interfering in any way whatsoever with all that parcel of land known as KISII TOWN BLOCK III/203 or the operations of the two-storey building house thereon pending the hearing and determination of this suit.

d. The costs of the application be provided for.

2. The application was premised on the grounds stated on its face, inter alia, that one of the Applicant's directors, Reuben Jack Masese, who was actively involved in the management of the Applicant, passed away on 5th February, 2025, triggering succession proceedings that are currently pending.
3. The Applicant pleaded that, prior to the deceased director's death, the deceased director was in the process of disposing of his parcel of land, West Kitutu/Bokega/1334, for Kshs 70,000,000, with the proceeds intended to offset indebtedness to the 1st Defendant. Additionally, the Applicant states that it is more than willing and able to redeem the suit property by clearing the loan arrears owed to the 1st Defendant/Respondent.
4. The application was opposed by the replying affidavit of Jackline Ndung'u, the legal officer of the 1st Respondent. She deposed, inter alia, that this dispute is of a commercial nature and is not founded on article 162(2)(b) of the Constitution, hence the Environment and Land court lacks jurisdiction to entertain it.

5. The 1st Respondent avers that it is important to distinguish between the Plaintiff's obligations as a juridical entity and those pertaining to the estate of one of its directors. It further urges that waiting for the conclusion of the director's succession serves no practical purpose and amounts to an exercise in futility.

Analysis and Determination:

6. The parties agreed to prosecute the application through written submissions, with the Applicant and the 1st Respondent filing their respective submissions. The 1st Respondent contests this court's jurisdiction; therefore, it must be addressed before delving into the merits of the application.

7. The Applicant discussing the significance of jurisdiction to a court cited the case of **Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR**, which held thus;

"At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction? 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of

the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has the authority to hear and determine it. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

8. They also state that the instant dispute falls squarely within this honorable Court's jurisdiction because it concerns the ownership, occupation, use, and potential sale of land. Consequently, the 1st Respondent's objection to jurisdiction lacks merit and should be dismissed. The Applicant relied on Article 162(2) of the Constitution and Section 13 of the ELC Act.
9. The Applicant pointed to the provisions of **Section 13 (2) (d) and (g)**, which provide that the court has jurisdiction to hear matters relating to public, private, and community land; contracts; choses in action; or other instruments granting any enforceable interests in land; and any other dispute relating to the environment and land. They aver that a charge is not an instrument that gives an enforceable interest in land, does not relate to land, and is not contractual in nature over land.
10. Further, the Applicant relies on the provisions of section 150 of the Land Act, which provide as follows;

"The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

11. It also contends that the sale of a charged property by a chargee is no different from a sale between two private individuals and cited the case of **Stephen Kibowen v Agricultural Finance Corporation [20151 KEELC 592 (KLR)]**, the court held that;

"The sale by chargee must be regarded as any other sale of property. The effect of any sale is to transfer property to the purchaser, and this is no different with regard to a sale by chargee. In ordinary sales of property, the sale is embodied in a sale agreement which sets out the obligations of the seller and purchaser. The general obligation of a purchaser is to pay the purchase price as agreed, whereas the general obligation of a seller, is to transfer the property to the purchaser. It is the same in a sale by chargee."

12. The Applicant asserts that both sales involve title and the process of acquiring title to land. In support of this argument, the Applicant cites the case of **Lydia Nyambura Mbugua v Diamond Trust Bank**

Kenya Limited & another [20181 KEELC 1599 (KLR)]. The Applicant further contends that these are land matters relating to title and use and occupation of land, for which the ELC is the court with jurisdiction. The High Court, by dint of Article 165 (5) of the Constitution, does not have jurisdiction to hear a power of sale matter.

13. On the other hand, the 1st Respondent submits that this honourable court lacks jurisdiction to entertain the matter because the main issue in dispute concerns the recovery of a debt/loan, which falls within the jurisdiction of the High Court. The Environment and Land Court has no jurisdiction unless the dispute concerns land rights, as provided in Article 162 of the 2010 Constitution and Section 13 of the Environment and Land Court Act.

