



Smith & another v Kenya Deposit Insurance Corporation (As receiver of Chase Bank Limited) & another (Civil Appeal E022 of 2022) [2025] KECA 294 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 294 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E022 OF 2022
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
FEBRUARY 21, 2025**

BETWEEN

DONALD EARLE SMITH 1ST APPELLANT

SONAL SMITH 2ND APPELLANT

AND

KENYA DEPOSIT INSURANCE CORPORATION (AS RECEIVER OF CHASE BANK LIMITED) 1ST RESPONDENT

WILLIAM OSIEMO T/A WILLIAM AUCTIONEERS 2ND RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court of Kenya at Malindi (Olola, J.) delivered virtually at Nyeri on 27th January 2022 in ELC Malindi Case No. E005 of 2020)

JUDGMENT

1. Central in this appeal is the issue of jurisdiction. The question is whether the Environment and Land Court (the ELC) (Olola, J.) was seized with the jurisdiction to hear and determine the dispute filed by Donald Earle Smith and Sonal Smith (the appellants) against Kenya Deposit Insurance Corporation (sued as the Receiver of Chase Bank Limited) (1st respondent) and William Osiemo T/A William Auctioneers (2nd respondent). The respondents also filed a cross appeal dated 6th September 2022.
2. The facts in dispute can be discerned from the appellants' plaint dated 7th October 2020. The appellants contend that they are husband and wife respectively and the registered owners of all those properties known as Titles Nos. Gede/Kijipwa B/56 and 57 situated off Turtle Bay Road in Kilifi County (the suit properties). The 1st appellant applied for a loan facility amounting to Kshs. 10,000,000 from Chase Bank Kenya Limited (under receivership) through his personal bank account number 00120011785004.



3. By a letter dated 3rd May 2006, Chase Bank Limited issued a conditional letter of offer of a banking facility to the 1st appellant. The facility was a medium-term loan of Kshs. 5,000,000 and an overdraft of Kshs. 5,000,000. The collateral for the loan facility was the suit properties. It was alleged that the 1st appellant defaulted on the repayment of the loan facility, and the 2nd respondent issued to the 1st appellant a notification of sale of immovable property followed by a letter dated 25th August 2020 giving 45 days of redemption notice.
4. The appellants alleged that they were not indebted to Chase Bank Limited as they had repaid in full the loan by 12th February 2016, and that the amount demanded by the 2nd appellant was for an alleged loan issued to a third party, namely Five Forty Aviation Limited, and which was not secured by a charge over the suit properties.
5. The appellants sought from the ELC for: a declaration that they are not indebted to the respondents in the sum of Kshs. 678,714,322.90 or in any other sum; a declaration that the appellants are entitled to the equity of redemption of the charge over its suit properties; a permanent injunction restraining the respondents from interfering with the suit properties in any manner, more so exercising their purported power of sale over the appellants' suit properties; an order compelling the 1st respondent to execute a discharge of charge and release the original titles to the suit properties within 14 days of the judgement; USD 1,000,000 held by Chase Bank Limited, together with the accrued interest on the said amount; general damages for breach of contract; costs of the suit; interests on the amounts held by Chase Bank; general damages from the date of filing suit; and such further orders or reliefs the court would deem just to grant.
6. Denying the allegations raised by the appellants in toto, the respondents filed a statement of defence, which they later amended on 18th November 2020. The respondents averred that the suit properties were used to secure a sum of Kshs. 14,000,000; that the appellants defaulted on payment of instalments as and when they were due, thus falling into arrears of Kshs. 678,714,322.90 as at 21st August 2020; and that, according to the 1st respondent, there was no reasonable cause of action against it as it did not advance any loan facility, nor issue any statutory notices to the appellants. Both respondents asked that the suit be dismissed with costs.
7. Contemporaneously with the suit, the appellants filed a Notice of Motion dated 7th October 2020 seeking interim injunctive orders restraining the respondents from interfering with the suit property in any manner, especially from selling through public auction, private treaty or by any other way whatsoever from disposing of the suit properties. The respondents objected to the application by a Notice of Preliminary Objection dated 24th November 2020, which raised seven grounds basically challenging the ELC's jurisdiction as follows:
 - i. The court lacks jurisdiction to hear and determine this matter given its specialized jurisdiction under Article 162 (2) (b) of *the Constitution* of Kenya and Section 13 of the *Environment and Land Court Act* and as held by the Court of Appeal in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auc* (2017) KECA 79 (KLR);
 - ii. The plaintiff's application cannot be salvaged by transfer to the High Court since this court lacks jurisdiction to handle the matter in any way including transfer as was held by the Supreme Court in *Albert Chaurembo Mumba & 7 Others vs. Maurice Munyao & 148 Others* (2019) eKLR;



