



REPUBLIC OF KENYA



**Syovathu v Kanyi & another (Environment & Land Case
E001 of 2023) [2024] KEELC 1820 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E001 OF 2023**

**EK MAKORI, J
MARCH 20, 2024**

BETWEEN

CAROLINE SYOVATHU PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT

STANBIC BANK KENYA LTD 2ND DEFENDANT

RULING

1. The application before this Court is the plaintiff's Notice of Motion dated 20th July 2023 brought under a Certificate of Urgency and pursuant to Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Order 40 Rules 1 & 2, Order 51 Rule 1 of the *Civil Procedure Rules*, the application inter alia seeks the following reliefs:
 - i. That this Court be pleased to issue an order of temporary injunction pending the determination of this application against the 1st and 2nd defendants, either by themselves, agents, servants, and/ or employees and/or any person acting under their instructions from selling by public auction or by any other manner whatsoever and/ or otherwise interfering with the Suit Property herein referred to as Maisonette number 30, Ivory Court Estate on subdivision Number 448 (Original Number 442/7), Mainland North;
 - ii. That this Court be pleased to issue an order of temporary injunction pending the determination of this suit against the 1st and 2nd defendants, either by themselves, agents, servants, and/ or employees and/or any person acting under their instructions from selling by public auction or by any other manner whatsoever and/ or otherwise interfering with the Suit Property herein referred to as Maisonette number 30, Ivory Court Estate on subdivision Number 448 (Original Number 442/7), Mainland North.



2. The application was opposed by the 2nd respondent through the replying affidavit that was deponed by one Edna Omangi 2nd respondent's legal counsel on 11th August 2023.
3. The 2nd respondent at the same time did raise a Preliminary Objection significantly in response to the application stating that this Court has no jurisdiction to entertain the current suit because it is a commercial as opposed to a land dispute.
4. The application was canvassed by way of written submissions.
5. On the Preliminary Objection, the 2nd respondent states that prayers 2 and 3 of the plaintiff's Notice of Motion application seek to temporarily injunct the 1st and 2nd respondents from selling by public auction or any other manner whatsoever suit property referred to as Maisonette Number 31, Ivory Court Estate on subdivision Number 448(Original Number 442/7) Mainland North. Notably, the applicant wants to stop the 2nd respondent from exercising its statutory power of sale which has been occasioned by the 1st respondent's default on the several loan facilities advanced to him. According to the 2nd respondent, the question then is whether such a dispute should be within the purview of the ELC jurisdiction. Section 13 of the Environment and Land Court Act clothes this Court with 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 the ELC Act or any other law applicable in Kenya relating to environment and land. Article 162 (2) (b) of the Constitution demarcates the jurisdiction of the ELC by enacting that it 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.
6. The 2nd respondent asserts that by dint of judicial precedents, this Court has no powers to deal with commercial disputes (like in the current case). In that regard the following cases are cited - Co-operative Bank Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR, Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another [2021].
7. The 2nd respondent is of the view that the applicant in his application dated 20th July 2023 wants to stop the 2nd respondent from exercising its statutory power of sale. The applicant has conceded that he was duly served with a 40-day statutory notice by the 2nd respondent. The issue before this Court therefore revolves around the issuance of the 40-day statutory notice and the exercise of the 2nd respondent's statutory power of sale. From the 2nd respondent's foregoing arguments, the 2nd respondent submits that the applicant has approached the wrong Court. The dispute as captured in the applicant's pleadings ought to have been placed before the High Court for determination. The 2nd respondent therefore avers that this Court lacks jurisdiction to entertain and determine this suit.
8. The 2nd respondent further proceeds to state that upon discovering that it has no jurisdiction, the Court should strike out the suit rather than transfer it. The 2nd respondent cites the following cases in support of that view - Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2019] eKLR, Phoenix of E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service [2019] eKLR (cited in the case of Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another [2021] eKLR.



