



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.296 OF 2013

LYDIA NYAMBURA MBUGUA.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

JOHN KIGUTHI KIMANI KIBE.....2ND DEFENDANT

RULING

(preliminary objection raised that the ELC does not have jurisdiction to handle this case based on the court of Appeal decision in Cooperative Bank –vs- Patrick Kangethe; Issue in this case being whether a chargee properly exercised its power of sale and whether the title of the purchaser ought to be cancelled; purchaser raising a counterclaim for vacant possession; these issues being squarely within jurisdiction of ELC as elaborated in the Constitution, ELC Act, Land Act, and Land Registration Act; sale by chargee being a process of sale of land leading to acquisition of title to land thus a subject matter falling within the jurisdiction of the ELC; decision in Cooperative Bank –vs- Patrick Kangethe distinguished; preliminary objection dismissed with costs).

1. This ruling is in respect of a preliminary objection that has been raised by the plaintiff over the jurisdiction of this court to handle this matter. In the preliminary objection, it is contended that based on the decision of the Court of Appeal in the case of **Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others, Mombasa Court of Appeal, Civil Appeal No. 83 of 2016**, this court lacks jurisdiction to proceed with the hearing of this matter, and the case ought to be heard before another court other than the Environment and Land Court. The objection is opposed and before I go to the gist of it, I believe that it is necessary to give a little background on this case.

2. This is now a fairly old case that was commenced by way of a plaint which was filed on 7 May 2003. In the plaint, the plaintiff has pleaded that she was at all material times the sole registered proprietor of the land parcel Njoro/Ngata Block 1/478 (hereinafter also referred to as “the suit property”) which property was charged to the 1st defendant, a bank, to secure financial facilities that were advanced to the plaintiff’s husband, one Isaac Mbugua Ngethe (Mr. Ngethe). Mr. Ngethe defaulted in repaying the loan and the bank filed a case against him and the plaintiff herein, being the suit **Nakuru HCCC No. 213 of 2001, Diamond Trust Bank of Kenya Limited vs Isaac Mbugua Ngethe & Lydia Nyambura Mbugua**, to recover the sum of Kshs. 11, 150, 435.10/= which was then said to be owing and attracting interest at the rate of 29%. It is averred in the plaint, that while this suit was pending, the bank moved to exercise its statutory power of sale and sold the suit property to the 2nd defendant and the suit property was then transferred to the 2nd defendant. It is the contention of the plaintiff, that the bank ought not to have moved to realize the suit property, when it had chosen to file a case against the plaintiff. It is further contended that the bank did not serve the plaintiff with the statutory notice, and as a result, she was denied the legal and equitable right to redeem the charge, as the statutory right of sale had not crystalized. It is further stated that the bank colluded with the 2nd defendant to defraud the plaintiff of the suit property and that the selling price was very low and not commensurate to its market value. It is further averred that the sale was done secretly and not at a public auction. It is thus her position that the 2nd defendant does not have good title to the land. In the suit, she has asked for the following orders :-

(a) A declaration that the purported sale of Njoro Ngata Block 1/478 by the 1st defendant to the 2nd defendant is and was for all purposes and intent inequitable, illegal, irregular and wrongful and null and void and as a result the court cancels the entire sale of 28 March 2002.

(b) A permanent injunction restraining the 2nd defendant by himself his agents, and servants from claiming any ownership on Njoro Ngata Block 1/478 and from evicting the plaintiff from the said parcel of land.

(c) Costs of this suit.

3. The 1st defendant in its statement of defence, inter alia pleaded that the suit property was disposed by way of public auction on 28 March

2002. It denied that the sale was illegal, wrongful or a nullity, and denied that it could not pass title to the 2nd defendant. It denied colluding with the 2nd defendant to defraud the plaintiff of her property as alleged. It is also denied that the selling price was not commensurate with the market price and that the sale was done in secret as alleged. It is further denied that no statutory notice was sent. It was contended that if the plaintiff had issue, she ought to have raised the same in the suit *Nakuru HCCC No. 213 of 2002*.

