



REPUBLIC OF KENYA



Pilot Gatias Limited & 2 others v NCBA Bank Kenya PLC & another (Environment & Land Case E143 of 2023) [2024] KEELC 104 (KLR) (15 January 2024) (Ruling)

Neutral citation: [2024] KEELC 104 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E143 OF 2023**

**EK WABWOTO, J
JANUARY 15, 2024**

BETWEEN

**PILOT GATIAS LIMITED 1ST PLAINTIFF
PILOT PROPERTIES LIMITED 2ND PLAINTIFF
JAMES KARIUKI MUCHIRI 3RD PLAINTIFF**

AND

**NCBA BANK KENYA PLC 1ST DEFENDANT
PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling is in respect to the plaintiff's application dated November 1, 2023 which the Plaintiffs seeks the following reliefs: -
 - a. Spent ...
 - b. Spent ...
 - c. That this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees, their agents, employees and or servants from selling by public , entering, taking possession of or in any way interfering with the current ownership of title number L.R 209/2272 located along Charles Rubia Road in Nairobi County.
 - d. That a declaration be issued, that the advertisement for sale made by the 2nd Defendant/ Respondent is a nullity for being defective and for failure to conform to the provisions of the law.



- e. That the 1st Defendant/Applicant be compelled a current loan statement for the facilities to inform a court mandated independent audit and determination of the 1st and 2nd Plaintiff's true level of indebtedness by an auditor jointly appointed by parties of this honourable court pending hearing and determination of the main suit.
 - f. That costs of this application be provided for.
2. The application was supported by the affidavit sworn by James Kariuki Muchiri the 3rd Plaintiff on November 1, 2023. It was averred that sometime between the year 2017 the 1st Defendant/Applicant advanced a loan facility to the 2nd Plaintiff /Applicant various for the purpose of running its daily operations and the said loan facility was secured by creation of a charged registered over all that piece of land known as land reference No. LR29/2277 Located along Charles Rubia Road in Nairobi County. It was also averred that the 2nd Plaintiff/Applicant has continued to service the facility as agreed.
 3. The Plaintiffs averred that the Defendants and its agent, issued Statutory Notice and a notification for sale on September 18, 2023 that indicated that the suit properties would be sold by Public Auction on November 2, 2023 and the notice has been placed in the Daily Nation on the 30th October 2023 in blatant disregard to the law. The latest valuation commissioned by the Defendants grossly undervalued the property and if the sales is allowed to proceed, the Applicants shall be greatly prejudiced.
 4. The Plaintiffs averred that the advertisement is also in blended contravention of Rule 15(d) of the Auctioneer rules which provides that the advertisement should be made not less than 45 days from the date of the notice, the Defendants/Respondents proceeded to advertise the property on the 42nd day after the notice was issued on September 18, 2023.
 5. The application was opposed by the Respondents who filed a Replying Affidavit sworn by Christine Wahome a Senior Legal Counsel - Retail Banking at the 1st Respondent's Bank. It was deposed that the Court has no jurisdiction to hear the suit since the dominant issue is the settlement of the amount between a borrower and lender vis – a vis the exercise of statutory power of sale over the charged property which falls squarely under the jurisdictions of the High Court article 165(3) of the Constitution.
 6. It was also averred that the interim orders were obtained by deliberate information and concealment of facts by the Plaintiff since the advertisement placed by the 2nd Respondent on 30th October 2023 speaks boldly that the auction will be held on 23rd November 2023 and not on 2nd November 2023 as falsely claimed by the Plaintiffs. It was also stated that the notice dated September 18, 2023 and served on 20th September 2023 succinctly proclaim that it was a courtesy notice to the Plaintiffs who had already been served with the 45 days notification of sale dated 6th March 2023 on 7th March 2023 receipt whereof was acknowledged.
 7. The bank also averred that the Plaintiffs repayment of the facility has been characterized by perennial default, sporadic payments and diversion of rental income in breach of contractual obligations under the facility and charge as a consequence which the account remained in arrears as reflected in the statements of account. The bank further averred that its auctioneers were duly instructed to issue the 45 days notification of sale and upon expiry of the said notices and there being no redemption of the facility the bank in compliance with section 97(2) of the Land Act proceeded to instruct a firm of qualified, professional and competent values to value the subject property which was valued as follows; Open Market Value Kshs. 170,000,000/ and forced Sale Value Kshs. 17,500,000/-.
 8. The bank denied any allegations of undervaluation and further stated that the plaintiffs had not meet the threshold for grant of the orders sought.