- iii. The 1st defendant is not a proper defendant under section 50 (4) (1) of *Kenya Deposit Insurance Act*, Cap 487C which only sanctions suit against the Kenya Deposit Insurance Corporation “...in the matter of the institution;
 - iv. The 1st defendant is statutorily recognized as an agent of the institution under receivership of section 45 (5) of the *Kenya Deposit Insurance Act* Cap 487C whereas the 2nd defendant stated it was working under instruction of Chase Bank (K) Limited (In receivership) hence they cannot be enjoined as a substantive party to the suit for a claim against a disclosed principal to wit Chase Bank (K) Limited (In receivership);
 - v. The plaintiffs never sought leave prior to the filing of the suit and the contemporaneous application dated 7th October 2020 as required under section 56 (2) of the *Kenya Deposit Insurance Act*, Cap 487C hence the suit is fatally defective;
 - vi. For the foregoing reasons, the suit, all proceedings taken and the interim orders issued on 10th November 2020 against the defendants/respondents are therefore nullity ab initio;
 - vii. The plaintiffs/applicants’ suit and the application are therefore incurably defective, bad in law and ought to be struck out.”
8. The parties agreed to dispose of the preliminary objection by way of written submissions. After considering the written arguments by the parties, Olola, J. opined that he had jurisdiction to hear and determine the suit. In so finding, the Judge heavily relied on this Court’s decision in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra), to which we will shortly return, to reach the decision that the main issue in dispute before him was about the creation of a charge and enforceable interest which the ELC had jurisdiction to determine. It was held that the issue in contention was whether or not the suit properties were developed with a cottage and family restaurant.
9. On the issue of whether the suit was bad in law in so far as the 1st respondent was not an improper party to the suit, the learned Judge held that misjoinder of parties cannot invalidate a suit. On whether it was fatal that the appellants did not seek leave prior to filing of the suit, as is required under section 56(2) of the *Kenya Deposit Insurance Act* (KDIA), the learned Judge conceded that leave was not sought prior to the commencement of the suit. The court found merit on this ground and struck out the suit with costs.
10. The striking out of the suit is what brings the appellants to this Court in this appeal. They have raised 8 grounds of appeal which we have condensed into the following 5 grounds. The appellants fault the learned Judge:
- a. For misinterpreting Section 56 of the *Kenya Deposit Insurance Act* Cap 487C;
 - b. For finding that the deposits held by the institution herein, Chase Bank (Kenya) Limited, including those belonging to the appellants were the assets of the institution rather than the property of the depositors;
 - c. For finding that leave to sue the respondents was required as the matter touched on assets of an institution in liquidation, herein Chase Bank (Kenya) Limited, when the 1st respondent is empowered by the statute to make payments on depositor claims or offset deposits against a depositor’s liabilities;
 - d. For failing to appreciate the definition of ‘institution’ and ‘deposits’ as provided by section 2 of the Kenya Deposits *Insurance Act* Cap 487C; and



