



**BJKL v MIL & 4 others (Environment & Land Case E031 of 2024)
[2025] KEELC 171 (KLR) (Environment and Land) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E031 OF 2024**

**MC OUNDO, J
JANUARY 30, 2025**

BETWEEN

BJKL PLAINTIFF

AND

MIL 1ST DEFENDANT

STANBIC BANK LIMITED 2ND DEFENDANT

PRICE WAVINYA MUTUA 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

THE HONORABLE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Vide a suit instituted by a Plaintiff dated 30th July, 2024, the Plaintiff sought a declaration that the registration of a Charge dated 8th September, 2012 over Aberdare Villa Number 128 Green Park, Great Rift Valley Lodge and Golf Resort Naivasha erected on LR. No. 420/226, which had been their matrimonial home had been null and void and therefore the Defendants be restrained from dealing with the said property. That in the alternative that the 1st and 2nd Defendants be ordered to compensate her for the illegal loss of her home to a tune of Kshs. 30,000,000/=.
2. Contemporaneously with the Plaintiff, and vide her Notice of Motion Application the Plaintiff also sought for interim orders of injunction against the Respondents restraining them from completing the conveyance resulting from an auction conducted on 8th June 2023 or interfering with her interest in the said suit properties.



3. In response to the said Notice of Motion Application, the 1st Defendant filed both a Replying Affidavit and a Notice of Preliminary Objection both dated 28th August, 2024 challenging the jurisdiction of the court to handle the instant matter on the grounds that the jurisdiction on matters involving Charges as delineated by the Court of Appeal in *Cooperative Bank Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR lay with the High Court/Commercial Court and not the Environment and Land Court and secondly that the Environment and Land Court sitting in Nakuru had delivered a ruling on 2nd November, 2023 in ELC Case No. E045 of 2023 between the same parties wherein it had held that it had no jurisdiction in respect of the matters raised.
4. The 2nd Defendant's Notice of Preliminary Objection dated 13th September, 2024 was that the Application arose from a contract based and/or commercial transactions between parties wherein the Honourable Court, being an Environment and Land Court, lacked the requisite jurisdiction to hear and determine the same.
5. Since both the Preliminary Objections sought to oust the jurisdiction of the court in hearing and determining the matter before it the case took directions that the same be disposed of in the first instance through written submissions.
6. The 3rd, 4th and 5th Defendants did not participate in the Preliminary Objections herein raised.
7. The Preliminary Objection was canvassed by way of written submissions, wherein the 1st Defendant premised his submissions on the decided case of *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696 and framed one issue for determination to wit; whether the court has jurisdiction to hear and determine the suit.
8. Wherein he proceeded to submit that the Plaintiff in the instant suit and application, had sought to challenge the creation and subsequent sale of the security by the Bank on account of spousal consent. That in fact, the Plaintiff had by her own pleading admitted that before the sale, she had approached the Bank in an attempt to regularize the position to no avail. That it was therefore not in dispute that the Plaintiff had approached the court upon becoming aware of the process by the Bank with regard to the exercise of statutory power of sale.
9. That pursuant to the provisions of Article 162 (2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, the Court of Appeal, had in delimiting the extent of the Jurisdiction of ELC Court held that matters relating to charges, mortgages, collection of dues and rent fell exclusively within the jurisdiction of the High Court as held in the Court of Appeal's holding in the case of *Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR.
10. That in a Ruling in Nakuru ELC Case No. 045 of 2023, the parties had been between the Plaintiff and the 1st and 2nd Defendants herein, wherein following the sale of the property, the Plaintiff in the instant suit had now enjoined the purchaser (3rd Defendant) and the Registrar of Titles as regards the transfer of the property.
11. That the said ruling, the court after setting out the nature of the dispute between the parties and upon undertaking an analysis of the same, had found that the matter involved a dispute relating to a Charge and therefore it had held that it had no jurisdiction to entertain the matter before it.
12. The dispute before the court then is exactly the same as the one set out by the Plaintiff in the present suit for which this court still lacked jurisdiction to determine the instant suit.
13. As to whether the court could transfer the instant suit to the High Court, reliance was placed in the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* [2021] eKLR. Case to



submit that a suit once filed in a court without requisite jurisdiction was not transferable to the High Court and that the only recourse available was to strike out the Plaintiff's suit for want of Jurisdiction.

