

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMMERCIAL CASE NO. E173 OF 2025 (O.S.)

IN THE MATTER OF THE LAND ACT, 2012 (CAP 280)
AND
IN THE MATTER OF AN APPLICATION BY SBM BANK
(KENYA) LIMITED FOR AN ORDER TO SELL PROPERTY
NAIROBI/BLOCK 94/185

BETWEEN

SBM BANK (KENYA)
LIMITED.....APPLICANT

VERSUS

PROF. SAEED RAUF MOHAMED
SAMNAKAY.....RESPONDENT

RULING

1. Before me is a Notice of Preliminary Objection dated 14th October 2024 challenging the competence of the Applicant’s Originating Summons dated 20th January 2025. The objection is premised on the following grounds:

- i. That Applicant’s Originating Summons is fatally defective, misconceived and bad in law as it has been brought under inter alia Section 76(6) and (7) of the Land Act, No. 6 of 2012 which provisions do not apply to the alleged informal charges herein.*

- ii. *That under the said Land Act 2012, the applicable provision governing enforcement of informal charges is Section 79 and not Section 76.*
 - iii. *That the procedure adopted by the Applicant herein is incurably and fatally defective and offends the mandatory provisions of the Land Act 2012 and therefore cannot confer jurisdiction upon this Honourable Court.*
 - iv. *That the suit herein offends the mandatory requirements for the creation of an informal charge as stipulated under Section 79(3) dealing with obtaining the spousal consent in a matrimonial home and the witnessing requirement under Section 79(6)(a) of the Land Act, No. 6 of 2012.*
 - v. *That the suit herein has been improperly instituted against only one (1) of the two (2) joint registered proprietors of the property known as Title Number Nairobi/Block 94/185 contrary to the provisions of law governing joint ownership of land.*
 - vi. *That for reasons set out in paragraphs 1-5 hereinabove, the suit as filed is incompetent, frivolous and an abuse of the due process.*
2. The preliminary objection was heard by way of written submissions and oral highlights by counsel.
 3. The Respondent submits that the Preliminary Objection raises a pure point of law challenging the competence of the

Originating Summons and the jurisdiction of this Court to entertain the same. It is contended that the Applicant seeks to enforce an alleged informal charge without complying with the mandatory requirements under Section 79(3) and 79(6)(a) of the Land Act, thereby rendering the suit fatally defective.

4. The Respondent argues that the suit property, L.R. No. Nairobi/Block 94/185, is jointly owned by the Respondent and a co-proprietor who has neither been joined in these proceedings nor consented to the alleged creation of the informal charge. It is further submitted that none of the documents relied upon by the Applicant constitute a valid informal charge as they are neither duly executed nor witnessed in accordance with the law, and no evidence has been presented to demonstrate the participation or consent of the joint proprietor.
5. Counsel further submits that the property in question is presumptively matrimonial, and in the absence of spousal consent as required under Section 79(3) of the Land Act, any purported charge is invalid. The Applicant's failure to disclose the Respondent's marital status or to demonstrate compliance with the statutory safeguards relating to spousal consent is said to be fatal.
6. It is the Respondent's position that these deficiencies are not merely procedural but go to the root of the Court's jurisdiction. The Court is therefore urged to find that, in the absence of compliance with the statutory requirements

governing informal charges, it lacks jurisdiction to grant the orders sought.

7. Finally, the Respondent contends that the documents relied upon by the Applicant are mere loan instruments and do not amount to instruments creating an interest in land. Consequently, the Originating Summons is said to be incurably defective, incompetent, and an abuse of the process of the Court, and ought to be struck out with costs.
8. The Applicant opposes the Respondent's Notice of Preliminary Objection, contending that the same is misconceived, incompetent, and intended to delay the hearing and determination of the suit.
9. It is submitted that the Preliminary Objection does not meet the threshold set out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696**, as affirmed in **Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others [2014] eKLR**, in that it does not raise pure points of law but is instead predicated on contested facts requiring evidentiary proof. In particular, the issues of spousal consent under Section 79(3) of the Land Act, compliance with witnessing requirements under Section 79(6)(a), and the question of joinder of parties are matters of fact that can only be determined upon a full hearing and cannot properly be raised as preliminary objections.
10. The Applicant further submits that any alleged defects in the Originating Summons, including failure to cite the correct statutory provisions, amount at most to procedural

technicalities which are curable and do not go to the jurisdiction of the Court. In this regard, it is argued that such issues should not be used to defeat substantive justice.