- e. For misapplying the applicable law.
11. The appellants asked that the appeal be allowed; that the ruling delivered on 27th January 2022 and all subsequent orders be set aside; that the suit by the appellants be reinstated and heard in the normal way by the appropriate trial judge; that costs of the appeal be awarded to the appellants; and for any further orders as may be appropriate.
 12. In its cross appeal dated 6th September 2022, the respondents contended:
 - a. That the learned Judge erred in finding that the court had jurisdiction to hear and determine the suit; and
 - b. That the learned Judge erred in finding that the misjoinder of the respondents was not fatal without interrogating whether the joinder was proper.
 13. The respondents prayed that the appeal be dismissed; that the cross appeal be allowed; that the superior court's decision that it was vested with jurisdiction be set aside; that the suit before the superior court be struck out for being a nullity; and that costs of this appeal and cross appeal be borne by the appellants.
 14. At the plenary hearing, learned counsel Mr. Mungu appeared for the appellants. The appellants relied on two sets of submissions dated 27th April 2023 and 9th October 2024 respectively.
 15. According to Mr. Mungu, all the grounds of appeal can be consolidated into only one issue for determination, namely whether the learned Judge correctly interpreted the provisions of section 56(2) of the KID Act; that the issue revolves around the question as to whether a suit filed without prior leave when a party is in receivership, bankruptcy, or winding up, is a substantive error that invalidates the suit, or a procedural one that can be cured later. To the counsel, the omission to seek leave before filing a suit is merely a procedural and not a substantive error, which can be rectified by granting leave to correct the anomaly during the proceedings.
 16. Learned counsel urged us to consider the development of jurisprudence on the question of leave from the courts in England and Wales. To this end, counsel cited the following decisions: In *Re Wanzer Limited* (1891) 1 CH. 305; *R v Lord Mayor Of London Exp Boaler* (1893) 2QB 146; *Re Hutton (a Bankruptcy)* (1969) 2 CH. 201; and *Randull v BLAI* 4 CH. D139, where it was held that retrospective leave could be granted and that, if a proceeding filed without leave were to be dismissed, the legislature could have used clear language to that effect- want of leave was considered as only an irregularity; *Re National Employers Mutual General Insurance Association Limited (in Liquidation)* (1995) 1 B.C.L.C and *Wilson V Banner Scaffolding Limited* (1982) Times, 22 JUNE, which reversed the earlier position by holding that any proceedings commenced without leave was a nullity; *Re Saunder (a Bankruptcy)* (1997) CH. 60 AND *RE Cothers International Uk Plc (in Administration) & Others* (2012) EWHC 2942 (CH) where the initial position was resorted to, that lack of leave was considered as directory, and did not lead to a nullity of proceedings, and can be given retrospectively; and the leading Irish decision in *RE MJBH Limited V. Murphy* (2013) 1 EHC 256 where the court delivered itself thus: "In the normal course, leave should be sought prior to the commencement of the proceedings. However, where this has not been done, it follows that court retains a jurisdiction to consider, retrospectively, the granting of leave."
 17. It was submitted that the above decisions are persuasive and relevant to the position in Kenya; that applying the yardstick of the leading Irish case, the learned trial Judge ought to have concluded that failure to apply for leave was a technical procedural infraction, and thus granted leave retrospectively suo moto in order that the appellants were granted an opportunity to access justice as the suit would have proceeded to its logical conclusion.



18. On the respondents' part, learned counsel Mr. Juma highlighted the submissions dated 31st May 2023. Counsel submitted that it was not disputed that the appellants never sought leave prior to filing their suit; and that, this was the only ground which succeeded in the preliminary objection, which this Court should uphold. Reliance was placed on *Bougainville Estate Limited vs. Kenya Deposit Insurance Corporation (Suing in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 Others Civil Application No. 34 of 2021 (2021) KECA 132 KLR* where this Court emphasised the importance of seeking leave in a similar scenario, and that, where leave is not sought, the entire suit ought to be dismissed. Learned counsel submitted that, even if access to justice should not be hindered by technicalities, parties must comply with the laid down procedure in ensuring that a suit before court is competent.
19. Counsel submitted that the jurisdiction of determining disputes relating to either the environment or occupation and use of, and title to, land were within the purview of the ELC as was held by this Court in *Bank of Africa Kenya Limited & another vs. TSS Investment Limited & 2 Others (2024) KECA 410 (KLR)*. It was further urged that, in the same decision, the Court held that in determining the question of jurisdiction, the court should look at the dominant issue in dispute.
20. Counsel argued that the dominant issue in this instance was not about the use of land, rather, the appellants contended that they had fully serviced the loan taken from Chase Bank and that, for this reason, the properties used to secure the loan ought to be discharged; and that, in this respect, the dispute was commercial in nature, hence the ELC did not have jurisdiction to hear and determine the dispute; and that it ought to have downed its tools ab initio.
21. We have considered the grounds raised in the appeal and the cross appeal, the pleadings before the trial court, the submissions by the respective counsel and the law. In our view, the issues that fall for determination are whether:
 - a. the Environment and Land Court had jurisdiction to determine the dispute before it;
 - b. leave ought to have been sought prior to filing the pleadings; and
 - c. misjoinder of a party was fatal to the suit.
22. Jurisdiction is the legal power to make a decision or judgment. The long-standing principle is that jurisdiction is everything and without it a court cannot make one more step. This was enunciated in the celebrated case of *Owners of The Motor Vessel "Lillian S vs. Caltex Oil (Kenya) Ltd (1989) KECA 48 (KLR)* in which Nyarangi, JA. opined that, when the question of jurisdiction is raised, it ought to be determined in the first instance, and if the court finds that it has no jurisdiction, there would be no basis to continue with the proceedings but to down its tools. The learned Judge observed thus:

“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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
23. Self-evidently, litigation begins by an aggrieved party who is known as a plaintiff or a petitioner or an applicant, as the case may be, depending on the nature of the pleading, in initiating a claim. Axiomatically, it must be the plaintiff or a petitioner or an applicant who chooses a court of competent jurisdiction in just the same way that a game of cricket must begin by a ball being bowled. The batsman cannot begin.