14. The 2nd Defendant on the other hand framed its issues for determination as follows:
 - i. Whether the Environment and Land Court has jurisdiction to hear and determine the instant matter.
 - ii. Whether the Honourable Court, upon finding it has no jurisdiction to hear and determine the matter, should have the matter struck out.
15. On the first issue for determination as to whether the Environment and Court had jurisdiction to hear and determine the present matter, its submission was in the negative for reason that the instant dispute did not relate to the environment, the use and occupation of and titles to land as envisaged by the provisions of Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. That a dispute emanating from a Charge could not therefore be said to be a dispute relating to the environment and the use and occupation of, and title to, land.
16. Reliance was also placed in the Court of Appeal's decision in the Co-operative Bank Limited (supra) to submit that the dominant issue in dispute herein was that the Applicant/Plaintiff was challenging the authenticity of the spousal consent contained in the Charge and that she had no knowledge of the loan that had given rise to the said Charge. That subsequently, the dominant issue that had been raised in the Application was whether the Applicant had truly executed the Affidavit of Spousal Consent in the Charge which issue was not in any way related to the environment and the use and occupation of, and title to, land. Reliance was placed in the decided case of Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates [2019] eKLR and Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others [2024] eKLR to reiterate that the dominant issue herein fell within the ambit of the High Court and therefore the ELC Court lacked the requisite jurisdiction to hear and determine the instant suit.
17. On the second issue for determination as to whether the Court, upon finding that it had no jurisdiction to hear and determine the matter, should have the matter dismissed, the 2nd Defendant's submission was that having demonstrated that the ELC Court lacked jurisdiction to entertain the instant Application, the court must down its tools and have the suit struck out and dismissed. Its reliance was hinged on a combination of decisions in the case of In Re The Matter of Interim Independent Electoral Commission S.C, Constitutional Application [2011] eKLR, Owners of Motor Vessel "Lillian S"-v-Caltex Oil (Kenya) Limited [1989], and Beatrice Lusiola v Michael Lusiola & 2 others [2023] eKLR.
18. That where a Court finds that it had no jurisdiction to adjudicate over a matter, it should not attempt to sanctify the incompetent suit through transfer to another Court but rather, it should proceed to strike out and dismiss the suit in its entirety. Reliance was placed in the decided case of Phoenix of E.A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR where the court had cited the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR.
19. In conclusion, the 2nd Defendant reiterated that the court lacked the requisite jurisdiction to hear and determine the instant Application hence the said Application and the accompanying suit should be struck out and dismissed with costs.
20. In opposition to both the Preliminary Objections, the Plaintiff summarized the factual background of the matter and then framed her issues for determination as follows:
 - i. Whether the Court had jurisdiction to determine the instant suit.



