



Shishili Two Thousand Investment Limited v Gichuhi & 2 others (Environment and Land Case E128 of 2024) [2025] KEELC 5384 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E128 OF 2024**

**EK MAKORI, J
JULY 17, 2025**

BETWEEN

SHISHILI TWO THOUSAND INVESTMENT LIMITED PLAINTIFF

AND

PETER MUNGA GICHUHI 1ST DEFENDANT

I&M BANK LIMITED 2ND DEFENDANT

LAND REGISTRAR, KILIFI 3RD DEFENDANT

RULING

1. The 2nd Defendant has submitted a Preliminary Objection (PO) dated December 18, 2024, asserting that the Plaintiff's case against the 2nd Defendant should be dismissed with costs because this Court lacks jurisdiction to hear and decide issues related to charges and mortgages, as those fall under the civil jurisdiction of the High Court.
2. The Plaintiff strongly opposes the PO, claiming a sale transaction with the 1st Defendant. They allege the 1st Defendant unlawfully transferred the land to himself and charged it to the 2nd Defendant. The Plaintiff contends that the 1st Defendant did not fully pay the purchase price, which provides the Plaintiff with grounds to rescind the sale agreement and request the return of the land.
3. The 2nd Defendant has alleged it was joined in these proceedings as a Chargee of the 1st Defendant. This is evident from paragraph (b) on the grounds of the Application dated December 10, 2024, paragraphs 7 and 8 of the Supporting Affidavit of Shimakha Leonard sworn on the same date, and paragraph 11 (b) and (ii) of the Plaint dated December 10, 2024.
4. The PO was meticulously canvassed through written submissions, ensuring a comprehensive understanding of the matter.



5. The issue that falls before this Court for decision is whether, based on the materials and submissions I have, the PO is sustainable, and who should bear the costs.
6. The court is committed to following the principles established in the well-known *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 when assessing the merit of a notice of PO. These principles, including raising a clear point of law and demonstrating the accuracy of all facts pleaded, provide a solid foundation for our decisions.
7. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is, first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

8. The core argument of a PO in this case hinges on the jurisdiction of this court, as established by *Nyarangi J.A. in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] Eklr:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. Ms. Akwana, representing the 2nd Defendant, argues that the pleadings clearly show that the suit against the 2nd Defendant involves only a charge. The question of whether this Court can hear and decide a matter solely based on a Charge has now been settled by the Superior Courts. In the recent case of *Bank of Africa Kenya Limited & another v. TSS Investment Limited & 2 others* (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment), the Court of Appeal held that:

“We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (supra) where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents’ suit as pleaded.”

10. Counsel further cites the following decisions to support her position that this court lacks jurisdiction, including *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and 5 others* [2017] eKLR, *Kinuthia v Kanyi and another* (Environment and Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling), *Muyuka and another v Barclays Bank of Kenya and 2 others* (Environment & Land Case E005 of 2021) [2023] KEELC 16581 (KLR) (29 March 2023) (Ruling), *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) and another* [2021] eKLR, *Amany*



General Suppliers Limited and another v Rafiki Microfinance Bank Ltd & another (Environment and Land Case E078 of 2024) [2024] KEELC 13207 (KLR) (13 November 2024) (Ruling), Masumbuko v National Bank Kenya Ltd (Environment and Land Case 113 of 2020) [2024] KEELC 5454 (KLR) (23 July 2024) (Ruling), Dr. Martin Luther MC Were v James Mabango Ambundo (Environment and Land Case E211 of 2021), and Re Estate of Aloysius Ndungu Gakunga (Deceased) [2019] KEHC 9273 (KLR).

11. Counsel concludes that, based on those relevant authorities and the fact that the Plaintiff's suit against the 2nd Defendant is solely based on a charge, she respectfully requests the Court to uphold the PO, December 18, 2024.
12. Mr. Shimaka, representing the Plaintiff, holds a different view. He argues that the sale of the suit property to the 1st Defendant has been rescinded due to the 1st Defendant's failure to complete the payment of the purchase funds. He also states that the charge created between the 1st Defendant and the 2nd Defendant cannot stand, as the Plaintiff still retains the rights to the ownership of the suit property.
13. I fully agree with Ms. Akwana that matters related to charges, mortgages, and the collection of dues and rents fall under the jurisdiction of the High Court. This Court has consistently ruled in the same manner, citing relevant legal authorities, as seen in *Amanyee General Suppliers Limited and another v Rafiki Microfinance Bank Ltd & another* (Environment and Land Case E078 of 2024) [2024] KEELC 13207 (KLR) (13 November 2024) (Ruling) (*supra*).
14. However, a review of the pleadings filed so far reveals that neither party in these proceedings has submitted defenses in this case or provided affidavits to introduce the alleged charge documents or demonstrate that the charge was legally created to counter the Plaintiff's claim that its ownership rights have been circumvented by the creation of that charge, especially now that there is an assertion that the 1st Defendant did not complete the payment of the purchase price.
15. In my view, this indicates that the PO was filed quite early in the proceedings, and the legal issue raised in the PO cannot be inferred from the materials and pleadings I have seen so far. Based on precedents and criteria established in the *Mukisa Biscuit Case* (*supra*), the current PO is not sustainable.
16. Consequently, the PO dated December 18, 2024, is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 17TH DAY OF JULY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Kyalo, for the Plaintiff

Ms. Omondi, for the 1st Defendant

Ms. Akwana, for the 2nd Defendant

Happy: Court Assistant