4. The 2nd defendant on his part, filed a statement of defence and counterclaim, and pleaded inter alia that he purchased the suit property from one Cosmas Kipkirui Ngetich, the latter having purchased the same from the 1st defendant after a proper exercise of the 1st defendant's statutory power of sale. It is averred that the filing of a suit by the 1st defendant, was not a bar to the 1st defendant exercising its statutory power of sale, and it is further argued that if the plaintiff was aggrieved by the sale, she ought to have filed a counterclaim in the said suit. It is pleaded that the 2nd defendant demanded vacant possession and that the plaintiff made an offer to buy back the suit land at Kshs. 2,500,000/=, or be a tenant at a monthly rent of Kshs. 20,000/=, but has done neither. In his counterclaim, he sought vacant possession plus costs.

5. The 2nd defendant died on 14 November 2004, and was substituted by his wife, one Phylis Wanjira Kibe.

6. Pre-trial matters were conducted under the pre-2010, Civil Procedure Rules, and the following issues were agreed to be subject for determination :-

(i) Whether the plaintiff's suit herein, is misconceived, bad in law, inept, ambiguous, scandalous and whether it discloses any or any reasonable cause of action or whether it has been overtaken by events.

(ii) Whether the 1st defendant's exercise of its statutory power of sale during the pendency of HCCC No. 213 of 2001 was premature and ill conceived.

(iii) Whether the 1st defendant's exercise of its statutory power of sale during the pendency of Nakuru HCCC NO. 213 of 2001 was inequitable, wrongful and fraudulent.

(iv) Whether the sale of the suit premises was by public auction or was conducted secretly.

(v) Whether the sale price was commensurate with the market price at that time.

(vi) Whether the 1st defendant did serve the plaintiff with the mandatory or with a valid statutory notice of sale. If not, whether the plaintiff was as a consequence denied legal and equitable right to redeem the charge.

(vii) Whether the 2nd defendant is an innocent purchaser for value and whether the 1st defendant has good title to pass to the 2nd defendant.

(viii) Whether the plaintiff is a trespasser on the suit premises and whether the 2nd defendant is entitled to vacant possession.

(ix) Whether there has been previous proceedings between the plaintiff and either or all of the defendants arising out of this same cause of action in any court.

7. I have felt it necessary to set down the above issues, because as will be seen shortly, they are key to my determination in this ruling.

8. For one reason or another, the matter did not take off until 24 November 2011, before Omondi J, but an issue was raised that she ought to recuse herself, and the good judge did so on 28 November 2011. The matter was mentioned on several occasions before the High Court, terminating with a mention on 6 March 2013 before Omondi LJ, when the good judge, directed the Deputy Registrar as follows:-

(i) (paraphrased) That she had recused herself from the case.

(ii) This is a matter relating to land and I direct the same be placed in the appropriate registry i.e Environment and Land Registry.

(iii) This being an old case i.e 2003, it must be given a hearing date on priority basis.

9. It should be put in mind that at this time, the Environment and Land Court, envisaged under Article 162 (2) (b) of the Constitution of Kenya, 2010, had been created and the court was operational from October 2012 or thereabouts. The case was on several occasions mentioned before Waithaka L J, the then judge in the Environment and Land Court, and upon her transfer, I took over the matter and the parties agreed that the case is to start de novo. That being the position, the matter at that juncture, could not be considered a partly heard case, and was for all intents and purposes, a fresh case.

10. The plaintiff testified and closed her case; so too the 2nd defendant. This preliminary objection was filed two days prior to 20 June 2018, when the 1st defendant's witness was scheduled to testify. I did take note of the preliminary objection and directed parties to file written submissions. In the meantime, I did direct the 1st defendant's witness to testify, but his evidence was lengthy and he could not complete his examination in chief on 20 June 2018. That is the position, in so far as hearing of the case is concerned.

11. In his submissions in support of the preliminary objection, Mr. Karanja Mbugua, learned counsel for the plaintiff, relied wholly on the

Court of Appeal decision cited in the objection, and argued that matters relating to charges, are no longer within the jurisdiction of this court. Mr. Kagucia, learned counsel for the 2nd defendant, was of the view that the decision in *Cooperative Bank vs Patrick Kangethe* was distinguishable and directed me to my own decision in the case of *John Kimani Njenga vs Margaret Wanjiru Kanyiri & 2 Others, Nakuru ELC No. 345 of 2014 (2015) eKLR*. No submissions were preferred by Mr. Kisila Gor, learned counsel for the 1st defendant.