- ii. Whether the matter is res-judicata in relation to the Ruling in ELC E045 of 2023.
 - iii. Whether the court can transfer the suit herein to the High Court Commercial.
21. On the first issue for determination as to whether the Court had jurisdiction to determine the instant suit, she submitted in the affirmative to the effect that her suit was premised among others on the issue of ownership/title of the suit property thus the court had jurisdiction to determine the present case and the conflict thereof. That in any case, she had not in any way been involved in the transaction/ Charge over the suit property as the same had been conducted between the 1st and 2nd Defendants. That her case was not commercial in nature as she was not a party/privy to the contract between the 1st and 2nd Defendants.
 22. That her case was of ownership of the land because being the owner of the same, it had been irregularly made an instrument of commercial transaction without her approval/spousal consent. Her reliance was hinged in the decided case of Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR as well as the provisions of Article 162 (2) (b) as read with Article 162 (3) of *the Constitution*, Section 150 of the *Land Act*, Section 13 (2) of the Environment and Land Court Act on the jurisdiction of ELC Court, to submit that her case fell within the issue relating to the title/ownership of land.
 23. She submitted that the suit property was jointly owned by herself and the 1st Defendant who held it in trust for her and which property had served as their matrimonial home. That the issue of Spousal Consent and matrimonial home were issues of ownership/title which fell within the jurisdiction of ELC Court. That subsequently, for the commercial issue and/or the Charge dated 3rd September, 2012 to be determined, the issue of ownership/title to the suit land had to take precedent. That the 1st and 2nd Defendants had failed to address the issue of title/ownership/spousal consent before irregularly proceeding to transact/create a Charge over the suit property to which she lay claim of ownership.
 24. That the issues that had been addressed by the Objectors in the Preliminary Objection as well as the cited case of Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 others (supra) did not relate to the dispute herein, since the primary issue in question in the said case were Charges that had been created and the manner in which the auction of the properties had been conducted. That in the present case however, the primary issue she had raised related to ownership/title of the suit land and the irregular manner in which the said property had been made an item of commercial transaction without her Plaintiff's approval/consent. It was thus her submission that the court had jurisdiction to hear and determine the instant matter.
 25. On the second issue for determination as to whether the instant matter was res-judicata the Ruling in Nakuru ELC Case No. E045 of 2023, she submitted that the issues and the parties in the Nakuru ELC Case No. E045 of 2023 were not the same as the ones that had been raised in the instant suit.
 26. That in the previous suit, the issues had been premised on legality of the loan facility that had been advanced to her husband, thus the prayers sought therein were different in nature as those sought in the instant matter where the matter had sought to address the issue of title and ownership of the suit land which she contended was jointly owned by herself and 1st Defendant who had no right to offer it as security for a loan facility advanced to him for which she was not a party hence the issue of res-judicata did not arise.
 27. On the third issue for determination as to whether the court should transfer the suit herein to the High Court Commercial, it was her submission that in the event the court found itself without jurisdiction to hear and determine the instant matter, then the court in the interest of justice and fairness should



be inclined to transfer the present dispute to the High Court for determination of the issues between the parties herein and not to strike the suit as the same would amount to grave injustice upon her and she would in turn suffer great loss of the suit property.

28. She placed reliance in the decided case of *Harun Kiptarus Tanui v East African Portland Cement Plc (2022) eKLR* where the court had cited the case of *Pamoja Women Development Program & 3 Others v Jackson Kihimbu Wangombe & another [2016] eKLR* to submit that the court was equipped with powers to transfer the instant suit to the correct forum to meet the ends of justice and fairness and to have the real issues between the parties herein heard and determined on merit in the spirit and intention of the provisions of Article 159 of *the Constitution* of Kenya.
29. In conclusion, she urged and implored the court to exercise its powers in her favour and dismiss the Preliminary Objections herein and thereafter make the necessary orders to meet the ends of justice and fairness in a bid to have the real issues between the parties herein heard and determined on merit.

Determination.

30. Having considered the Notice of preliminary objections herein, the submissions and the authorities cited for and against the same thereof. I find that this matter arose as a result of a Plaintiff filed by the Plaintiff dated 30th July 2024, wherein she sought a declaration that the registration of a Charge dated 8th September, 2012 over Aberdare Villa Number 128 Green Park, Great Rift Valley Lodge and Golf Resort Naivasha erected on LR. No. 420/226, which had been their matrimonial home had been null and void and therefore the Defendants be restrained from dealing with the said property. That in the alternative, that the 1st and 2nd Defendants be ordered to compensate her for the illegal loss of her home to a tune of Kshs. 30,000,000/=.
31. It is not disputed that the 1st Defendant secured a loan facility from the 2nd Defendant wherein a charge was created over the suit properties to secure the loan. Subsequently the 1st Defendant defaulted in repayment of the loan wherein consequently the said property was sold through a public auction to the 3rd Defendant.
32. The Plaintiff through her Notice of Motion now seeks for interim orders of injunction against the Respondents restraining them from completing the conveyance resulting from an auction conducted on 8th June 2023 or interfering with her interest in the said suit properties.
33. The Plaintiff's argument is that the suit property being their matrimonial home, where the 1st Defendant held the same in trust for her as a joint proprietor, the legal charge created over the suit property was invalid and illegal for lack of her spousal consent.
34. The application was opposed by the 1st and 2nd Defendants who filed their respective Preliminary objections wherein they had argued that the instant matter arose from a contract based and/or commercial transactions between parties wherein the Honourable Court, being an Environment and Land Court, lacked the requisite jurisdiction to hear and determine the same. That secondly, the Environment and Land Court sitting in Nakuru had delivered a ruling on 2nd November, 2023 in ELC Case No. E045 of 2023 between the same parties wherein it had held that it had no jurisdiction in respect of the matters raised.
35. I find the matter for determination as being:
 - i. Whether this matter is Res judicata Nakuru ELC Case No. E045 of 2023.
36. From the holding, in *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696* it is clear that Preliminary Objection must therefore be raised on the assumption that all facts



pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amounts to abuse of Court process.

37. On the first issue for determination, the substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

38. The doctrine of res judicata is important in adjudication of case and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

39. In order therefore to decide as to whether this case is res judicata, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. What issues were really determined in the previous case;
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction

40. The supreme Court in the case of *John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others*, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

41. Looking at the circumstance of the present suit wherein the Plaintiff Applicant now seeks for interim orders of injunction against the Respondents restraining them from completing the conveyance



resulting from an auction conducted on 8th June 2023 or interfering with her interest in the said suit properties.

42. In the ruling that was delivered in Nakuru ELC Case No. E045 of 2023 now reported as Lusiola v Lusiola & 2 others [2023] KEELC 21210 (KLR), (2 November 2023) (Ruling) the suit had been between Plaintiff vs Michael Imbusi Lusiola, Stanbic Bank Kenya Limited and Garam Investments Limited as the Defendants following the sale of the property, the Plaintiff in the instant suit has now joined the purchaser (3rd Defendant) the Registrar of Titles and the Hon Attorney General.
43. Looking at the 2nd prayer of the Plaintiff's former suit dated the 7th June 2023, the Plaintiff had sought for;

‘A declaration that the transaction between 1st and 2nd Defendants creating the Legal Charge over Land Parcel site no 128. Villa no 6280 IR NO 139336 ON LR NO 420/226 and 430/134 was illegal, incomplete, Ineffective thus null and void due to fraudulent spousal consent used to procure the loan title over the suit property and/or a declaration that the suit property is a matrimonial property incapable of being charged and sold by the Defendants without the spousal consent of the Plaintiff herein and that the Defendants actions of charging the suit property without spousal consent thus illegally and unlawful and the same is null and void.’

44. In its ruling, the court had held as follows:

‘I am guided by the decision in Co-operative Bank of Kenya Ltd Vs Patrick Kangethe Njuguna and five others (2017) eKLR wherein the Court of Appeal found that the jurisdiction of the Environment and Land Court to determine disputes connected to “use” of land within the meaning of Article 162(2)(b) of *the Constitution* of Kenya, 2010 does not include mortgages, charges, collection of dues and rents and that these are within the Civil Jurisdiction of the High Court.’

45. In Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, the Court of Appeal had at paragraphs 36, 37 and 41 observed as follows:

“By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the *Land Act*). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.”

46. I thus find that the matter in issue is identical with the matter in the previous suit, that further the parties were similar wherein the title was also identical and lastly that there was concurrence of jurisdiction. Indeed the orders issued by the court in the previous proceedings were of a nature of finality, wherein the court had found that it had no jurisdiction over issues touching on mortgages and charges, which issues were within the Civil Jurisdiction of the High Court.
47. There having been a Judgment from a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.



48. It was held in the case of E.T vs Attorney General & Another (2012) eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

49. The upshot of the foregoing is that the Preliminary Objections dated the 28th August 2024 and 13th September 2024, herein succeed. That the Applicant’s application lacks merit, the current suit herein filed by the Plaintiff is therefore res judicata Nakuru ELC Case No. E045 of 2023 and an abuse of the court process. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to. The Plaintiff/Applicant’s application dated the 30th July, 2024 as well as her suit of an equal date are herein dismissed with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 30TH DAY OF JANUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

