



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 733 OF 2017

EDWIN KAGO KAGWI.....

.....PLAINTIFF

=VERSUS=

STANBIC BANK LIMITED.....1ST
DEFENDANT

JOSEPH NGANGA KARIUKI

t/a JOSRICK MERCHANTS.....2ND
DEFENDANT

MICHAEL WAIGWA.....3RD
DEFENDANT

CHIEF LAND REGISTRAR.....4TH
DEFENDANT

HON ATTORNEY GENERAL.....5TH
DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection dated 28th March 2025, raised by the 1st Defendant on the grounds that

this Court lacks the requisite jurisdiction to hear and determine this matter.

2. The preliminary objection was canvassed by way of written submissions.

THE 1ST DEFENDANT'S SUBMISSIONS

3. The 1st Defendant filed its submissions dated 27th May 2025. On behalf of the 1st Defendant, Counsel submitted that the only issue for determination is whether this Court has jurisdiction to hear and determine this suit.
4. Counsel argued that the preliminary objection aligns with the description of a preliminary objection outlined in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969) 696 E A.** Counsel further submitted that the dispute between the parties falls within the jurisdiction of the High Court as it relates to a mortgage transaction. Counsel submitted that the jurisdiction of this Court is governed by Article 162(2) & (3) of the Constitution, and Section 13 of the Environment and Land Court Act stipulates that this Court can only handle disputes related to the use, occupation and title to land. To support this point, reliance was placed on **Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others**, where it was held that the Court's jurisdiction is limited to disputes related to the use of land and does not concern mortgages or accounting.

5. Based on the foregoing, Counsel urged the Court to strike out the suit with costs.

THE PLAINTIFF'S SUBMISSIONS

6. The Plaintiff filed his submissions dated 4th June 2025.
7. On behalf of the Plaintiff, Counsel submitted that the preliminary objection is incompetent and does not meet the threshold outlined in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696.**
8. Counsel submitted that the 1st Defendant did not challenge the court's jurisdiction in its statement of defence. Counsel argued that the objection does not meet the threshold of a preliminary objection as it is based on disputed facts. Counsel further submitted that the suit is not limited to issues arising from the mortgage relationship but also involves the alleged unlawful auction and transfer of the suit property under the guise of the statutory power of sale.
9. Counsel highlighted that the plaint seeks, among other reliefs, orders of Prohibition/Inhibition to restrain the 1st, 2nd, and 3rd Defendants from selling or transferring the suit property, a declaration that the alleged sale of the suit property under the guise of a statutory power of sale is illegal and void, cancellation of the title registration of any caution, inhibition, or other interest on the suit property, and an order for

reimbursement by the 1st Defendant to the Plaintiff, along with other reliefs.

10. In light of the foregoing, Counsel submitted that most of the prayers sought by the Plaintiff relate to the title of the suit property and therefore fall within the jurisdiction of this Court.
11. In conclusion, Counsel urged the Court to dismiss the preliminary objection with costs.

ANALYSIS AND DETERMINATION

12. The law on preliminary objections is well settled. A preliminary objection must be based on a pure point of law.

In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696,**

Law JA stated;

“So far as I’m aware, 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

13. In Oraro Vs Mbaja, 2005 eKLR, Ojwang J (as he then was) described it as follows:

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

14. In Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR, the Supreme Court observed as follows:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the

preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. For a preliminary objection to be valid, it must be based on a point of law. It should not be proved with facts or evidence, nor should it address disputed facts.
16. The 1st Defendant’s Preliminary Objection is based on the grounds that this Court lacks jurisdiction to hear and determine the suit. The issue of jurisdiction is a pure point of law that can determine the matter without considering the merits of the case. This Court is satisfied that the Preliminary Objection is based on a point of law.
17. It is trite law that jurisdiction is everything, and without it, the court cannot take one more step in the case. In the celebrated case of **Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited (1989) eKLR**, the Court held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

18. Similarly, the Supreme Court in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** pronounced itself thus:

“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....”