9. The applicant is of a contrary view stating that a look at the plaint shows that the prayers sought concern specific performance arising from the sale of the suit property between himself and the 1st respondent with a total purchase price paid on 18th March 2015. The issue involved then is about the uncompleted sale agreement and specific performance which is within the ambit and the jurisdiction of this Court.
10. From investigations done, there is a discovery made that the 1st respondent knowing he had sold the suit property to the applicant as of 18th March 2015 proceeded to place the same property as a security. The 1st respondent failed to notify the applicant about the placing of the property as security. That he failed to seek his consent before charging the same, fraud came much later when the 2nd respondent issued a 40-day statutory notice which is an issue to be reckoned at the hearing hereof.
11. According to the applicant the issues that the Court will be called upon to decide will be twofold – whether the 1st respondent had a good title to pass to any other party well knowing that there was already a sale agreement in favour of the applicant, and whether the long stay and occupation of the suit property should be regularized in favour of the applicant and the several parties who have also brought similar suits, through an order of specific performance directed at the 1st respondent to complete his part of the bargain. The applicant cites the cases of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd* [2018] eKLR and *Cooperative Bank of Kenya v Patrick Kangethe Njuguna & 5 Others* Msa. CA No. 83 of 2016 to support his assertion.
12. According to the applicant we are dealing with the right of the applicant to use the property by dint of a long stay and enforcement of the agreement of sale. The applicant concludes that this Court has the requisite jurisdiction to deal with the suit herein.
13. From the materials placed before me, the issues that fall for the determination of this Court are whether the Preliminary Objection raised herein is sustainable. Whether this Court has jurisdiction to entertain the current suit in the form and manner it has been filed. And who should bear the costs of these proceedings?
14. A Preliminary Objection rests on the proposition that when raised, its fundamental accomplishment will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent management of time as a Court resource by summarily flagging out a frail and hopeless suit that if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not, but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. (1969) EA 696, where the Court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by



the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. The thrust of the Preliminary Objection herein rests squarely on the jurisdiction of this Court, as held by Nyarangi JA. in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Looking at the pleadings herein from the plaintiff, defence, and the affidavits by parties, it is not disputed that the 1st respondent charged Maisonette Number 30, Ivory Court Estate on subdivision Number 448 (Original Number 442/7) Mainland North to the 2nd respondent to secure a loan. The title is currently with the 2nd respondent. The 1st respondent has long defaulted in the repayment of the loan and a 40-day Statutory Notice of sale has been issued. It is this notice when served on the applicant and several other parties who have also filed suits contemporaneously with this one, it was discovered that there was an existing legal charge on the original title intended for sub-lease to the applicant. In this suit, the applicant and the parties in the other suits seek specific performance to have the 1st respondent transfer the sub-leases to them. She has been in occupation of the respective unit since 2015. She will want to show the 1st respondent acted fraudulently when charging the title. She will also want to show that the 2nd respondent acted without due diligence when registering the charge and failed to discover the applicant had already purchased a unit and the title was due for subdivisions to capture his respective beneficial interest.
17. From the materials placed before me, this is a mixed grill case where we have a duly registered legal charge and at the same time sale agreements by parties who would wish to have the same completed by transfer and issuance of sub-leases. In mixed grill cases in the past, the ELC (see for example Munyao J. in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Ltd* [2018] eKLR) was of the view that such matters could be dealt with by this Court particularly checking on the predominant features and the substratum of the subject matter. The demarcation on this issue has been clarified by the Court of Appeal as shown in paragraph



18 below. I will then agree with the 2nd respondent that whereas in this matter the applicant will be seeking specific performance of the sale agreement in place by seeking a sub-lease registered in his favour, already the original title is charged and there will be no privity of contract between the 2nd respondent and the applicant.

18. The primary issue in this suit initially will be the subsisting legal charge and the subsequent statutory power of sale. Whether the 1st respondent acted fraudulently in creating the said legal charge or the 2nd respondent did not conduct due diligence before the creation of the same will be secondary. In my view, the High Court will be the appropriate forum to ventilate the issues raised herein based on judicial precedents – see Angote J. in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* [2021] eKLR quoted with approval in *Keter v Ecobank Kenya Limited (Civil Case 16 of 2018) [2022] KEHC 13352 (KLR) (28 September 2022) (Ruling)*:

“The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the charge. In *Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another* [2021] eKLR the court held; The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

19. We are primarily dealing with a legal charge here and the subsequent statutory notice of sale, which is what the applicant intends to stop and which cannot be separated from the applicant’s claim of purchase, which in my view can be challenged in the High Court by opposing the creation of that legal charge and all allegations raised here can be ventilated there.
20. Having said so, I find that this Court based on the reliefs sought, and a red flag having been raised the earliest, that this Court lacks jurisdiction to proceed further to consider the claim as raised in the plaint and, in the same breath deal with the pending application for an injunction, I down tools.
21. The effect of downing tools means striking out the entire suit rather than transferring the same as held in the case of *Phoenix of E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR:

“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction... These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words: -“In numerous decided cases, courts, including this Court have held that



it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same....In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

22. In a nutshell, therefore, the pending application and the entire suit are hereby struck out with costs to the 2nd respondent.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20TH DAY OF MARCH 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Koira Kimani for the Plaintiff

Mr. Wafula for the 2nd Defendant

Court Assistant: Happy