12. I have considered the matter and I have also read the decision of the Court of Appeal, in the case of *Cooperative Bank vs Patrick Kangethe*, which case was commenced in the High Court of Kenya at Mombasa by the 1st, 2nd and 3rd respondents in the appeal (together referred to as the Kang'ethes). They sought various orders against Cooperative Bank, and its agents over some three parcels of land which had been charged to Cooperative Bank. Together with the suit, they filed an application seeking to restrain the Bank from exercising its statutory power of sale. It emerged that the Kang'ethes had charged their properties to the bank and that they had defaulted, which prompted the bank to appoint an auctioneer to sell the charged properties. The bank in objecting to the application for injunction, also raised a preliminary objection that the High Court does not have jurisdiction to entertain the matter, and that the case ought to be heard before the Environment and Land Court. The learned High Court Judge dismissed the objection, and held that the dispute before him was commercial in nature, whose determination was within his jurisdiction. He also allowed the application for injunction which prompted the bank to appeal to the Court of Appeal. In its decision, the Court of Appeal, was of the view that a charge is not the equivalent of use of land. Nevertheless, the Court of Appeal, did acknowledge that a charge is an interest in land (see paragraph 36) and that a charge is a disposition in land (see paragraph 37).

13. In assessing the appeal, the Court of Appeal was of the view that “*the cause of action herein was not the validity of the charge but a question of accounts.*” (see paragraph 38). The court further went to state at paragraph 40 that “*it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulations of the sums owing and whether the statutory notices had been issued prior to the attempted statutory sale.*” The court went further to state as follows at paragraph 41 “*the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a bank and lender.*”

14. My own understanding of the above decision, is that the Court of Appeal was of opinion that the particular dispute was more in relation to accounts of which the High Court had jurisdiction to hear.

15. I do not think that the Court of Appeal was holding the position that once the Environment & Land Court (ELC) sees the word “*charge*” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what the Constitution under Article 162 (2) (b), and parliament under Section 13 of the Environment and Land Court Act No.19 of 2011, have prescribed as being the jurisdiction of the ELC. This would also go contrary to the Supreme Court decision in the case of *R Karisa Chengo & 2 others (2017) eKLR* where the Supreme Court stated as follows at paragraph 51 of its decision:-

“*...In this instance, the jurisdiction of the specialized courts is prescribed by parliament, through the said enactment of legislation relating, respectively, to the ELC and ELRC.*”

16. It is in fact worthwhile setting down the provisions of the whole of Article 162 of the Constitution so that one can see the context of the jurisdiction of the ELC. The said provision is drawn as follows :-

162. *System of courts*

(1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

(2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

(a) *employment and labour relations; and*

(b) *the environment and the use and occupation of, and title to, land.*

(3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*

(4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

17. It will be seen from Article 162 (3) that it was left for Parliament to determine the jurisdiction of the courts created under Article 162 (2). In elaborating the jurisdiction of the ELC, Parliament did enact the Environment and Land Court Act, and various other statutes which provide for instances where the ELC has jurisdiction.

18. Section 13 of the Environment and Land Court Act, does provide as follows in so far as jurisdiction is concerned :-

13. *Jurisdiction of the Court*

(1) *The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

(2) *In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by [Act No. 12 of 2012](#), Sch.

(6) Deleted by [Act No. 12 of 2012](#), Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs. [[Act No. 12 of 2012](#), Sch.]

19. It will be seen from Section 13 (2) (d) above, that the ELC has jurisdiction to hear disputes relating to inter alia, “contracts, choses in action or other instruments granting an enforceable interest in land.” It cannot be argued that a charge is not an instrument that gives an enforceable interest in land, or that it is not an instrument that relates to land, or that it is not an instrument that is contractual in nature and is over land. Charges are more elaborated in the Land Act No.6 of 2012 and the Land Registration Act No.3 of 2012, which inter alia provide for the rights of a chargee, one of which is the right of sale when there is default. It is in these statutes that the manner and process of sale for a property that is subject of a charge is provided. Inter alia, the chargee needs to give a statutory notice before embarking on selling the property and also issue other stipulated notices. A dispute over the manner in which the chargee has exercised his statutory power of sale would thus be a dispute falling within the Land Act and Land Registration Act, for one will need to scrutinize the provisions of these statutes to see whether the process of sale has been followed. These statutes also provide for the court which has jurisdiction to hear disputes that arise out of the application of these particular statutes.