9. The application was canvassed by way of written submissions. The Plaintiff filed with submissions dated December 13, 2023 while the Defendants filed with submissions dated December 15, 2023.
10. The Plaintiffs submitted on the following three issues; whether this Court has jurisdiction to determine the suit, whether the purported advertisement by the Defendants was lawful and whether the Plaintiffs/Applicants are deserving of the temporary injunctive order sought.
11. The Plaintiffs averred that the cause of action is grounded on the fact that the Defendants unlawfully and irregularly advertised for sale of property known as file no. L.R. No. 209/2272 and that the cause of action relate to transfer of the suit property and in view of the foregoing. This Court has jurisdiction to hear the matter pursuant to the provisions of section 4 and 13 of the [Environment and Land Court Act](#).
12. On whether the purported advertisement was lawful, it was contended that the advertisement of October 30, 2023 was contrary to the provisions of rule 15 (d) which requires that an advertisement be made not less than 45 days.
13. It was also submitted that the Plaintiffs have made a case and are deserving of the orders sought. Reliance was made to the cases of *Giella vs Cassman Brown* (1973) EA 358, [Jan Bolden Nielsen v Hemen Phillips Steya](#) also known as *Hermannus Phillip's Steyn & 2 others* (2012) eKLR and [Mrao vs- First American Bank of Kenya Ltd & 2 others](#) (2003)KLR 125.
14. It was also submitted that the bank had failed to performance and property valuation by undertaking to perform a proper valuation by undervaluing the property and that if the auction was allowed to proceed, the Plaintiffs will be highly prejudiced.
15. The 1st Respondent submitted on the following two issues; whether the Court has jurisdiction to grant the orders sought and whether the Plaintiffs have met the threshold for the grant of the orders sought.
16. The bank maintained that the Environment and Land Court should not hear the matter since the dominant issue is the settlement of the amounts between the borrower and lender -vis – a – vis the exercise of the statutory power of sale of the charged property which falls squarely under jurisdiction of High Court pursuant to article 165(3) of the [Constitution](#). Reliance was made to the case of *Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) eKLR.
17. On whether the Plaintiffs have met the threshold for grant of the injunction orders sought it was submitted that the Plaintiffs had misled the Court by stating that the suit property was to be sold by auction on 2nd November 2023 yet the advert clearly stated that the auction was to take place on 23rd November 2023. It was further submitted that the auctioneer's notice dated 18th September 2023 was a courtesy notice to the plaintiffs who had already been served with the 45 days notification of sale dated 6th March 2023 on 7th March 2023.
18. The bank also submitted that no aspersions were cast on the conduct or process of valuation or non-independence or misconduct of the personnel involved in the valuation process. Relying on the cases of [Zum Zum Investment Limited v Habib Bank Limited](#) (2014) eKLR, [Palmy Company Limited v Consolidated Bank of Kenya Limited](#) ML HCCC No. 527 of 2013 (2014) eKLR, [Silas Misoi Yes T/ A Silo Investment v Transnational Bank Limited & another](#) HC COMM No. E101 of 2020 (2020) eKLR and [Geoffrey Kinuthia Mungai & Another v Progressive Great Limited](#) (2018) eKLR, the bank reiterated that it had discharged its duty of care pursuant to section 97(1) of the [Land Act](#) and should be allowed to proceed with the realization of the property. The Court was urged to dismiss the application with costs.



19. The Court has considered the application, together with the written submissions filed by the parties. The Court has also considered the statutory provisions and case laws cited. The main issues for determination are as follows: -
- i) Whether this Court has jurisdiction to hear and determined the application herein.
 - ii) Whether the Plaintiffs have made out a case for grant of the orders sought.
20. With regards to jurisdiction, it is now a well-founded principle that jurisdiction is the most crucial component of a suit. The Supreme Court in the case of [*Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 others*](#), Civil Appl. No. 2 of 2011, observed that:
- “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.”
21. Article 162(2)(b) of the [*Constitution*](#) states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the [*Environment and Land Court Act*](#) expounds on the jurisdiction of this Court as follows:
- (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.
22. From a careful examination of the pleadings herein, the suit herein relates to the dispute as to whether the intended sale and auction of L.R. No. 209/2272 along Charles Rubia Road by the defendants was carried out in compliance with the law. The Plaintiffs have also maintained that they have continued to service the facilities agreed by the parties. There is absolutely no dispute as to the ownership, use, occupation and title to the land known as L.R. No. 209/2272 located along Charles Rubia Road.



23. In the case of *Suzanne Butler & 4 others v Redhill Investments & another* [2017] eKLR the court stated as follows:

“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.

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.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

24. The dominant issue herein and as aptly submitted by the bank is whether or not the settlement of the amounts between the borrower and the lender vis a vis the exercise of the statutory power of sale over the charged property. In view of the foregoing this Court finds that the suit falls squarely within the jurisdiction of the High Court.
25. Having found that the High Court is the appropriate forum for this dispute, I must answer a second, consequential question: must I then strike out the suit. In the case of *Pamoja Women Development Programme & 3 others v Jackson Kibumbu Wang'ombe & another* (Kiambu H.C. Civil Suit No. 16 of 2016), Justice Prof. Ngugi (as he then was) when faced with a similar issue had this to say:

“Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts. Kenyans' objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit.”

Similarly, in the case of *Spinners & Spinners Limited v Spinners & Spinners Limited* [2017] eKLR, it was held as follows;



“In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.”

25. In view of the foregoing, I see no to reason depart from the aforementioned decisions.
26. The uphold of the foregoing and in the interest of justice, this Court issues the following orders; -
- a. This suit is hereby transferred to High Court (Commercial and Tax Division) and the Deputy Registrar of this Court is directed to facilitate the same.
 - b. The existing interim orders are hereby discharged.
 - c. Costs to abide the determination of the main suit.

It is hereby ordered:

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF JANUARY 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

Ms. Wachuka for the Plaintiffs.

Mr. Kabaiku for Defendants.

Court Assistant, Caroline Nafuna.