19. The 1st Defendant asserts that this Court lacks jurisdiction to hear and determine this suit, as the dispute falls within the jurisdiction of the High Court, since it concerns a mortgage.

20. The Plaintiff instituted this suit by way of a Plaint dated 27th November 2017, seeking the following orders:

a) An order of Prohibition/inhibition to retain the 1st, 2nd & 3rd Defendant from selling, effecting transfer, charging, pledging, assigning, or any other dealing whatsoever in regard to Flat No. D6, BLOCK D, located on L.R. No. 2/125(Original No. 2/90/2).

b) A Declaration that the purported Sale of flat No. D 6, BLOCK D, located ON L.R. No. 2/125 (Original No. 2/90/2) under the guise of statutory power of sale by the 1st Defendant to the 3rd

Defendant through the 2nd Defendant, was unprocedural, illegal and hence Void.

C) An order for the cancellation of the registration of any Transfer of Flat No. D 6, BLOCK D, located on L.R. No. 2/125 (Original No. 2/90/2) to the 3rd Defendant or any other person or entity whatsoever at the behest of the 1st, 2nd & 3rd Defendants.

d) An order for the Cancellation of the registration of any Caution, inhibition, License, Encumbrance, overriding interest or other interest whatsoever over Flat No. D 6, BLOCK D, located on L.R. No. 2/125 (Original No. 2/90/2) to the 3rd Defendant or any other person or entity whatsoever at the behest of the 1st, 2nd & 3rd Defendants.

e) An order for the reimbursement by the 1st Defendant to the Plaintiff of all Legal Fees, Auctioneers' fees, Valuation Fees and other Charges wrongfully and improperly debited from the Plaintiff's Current Account No. 0100000659918 pursuant to its purported exercise of Statutory Power of Sale against him.

f) An order for the full payment by the 1st, 2nd & 3rd Defendants of all Rental income/Mesne Profits to be lost by the plaintiff from Flat No. D 6,

BLOCK D, located on L.R. No. 2/125 (Original No. 2/90/2) as a result of the 1st Defendant's purported exercise of Statutory Power of Sale through the 2nd Defendant in the 3rd Defendant's favour at the rate of Kshs. 60,000.00 per month from the end of November 2017.

g) General & punitive Damages against the 1st and 2nd Defendant as a result of the fraudulent and/or irregular Sale of Flat No. D 6, BLOCK D, located on L.R No. 2/125 (Original No. 2/90/2) in favour of the 3rd Defendant by the 1st and 2nd Defendants.

h) Opportunity Costs of Kshs.4,000,000.00 incurred by the Plaintiff as a result of the fraudulent and/or irregular sale and/or transfer of Flat No. D 6, BLOCK D, located on L.R. No. 2/125 (Original No. 2/90/2) as a result of the 1st Defendant's purported exercise of Statutory Power of Sale through the 2nd Defendant in the 3rd Defendant's favour; being the difference between the current value of the property and the Value it was sold to the 3rd Defendant.

i) Special damages.

j) Costs of this suit.

k) Interests on (e), (f), (g), (h), (i) & (j).

l)Any other relief that this Honourable court deems fit to grant.

21. The pleadings show that part of the disputes relates to the title and occupation of the land. While it is true that some issues relate to the mortgage and the exercise of the statutory power of sale, the Court notes that the dispute is not limited to the mortgage or the recovery of the debt. The substratum of the suit concerns the propriety of the transfer of the suit property and the legality of dealings affecting the title to land.
22. The Court further notes that the determination of the objection would require interrogation of contested facts, including the alleged transfer of title and the nature of the interest in the suit property. Such issues cannot be determined within the scope of a preliminary objection.
23. The upshot of the foregoing is that the Preliminary Objection dated 28th March 2025 is without merit and is hereby dismissed.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY, 2026.

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**T. MURIGI
JUDGE**

IN THE PRESENCE OF:

Mahugu for the 1st Defendant

Ahmed – Court assistant

ORIGINAL