24. The decision of the Supreme Court of Kenya in Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others (2017) eKLR is instructive where it was held that:

“A court’s jurisdiction flows either from the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law... It cannot expand its jurisdiction through judicial craft or innovation.”

25. The starting point is the supreme law of the land which is the Constitution. Article 162(2) (b) established the Environment and Land Court which has the same status as that of the High Court to determine disputes revolving around the environment and the use and occupation of, and title to, land. Under Article 162(3), Parliament was to enact laws which would determine the jurisdiction and functions contemplated under Article 162(2). To give effect, the Environment and Land Court Act, Cap 8D (the ELC Act) was enacted.

26. Section 13 (1) & (2) of the ELC Act provide:

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.

27. The learned Judge referred to the findings of the decision by this Court in Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna (supra) and acknowledged the observations made therein that charging land does not connote land use as described under Article 162(2) of the Constitution and section 13(2) of the ELC Act. Interestingly, the Judge concluded that he had jurisdiction to determine the dispute as follows:

“I note from the pleadings herein that one of the issues in contention is whether or not the suit properties were developed with a cottage and family restaurant. At paragraph 4 of the amended statement of defence, the defendants have actually put the plaintiff to strict proof of the contention that the properties are developed thereby inviting this court to determine a material fact on land use.”

28. It is trite that the guiding principle in determining whether a court has jurisdiction to determine a matter is derived from the pleadings filed since they contain the legal basis of the claim under which the plaintiff had chosen to invoke the court’s competence.



- 29. It is also critical that, when a court is determining whether it has jurisdiction, where its jurisdiction is in contestation, a critical guiding factor is the substratum on which the pleading is hinged. This was cut out in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna* (supra) where emphasis was placed that the ‘dominant test principle’ was to be used to determine the real issue in dispute.
- 30. Having perused and appreciated the pleadings filed before the ELC, the appellants’ main lamentation is that, despite having completed payment of the loan facility advanced to them by Chase Bank Limited (under receivership), the 2nd respondent purported to enforce a statutory power of sale over the suit properties to recover an alleged outstanding loan amount which, according to the appellants, was advanced to an entity known as Five Forty Aviation Limited which is allegedly associated with the 1st appellant. The 1st appellant denies that the suit properties were intended to secure the loan advanced to Five Forty Aviation Limited if at all the loan was advanced in the first instance.
- 31. We then ask a simple question: what then would a court presiding over such a dispute be required to do? The answer to the question is simple: the trial court would be expected to interrogate the terms of the loan facility, inspect the loan statements to be produced in court, further interrogate whether the borrowing party is in default or not, and if the lending party’s right to exercise its statutory power of sale over the charged property had crystallised. These issues are a clear pointer that none would amount to a determination of the ‘use’ and ‘occupation’ of, the charged property. To our minds, it matters not whether at the time when the charged property was being offered as security was developed or not, but that the parties to the loan agreement fulfilled their respective obligations. For all intent and purposes, and without any iota of doubt, that would be a commercial dispute.
- 32. In view of the foregoing, we disagree with the learned Judge’s view that the issues in contention related to the “...the environment and the use and occupation of, and title to, land” as contemplated in Article 162 of *the Constitution* and section 13 of the ELC Act. The use of land does not include a situation whereby the charge instrument is put to test and/or where the chargor and chargee each claim interest from the charge instrument.
- 33. Consequently, we do not hesitate to agree with the submissions made by learned counsel for the respondents that the ELC could not arrogate itself jurisdiction over the dispute. It is bereft of it. The jurisdiction over the matter can only lie with the Commercial Division of the High Court, or a High Court judge for that matter. And by conferring himself with the jurisdiction to hear and determine the matter, the learned Judge overstretched his hand to do what the law does not authorise him to do.
- 34. In the end, and in view of our foregoing findings, we reach the decision that the ELC had no jurisdiction in the first instance to entertain the appellants’ suit. And for this reason, all other issues arising in the appeal and cross–appeal fall by the wayside.
- 35. Accordingly, we find that the respondents’ cross-appeal succeeds on the issue of jurisdiction with costs to be borne by the appellants. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A.K MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