11. On jurisdiction, the Applicant maintains that this Court is properly seized of the matter, relying on **Co-operative Bank of Kenya v Patrick Kang'ethe Njuguna [2017] eKLR** for the proposition that disputes relating to charges, loan facilities, and realization of security fall within the jurisdiction of the High Court.
12. On costs, the Applicant invokes the principle that costs follow the event as articulated in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others S.C. Petition No. 4 of 2012** and Section 27 of the Civil Procedure Act, and contends that the Respondent, having improperly raised the Preliminary Objection, should bear the costs.
13. In conclusion, the Applicant urges the Court to find that the Preliminary Objection is devoid of merit, dismiss the same with costs, and allow the suit to proceed to hearing on its merits.

Analysis and determination

14. The sole issue for determination is whether the Notice of Preliminary Objection is merited.
15. The law on preliminary objections is settled. In **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696;**

“...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.

16. This position was affirmed by the Supreme Court in the case of **Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** where it was 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.”

17. The gravamen of the Respondent’s objection is that the Applicant seeks to enforce an informal charge without complying with Section 79 of the Land Act, particularly the requirements relating to spousal consent and execution. Section 79 of the Land Act governs informal charges and provides, *inter alia*, that an interest in land may be created by deposit of title or by a written and witnessed undertaking, subject to statutory safeguards including spousal consent where the property is matrimonial.

18. The Respondent’s case is that these requirements were not complied with, thereby rendering the alleged charge invalid and the suit incompetent. However, whether an informal charge exists, whether the statutory requirements under Section 79(3) and 79(6)(a) were complied with, and

whether the suit property is matrimonial property are all matters that call for evidentiary interrogation.

19. These are not self-evident points of law. They require the Court to examine documents, ascertain facts, and evaluate evidence. Such an exercise falls outside the scope of a preliminary objection as defined in ***Mukisa Biscuit (supra)***.
20. Similarly, the contention that the suit is defective for failure to join a co-proprietor is not a pure point of law. The issue of joinder is a procedural matter amenable to cure under Order 1 Rule 10(2) of the Civil Procedure Rules and cannot, without more, dispose of the suit at a preliminary stage.
21. The Respondent has further argued that the invocation of Section 76 of the Land Act instead of Section 79 renders the suit incompetent. While proper citation of the law is desirable, it is trite that a mis-citation or omission does not defeat a claim where the substance of the cause of action is discernible.
22. In **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1**, the Court emphasized that suits should not be summarily dismissed unless they are so hopeless that they plainly and obviously disclose no reasonable cause of action.
23. The question whether the Applicant has established a valid informal charge is a substantive issue that goes to the

merits of the case and cannot be determined at a preliminary stage.

24. On the issue of jurisdiction, the Respondent invokes non-compliance with the Land Act as a basis for ousting the Court's jurisdiction. That argument is misplaced.
 25. Jurisdiction flows from the Constitution and statute. In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, the Court held that jurisdiction is everything. However, the jurisdiction of this Court over disputes relating to charges, securities, and the realization of land-based securities is not in doubt.
 26. A dispute relating to charges and securities fall within the jurisdiction of the High Court. (See **Co-operative Bank of Kenya v Patrick Kang'ethe Njuguna [2017] eKLR**).
 27. The issues raised by the Respondent, even if ultimately meritorious, do not divest this Court of jurisdiction. They go to the validity and enforceability of the alleged charge, which are matters for determination at trial.
 28. In the premises, I find that the Preliminary Objection is not founded on pure points of law but on contested facts and evidentiary issues, and therefore fails the threshold.
 29. In the result, the Notice of Preliminary Objection dated 14th October 2024 is without merit and is hereby dismissed. Costs thereof shall be borne by the Respondent.
 30. The suit shall proceed to a hearing on its merits.
- It is so ordered.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Ms. Odongo h/b for Mr. Akello for Applicant

Mr. Darr for Respondent

Court Assistant: Lispa