20. For the Land Act, Section 150 provides 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.

21. For the Land Registration Act, the jurisdiction provision is under Section 101 which provides as follows:-

101. Jurisdiction of court

The Environment and Land Court established by the Environment and Land Court Act, 2011 ([No. 19 of 2011](#)) and subordinate courts have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these

statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of **Stephen Kibowen –vs- Agricultural Finance Corporation (2015) eKLR**). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.

23. That being the case, it thus follows that the High Court, would not have jurisdiction to hear such a matter given the provisions of Article 165 (5) of the Constitution, which provides as follows :-

The High Court shall not have jurisdiction in respect of matters –

- (a) *Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*
- (b) *Falling within the jurisdiction of the courts contemplated in Article 162(2).*

An explanation of how to interpret the above provision was offered by the Supreme Court in the case of **Republic vs Karisa Chengo & 2 Others (supra)** where the court stated as follows at paragraph 52 of its decision :-

[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

24. I have already pointed out that the process of disposing of a charged property is a process elaborated in the Land Act and Land Registration Act, and these two statutes provide that it is the ELC with jurisdiction. The High Court cannot therefore have jurisdiction, given the provisions of Article 165(5) of the Constitution, to hear a matter relating to the process of sale of a charged property, unless that issue arises in a case relating to issues that the High Court would have jurisdiction, and the same cannot be severed from these other issues. It needs to be appreciated that the High Court cannot have jurisdiction over matters that fall within the jurisdiction of the ELC, and although I have seen arguments that in some matters the High Court has concurrent jurisdiction with the ELC (See for example the case of **Ledidi Ole Tauta & others – vs- Attorney General & 2 others (2015) eKLR**) with utmost respect, I doubt this view, for the Constitution, does not recognize concurrent jurisdiction; the Constitution being clear, that the High Court cannot have jurisdiction over what is for determination by the ELC and ELRC. The Constitution uses an exclusion method, and in simple terms, what falls within the jurisdiction of the ELC and ELRC, cannot fall within the jurisdiction of the High Court by dint of the provisions of Article 165 (5) of the Constitution.

25. But then, one may ask, what if I have a matter which brings forth various issues, some of which fall within the jurisdiction of the High Court or Employment and Labour Relations Court (ELRC) and some falling within the jurisdiction of the ELC, and yet such dispute cannot be severed for the different issues to be heard in different courts? That is a case with mixed issues, some falling within the jurisdiction of the ELC and some falling within the jurisdiction of the High Court or ELRC, the three superior courts with equal status. In such instance one needs to find out what the predominant issue in the case is, and file suit in the court which has jurisdiction to hear the predominant issue. I am aware of the decision of my brother, Ngugi J, in the case of **Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another (2016) eKLR**, where the learned judge, when faced with an objection to jurisdiction, was of the view that what is important in determining which court would have jurisdiction, is the “pre-dominant purpose test”, which the judge elaborated as follows :

“23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

24. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessarily be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant’s predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC.

26. Going back to the issue at hand, in cases revolving around a charge, and the chargee’s exercise of its power of sale, where the

predominant issue is whether the statutory right of sale has arisen; or whether a statutory notice was issued; or whether the property has properly been advertised; or whether generally, the process of sale is in accordance with the provisions of the Land Act and Land Registration Act, then the matter would fall under the jurisdiction of the ELC, for these processes are laid down in the Land Act and Land Registration Act, for which it is the ELC which is the court with jurisdiction. It should also not be forgotten that this is a process of acquisition of title to land. However, if the predominant complaint is whether the bank has properly calculated its figures, and not how the bank is proceeding to sell the property, then this could be a High Court matter, but again, as I have stated above, if this issue is collateral to the process of sale, and not severable, the ELC would still have jurisdiction to hear the whole of the dispute including related issues such as the amounts payable, where these cannot be severed from the dominant issue.