14. The 1st Respondent outlined the background of the case, arguing that this is a commercial dispute. It cited, inter alia, the case of **Bank of Africa Kenya Limited & Another vs TSS Investments & 2 Others (2024) KECA 410 (KLR)**, where the Court of Appeal stated thus;

“The Environment and Land Court only had jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. Moreover, a charge was a disposition that had no direct contractual relation to “use” (by a tenant or licensee) as

in the instant case, of a chargor's land. The trial court had no jurisdiction to entertain the respondents' suit as pleaded."

15. From the pleadings filed, it is not in dispute that the Applicant is indebted to the 1st Respondent. The debt arises from a financial advance made by the 1st Respondent to the Applicant. For instance, under **paragraph (o)** of the grounds in support of the motion, the Applicant pleaded that, as the registered proprietor of the suit property, it secured a Kshs 15,000,000 loan facility from the 1st Respondent.

16. Under **paragraph (p)**, the applicant pleaded, "it is from the said charge that the 1st Respondent's rights of sale have crystallized due to unforeseen and unfortunate circumstances." The Applicant then explained why the loan became non-performing, including the death of one of its directors.

17. Despite this, the applicant urged that the transaction involved land and that the 1st Respondent's sale of the land constituted a disposition of land, thereby establishing this court's jurisdiction. The applicant further relied on the provisions of the Land Act, which govern charges and designate the Environment and Land Court as the court.

18. The 1st Respondent argued otherwise, recounting the genesis of the transaction, including the issuance of offer letters. It further stated that, at the Applicant's behest, the 1st Respondent advanced the

Applicant various facilities, culminating in a Kshs 15,000,000 loan, the registration of a charge over the suit property, and the Applicant's default, which led to the restructuring of the loan. The 1st Respondent contended that this was a commercial transaction that should be handled by the High Court rather than the ELC.

19. I have considered the rival submissions and the statutory and case law cited. I am aware that since the establishment of this court in 2012, it has handled all land matters, including disputes involving banks exercising their statutory power of sale. However, this changed in 2017 following a decision by the Court of Appeal in Mombasa in **Cooperative Bank of Kenya versus Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR)**.

20. In the Coop Bank Ltd case supra, one of the grounds of appeal raised by the Appellant against the Ruling of the High court accused the trial judge of *“arrogating (himself) jurisdiction which is denied by Articles 162 (2) (b) and 165 (5) of the Constitution, section 150 of the Land Act No. 6 of 2012, section 13 (2) of the Environment and Land Court Act 2011 and section 2 of the Statute Law (Miscellaneous Amendments) Act No. 25 of 2015.”*

21. The Court of Appeal, in paragraphs 36, 37, and 38 of that judgment, stated as follows;

“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 in which one person acquires rights over another person's land 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 charger.

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.

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.

22. The Court of Appeal also held at paragraph 41 thus,

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. In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

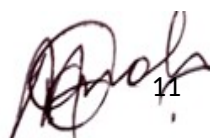
“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing

by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the ELRC Act.”

23. Our courts are bound by precedent, and following the Cooperative Bank case cited supra, the Court of Appeal has held in subsequent decisions that disputes relating to charges are commercial transactions that must be handled by the High Court and the Environment and Land Court. All the arguments raised by the Applicant herein were addressed in the Cooperative Bank Ltd case cited.

24. In light of the foregoing analysis, I find that this court lacks jurisdiction to entertain this claim. Consequently, I do not address the merits of the application. It is ordered that the application dated 7th October, 2025, be struck out with costs in the cause. The orders of injunction which were subsisting pending the determination of the application are hereby vacated and or discharged.

Dated, Signed, and Delivered at Kisii on the 16th day of April, 2026



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A. OMOLLO

JUDGE

ORIGINAL