27. And I do not think that one can argue that they are confused, and cannot point at what is predominant in such a case. No, it is not too difficult to find out what the predominant issue in matters relating to a charge may be. Where it is the process of sale being challenged, and as I have said, such issue would fall under the jurisdiction of the ELC, it will in most instances come with an application seeking to stop the sale, and complaints that will be at the fore will be complaints such as, the applicant was not served with a statutory notice; the property has not been properly advertised; the sale is secretive, or at an undervalue. Such a matter will most likely be accompanied by an application seeking to stop the intended sale for these reasons. On the other hand, where the predominant issue is accounts, this will be clear in the pleadings, and such person will not be questioning the process of sale, but rather, the figures that the bank is claiming.

28 As I have said before, and I pray to be forgiven for repeating this again; the sale of land by a chargee, is a process whose end product results in the acquisition of title. Title is squarely within the jurisdiction of the ELC and it is worth reiterating that if you say that the ELC has no jurisdiction to hear a matter where such process of sale is in issue, then you can as well say that the ELC has no jurisdiction to hear a case where one has sued another over a sale agreement relating to land, and I do not think that there is any dispute that in matters such as the latter, it is the ELC which is the right forum to determine the dispute.

29. It is with the above reasoning that I would distinguish the case of **Cooperative Bank vs Patrick Kangethe**. The Court of Appeal thought that the predominant issue is accounts and it is probably because of that, that the Court of Appeal felt that the High Court had jurisdiction to hear the case. I am also aware that in its decision, the Court of Appeal averred that charging land is not commensurate to use of land and referred to the Black's Law Dictionary to stress this point. The Court stated as follows :-

“32. As for land use, the Black's Law Dictionary, 9th Edn; gives the basic definition of the word ‘use’ as being :-

‘the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.”

The above definition is correct, when you utilize the word “use” as a verb, but it will be remiss of me, not to point out that the word “use”, in law, is not limited to being a verb, but can also be a noun, where in essence, it is a reference to certain rights. (See **Black's Law Dictionary, 10th Edition**, pages 1775 - 1776). The Black's Law Dictionary elaborates the many forms of how this word “use” is utilized as a noun, but let me just take one example which is “passive use” (see page 1776); here you will not be referring to any active utilization of the land, but you would mean, *“a use that places no duties on the trustee other than to simply hold the property for the beneficiary.”* I thought it important to point this out, but I need not go too deeply into it, for it is not the subject before me.

30. In the matter before me, the issue of accounts has not arisen at all, even in the periphery (but as I have argued above, if accounts arise, in a matter which the ELC has jurisdiction such as a sale by chargee, and this cannot be severed, the ELC would not be divested of jurisdiction solely for this reason). The agreed issues, which I elaborated earlier in this ruling, all concern the manner in which the bank conducted the sale, and question whether the title of the 2nd defendant, is a good title or ought to be revoked for having been acquired fraudulently. In fact, the plaintiff in her prayers, has explicitly asked this court to cancel the sale of 28 March 2002, which if allowed, may lead to the cancellation of the title of the 2nd defendant. The counterclaim that has been filed, seeks vacant possession. These are land matters relating to title and use and occupation of land, for which it is the ELC which is the court with jurisdiction. The High Court, by dint of Article 165 (5) of the Constitution, does not have jurisdiction to hear these issues. If I am to allow this preliminary objection, I will be divesting myself of jurisdiction which is provided to this court by the Constitution and the relevant statutory law, and direct that the matter be heard before a court that has no jurisdiction to hear the issues being raised in this matter. In essence, I will be disregarding my oath of office and negating the very purpose for which the ELC was created.

31. I said earlier, that just because “charge” has been mentioned in a case, does not mean that the ELC has no jurisdiction. On the contrary, where “charge” is being mentioned, the presumption should be that it is the ELC with jurisdiction, unless it is discernible, that the case raises issues that have little or no relation to the charge. A charge is a proprietary transaction which creates a proprietary interest. It is contract over land. It is created by an instrument which is registered in the title to the land. A charge is an instrument that affects title. Issues relating to charges, the rights and obligations that arise in such instruments, are proprietary issues, that squarely fall within the jurisdiction of the ELC.

32. I am thus not persuaded that this preliminary objection is well grounded and the same is hereby dismissed with costs to the 2nd defendant.

33. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Karanja Mbugua for the plaintiff.

Mr. Kisila Gor for the 1st defendant.

Mr. J.G. Kagucia for the 2nd defendant.

Court Assistant: Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU