



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others
(Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 410 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E055 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
APRIL 26, 2024**

BETWEEN

BANK OF AFRICA KENYA LIMITED 1ST APPELLANT

GARAM INVESTMENTS AUCTIONEERS 2ND APPELLANT

AND

TSS INVESTMENT LIMITED 1ST RESPONDENT

CHANGAWA KAZUNGU KITSAO 2ND RESPONDENT

ALMADDY MDZOMBA MWAGANDA 3RD RESPONDENT

(Being an appeal from the Ruling and Orders of the Environment and Land Court of Kenya at Mombasa (L. L. Naikuni, J.) dated 24th May 2022 in E.L.C No. 51 of 2022)

Only a chargor could legitimately seek relief against the exercise of a chargees statutory power of sale.

The main issues revolved around the scope of the jurisdiction of the Environment and Land Court and the locus standi of a lessor who sought to restrain a chargor from exercising their statutory power of sale. The court held that the Environment and Land Court only had jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. Moreover, a charge was a disposition that had no direct contractual relation to “use” (by a tenant or licensee) as in the instant case, of a chargor’s land. On locus standi, the court stated that the fact that a consenting spouse had a stake in the charged property with the right to be served with the notice of the chargee’s exercise of its statutory power of sale, and to challenge the exercise of such powers in appropriate cases, did not of itself avail similar rights to tenants or licensees who were not privy to, or have any stake in, the charge.

Reported by Robai Nasike

Jurisdiction – jurisdiction of the Environment and Land Court – determination of matters involving mortgages and charges – where a lessee to a chargor’s property sought to stop a chargee from exercising a statutory



power of sale over property owned by the charger – whether the issues under determination constituted matters relating to the environment and the use and occupation and title to land, hence the Environment and Land Court had jurisdiction to determine them.

Civil practice and procedure – *locus standi* – right to sue - right to sue a chargee who was exercising statutory power of sale – where lessees of a chargor sought to stop a chargee from exercising their statutory power of sale – whether a lessee of property owned by a chargor had the right to seek to restrain or challenge a chargee’s exercise of the statutory power of sale.

Brief facts

The 3rd respondent, TSS Investment Limited, had charged two parcels of land known as LR Nos. Mombasa/Block XXI/526 and 527 (the suit properties) to the 1st appellant, Bank of Africa Kenya Limited (the bank) as security for repayment of a loan or other financial facility in respect of which the 3rd respondent defaulted. At all material times, the 1st and 2nd respondents allegedly carried out a car bazaar business on the suit properties as tenants of the 3rd respondent. In consequence of the 3rd respondent’s default in repayment to the 1st appellant of the loan, the bank moved to realise the security and issued a statutory notice of sale pursuant to section 90(1) of the Land Act, 2012.

In an attempt to resist the bank’s right to realise its security, the 1st and 2nd respondents filed suit against the appellants and the 3rd respondent in the Environment and Land Court at Mombasa in ELC Case No. 51 of 2022. The appellants raised a preliminary objection against the suit questioning the jurisdiction of the Environment and Land Court and the *locus standi* of the 1st and 2nd respondent. The trial court dismissed the preliminary objection, culminating into the instant appeal instituted by the appellant.

Issues

- i. Whether the issues under determination constituted matters relating to the environment and the use and occupation and title to land, hence the Environment and Land Court had jurisdiction to determine them.
- ii. Whether a lessee of property owned by a chargor had the right to seek to restrain or challenge a chargee’s exercise of the statutory power of sale.

Held

1. The issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant’s exercise of its statutory power of sale over the suit properties based on the alleged tenancy relationship with the 3rd respondent. They were not matters relating to the environment, the use and occupation, the title to land as contemplated in article 162 of the Constitution, section 13 of the Environment & Land Court Act, and section 150 of the Land Act. Such matters could only be subject to litigation between the 1st and 2nd respondents as lessees, and the 3rd respondent as lessor.
2. The Environment and Land Court only had jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. Moreover, a charge was a disposition that had no direct contractual relation to “use” (by a tenant or licensee) as in the instant case, of a chargor’s land. The trial court had no jurisdiction to entertain the respondents’ suit as pleaded.
3. The validity of the 1st and 2nd respondents’ claims was entirely dependent on the nature of their interest in the suit properties. In principle, the 1st and 2nd respondents had no contractual or other legal right of claim under the charge on the basis of which the 1st appellant moved to realise its security. They did not have *locus standi* by virtue of section 96(3) of the Land Act, 2012 which recognized the right of the chargors’ spouses who consented to the creation of a charge to question the exercise of the chargee’s



- power of sale. Neither did the two have any right or interest recognised under section 24 of the Land Registration Act, 2012. Indeed, they did not fall in any of the categories of persons entitled to seek relief under section 103(1) and (2) of the Land Act, 2012.
4. The fact that a consenting spouse had a stake in the charged property with the right to be served with the notice of the chargee's exercise of its statutory power of sale, and to challenge the exercise of such powers in appropriate cases, did not of itself avail similar rights to tenants or licensees who were not privy to, or have any stake in, the charge. In any event, once the 1st appellant issued its statutory notice of sale to the 3rd respondent, it was under no statutory or other legal obligation thereafter to issue such notice to any third party claiming under a tenancy or other contractual relationship with the 3rd respondent to which the charge was not subject.
 5. Only the chargor could legitimately seek relief against the exercise by the charge of its power of sale. A debtor who had partly secured a loan by a charge against a third party's property could not seek to restrain or challenge the chargee's exercise of the statutory power of sale for want of proprietary interest in the charged property. That restricted *locus* was expanded vide section 103(1) of the Land Act, 2012 to include other persons who could seek relief against a chargee. However, the Land Laws (Amendment) Act, No. 28 of 2016 deleted section 103(1) (d), which had provided that lessees of the chargors were also entitled to seek relief. Statutory notices were only issued once at the point of default, and the chargee was not required to repeat or reissue the notice once it was issued and served upon the chargor, the only party with *locus standi* to apply for injunction to restrain the bank from exercising its statutory power of sale.
 6. The 1st and 2nd respondents were not the first or the only ones to resist the 1st appellant's move to realise its security. Others claiming under the same title had gone before them albeit unsuccessfully over the same subject matter and cause of action in the High Court, the ELC, and on appeal to the Court of Appeal. The multiple proceedings instituted by individuals and corporate entities not party to the charge over the suit properties to which only the 1st appellant and the 3rd respondent were privy demonstrated the spirited albeit unmerited attempts by third parties to obstruct the 1st appellant's rightful exercise of its statutory power of sale.
 7. The multiplicity of suits, the motions for injunctive relief, and the ensuing appeals determined in favour of the 1st appellant demonstrated that the issues in contention in the respondents' suit were *res judicata*, having been determined with finality on their merits by courts of competent jurisdiction, over the same subject matter, and the same cause of action. It matters not that the 1st and 2nd respondents were not party to the suits. The fact that those suits and motions raised issues similar to those in contention between the appellants and the respondents in the instant case, and over the same subject matter, and on the same cause of action, rendered them *res judicata*.
 8. The impugned ruling was rendered in the face of the instant court's decision in *Bank of Africa Limited vs. Juja Coffee Exporters Limited & 4 others* [2018] eKLR; *Juja Coffee Exporters Limited & 2 Others vs. Bank of Africa Limited & Another*, Mombasa Civil Appeal No. 158 of 2018 (UR); the High Court decision in *Osman Tabir Sheikh Said & 2 Others vs. Bank of Africa Limited*, Mombasa HCC No. 86 of 2019 (UR); and the ELC decision in the case of *Tabir Sheikh Investments Limited vs. Bank of Africa Limited* [2020] eKLR, by which the matters in contention had been determined with finality. Yet, those were the very decisions which the impugned ruling purported to reverse.
 9. The High Court had no power to overrule the Court of Appeal; it had no jurisdiction to flout the first principles of *stare decisis*; and the High Court must in the end follow the decisions of the Court of Appeal, unless they could be distinguished from the case under review on some other principles. The issues raised in the suit and the motion in issue were *res judicata*.

Appeal allowed.



Citations

Cases

1. Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others Civil Appeal 83 of 2016; [2017] KECA 79 (KLR) — (Explained)
2. Executive Curtains & Furnishers Limited v Family Finance Building Society (Civil Case 81 of 2007; [2007] KEHC 2437 (KLR)) — Followed
3. Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) Civil Case E007 of 2021; [2022] KEHC 2227 (KLR) — (Explained)
4. Independent Electoral & Boundaries Commission v Maina Kiai & 5 others Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) — (Explained)
5. Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates Civil Appeal 250 of 2017; [2019] KECA 504 (KLR) — (Explained)
6. John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others Petition 17 of 2015; [2021] KESC 39 (KLR) — (Explained)
7. Kibaki, Mwai v Daniel Toroitich Arap Moi Civil Application 172 of 1999; [1999] KECA 158 (KLR) — (Explained)
8. Njau & 5 others v City Council of Nairobi Civil Appeal 74 of 1982; [1983] KECA 56 (KLR); [1983] KLR 625) — (Explained)
9. Njeru, Nicholas v Attorney General & 8 others Civil Appeal 110 of 2011 – (Mentioned)

Regional Court

1. Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd (Civil Suit 551 of 2003; [2006] KEHC 3446 (KLR); [2004] 1 EA 357) — Explained
2. Nairobi Mamba Village v National Bank of Kenya ([2002] 1 EA 197) — (Explained)

Statutes

1. Constitution of Kenya, 2010 — article 162 — (Interpreted)
2. Court of Appeal Rules, 2022 (cap 9 Sub Leg) — rule 88 — (Interpreted)
3. Environment And Land Court Act (cap 8D) — section 13 — (Interpreted)
4. Land Act (cap 280) — sections 87, 90(1,3); 96; 103; 150 — (Interpreted)
5. Land Laws (Amendment) Act, 2016 (Act No. 28 of 2016) — section 103(1)(d) — (Interpreted)
6. Land Registration Act (cap 300) — sections 24; 25(1)(a); 59 — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The precis of the case on appeal as gathered from the scanty record as put to us is that the 3rd respondent, TSS Investment Limited, had charged two parcels of land known as LR Nos. Mombasa/Block XXI/526 and 527 (the suit properties) to the 1st appellant, Bank of Africa Kenya Limited (the bank) as security for repayment of a loan or other financial facility in respect of which the 3rd respondent defaulted, but whose particulars are not disclosed in the record before us.
2. At all material times, the 1st and 2nd respondents allegedly carried out a car bazaar business on the suit properties as tenants of the 3rd respondent, the terms and conditions of which tenancy are also not



disclosed in the record as put to us. We also find nothing on record to suggest that the alleged tenancy agreement/lease(s) were registered against the suit properties.

3. In consequence of the 3rd respondent's default in repayment to the 1st appellant of the loan aforesaid, the bank moved to realise the security and issued a statutory notice of sale pursuant to section 90(1) of the Land Act, 2012. To this end, the bank instructed the 2nd appellant, Garam Investments Auctioneers (Garam) to facilitate the realisation of its security by sale of the properties by way of public auction.
4. The 2nd appellant advertised sale of the suit properties by public auction vide a notice dated May 9, 2022 published in the People's Daily Newspaper of even date.
5. In an attempt to resist the bank's right to realise its security, the 1st and 2nd respondents filed suit against the appellants and the 3rd respondent in the Environment and Land Court at Mombasa in ELC Case No 51 of 2022 vide a plaint dated 12th May 2022 praying for: an injunction to restrain the appellants from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing of or otherwise completing by conveyance, transfer of any sale concluded by public auction or private treaty, taking possession, appointing receivers or exercising any power conferred by section 90(3) of the Land Act, 2012 leasing, letting, charging or otherwise interfering with the suit properties; costs and interest.
6. The 1st and 2nd respondents' case was that they were long-term tenants in occupation of the 3rd respondent's properties aforesaid since the year 2013/2014; that they carried out a car bazaar business thereon; that in recent times, there came a stream of prospective buyers coming to inspect the suit properties ahead of the intended public auction; that the public auction was a threat to their tenancy and business operations; that they were not served with any statutory notices, and that they only became aware of the sale by public auction on May 23, 2022 when they received numerous telephone calls from their business associates informing them that sale of the properties had been advertised in the People's Daily on May 9, 2022; that the intended sale was premature and that, in any event, none of the tenants had been issued with notices envisaged under section 96 of the Land Act; that the 3rd respondent never informed them that the suit properties were charged; that the suit properties were occupied by them and their tenants as business premises, which would have been impossible to replace in the event of sale; and that they would not be adequately compensated by an award of damages.
7. It is noteworthy that the 3rd respondent neither entered an appearance nor filed a defence to the suit. On their part, the appellants entered appearance, but did not file a defence.
8. Along with their plaint, the 1st and 2nd respondents filed a Notice of Motion dated May 12, 2022 seeking an interim injunction pending hearing and determination of their application and the main suit. The Motion was supported by the annexed affidavit of the 1st respondent sworn on May 12, 2022 essentially deposing to the grounds on which their injunctive relief was sought in the Motion and the suit as aforesaid, but which we need not replicate here. Suffice it to observe that the grounds on which their Motion was anchored are identical to those on which they sought injunctive relief in the main suit.
9. Neither the appellants nor the 3rd respondent filed any affidavit in reply to the 1st and 2nd respondent's Motion. However, the appellants raised a preliminary objection vide a formal notice dated May 18, 2022 seeking to have the 1st and 2nd respondents' Motion and suit struck out with costs on the grounds, inter alia: that the court had no jurisdiction to entertain the application and the entire suit, as the jurisdiction in the suit exclusively lay with the High Court; that the 1st and 2nd respondents lacked locus standi to seek the above-mentioned reliefs against the Bank as they were not recognized in law as one of the persons to seek relief under section 103 of the Land Act, 2012; that the 1st and 2nd respondents'



interest was subject to the Bank's interest pursuant to section 25(1)(a) of the [Land Registration Act](#) as the property was encumbered/charged to the Bank; that the application was res judicata; that the application was fatally defective as it purported to invite the court to overturn the various decisions on the issue rendered by this court, the High Court and the Environment & Land Court, which are of equal status; that the application was an abuse of the court process because numerous similar applications had been filed in this Court, the High Court and the Environment and Land Court seeking to stop the sale of the suit properties, which applications were dismissed; and that the purported lease agreement between the 1st and 2nd respondents and the 3rd respondent was unenforceable against the Bank, as the 3rd respondent did not obtain consent from the Bank to lease the charged properties to the 1st and 2nd Respondents aforesaid in contravention of section 59 of the [Land Registration Act](#) No 3 of 2012 and section 87 of the [Land Act](#) No 6 of 2012.

10. Upon hearing the parties, the ELC (LL Naikuni, J) delivered its ruling dated May 24, 2022 dismissing the appellants' preliminary objection. He ordered that the Motion, being unopposed, be allowed as prayed. In addition, the learned Judge directed that the appellants do file and serve their statements of defence and/or counterclaim within 7 days next following; that the 1st and 2nd respondent do file their replies to the defence and/or counterclaim (if any) together with any further documents and/or witness statements; and that the matter be mentioned on July 30, 2022 for the purpose of ascertaining compliance, pre-trial conference session and fixing of a hearing date.
11. Dissatisfied with the learned Judge's decision, the appellants moved to this Court on appeal on a whopping 13 grounds, which go against the grain of rule 88 of the [Court of Appeal Rules](#), 2022 but which we need not replicate here, save to mention that they faulted the learned Judge for, inter alia: holding that the ELC had jurisdiction to hear and determine the application and the suit; holding that the 1st and 2nd respondents had locus standi to file the suit by virtue of being tenants or lessees on the suit properties; granting the 1st and 2nd respondents an injunction on the basis that they were not served with the statutory notice in their capacity as tenants or lessees; holding that the suit and application were not res judicata; and for failing to appreciate that the alleged lease agreement between the respondents was unenforceable against the 1st appellant for failure to obtain consent from the 1st appellant.
12. In support of the appeal, learned counsel for the appellants, M/s Wamae & Allen, filed written submissions and list of authorities dated January 17, 2023 citing 13 judicial authorities, which we have duly considered. None of the respondents filed submissions either in support or in opposition to the appeal.
13. Having considered the record of appeal as put to us, the impugned ruling, the submissions on record and the law, we form the view that the appeal before us stands or falls on our finding on 3 main issues, namely:
 - (i) whether the ELC had jurisdiction to entertain the 1st and 2nd respondents' suit;
 - (ii) whether the 1st and 2nd respondents had *locus standi* to challenge the 1st appellant's exercise of its statutory power of sale to enforce the security over the suit properties; and
 - (iii) whether the issues in contention between the appellants and the 1st and 2nd respondents were *res judicata*.



14. On the 1st issue as to whether the ELC had jurisdiction to hear and determine the respondents' case, the learned Judge concluded:

“29... I am therefore satisfied beyond doubt that under section 13 of the *Environment and Land Court Act*, this court has jurisdiction to entertain any matter that involves land disputes; that jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.

30... I fully concur with the Advocate for the Plaintiffs on this issue while citing the two (2) recent decisions by the ELC (Munyao and Yano JJ). In *Margaret Muthoni Njoroge (Supra)*, Munyao J, making direct reference to Patrick Kangethe, commented that:-

...the Court of Appeal was of opinion that the case was one that was principally related to accounts. I do not believe that the Court of Appeal held that when this court sees the word “charge” in any pleadings, then it should drop its pen.”

15. The question as to whether the ELC had jurisdiction to entertain the suit turns on the provisions of section 13 of the *Environment and Land Court Act*, which provides:

“ 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.

16. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR, this Court held that:

“ 25. The respective jurisdictions of the ELC and the High Court are well spelt out by our Constitution. With regard to the ELC, article 162(2) & (3) of the *Constitution* requires inter alia, that:



Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) ...
- b) The environment and the use and occupation of, and title to, land

36. 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.

37. Further, section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use. While the former creates the relationship, the latter is the utilization of the natural resources found on, above or below the land. As seen before, land use connotes the alteration of the environmental conditions prevailing on the land and has nothing to do with dispositions of land. Saying that creation of an interest or disposition amounts to use of the land, is akin to saying that writing a will bequeathing land or the act of signing a tenancy agreement constitute land use. The mere acquisition or conferment of an interest in land does not amount to use of that land

41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court."

17. This position was affirmed by this court in *Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates* [2019] eKLR in the following words:

"(11) It is evident from Article 162(2) of the *Constitution* that the intention of the framers of the *Constitution* was the creation of special courts to determine disputes relating to the environment and the use and occupation of, and title to, land. This is confirmed by the preamble to the ELC Act wherein it is stated that the purpose of the *ELC Act* is:

To give effect to article 162(2)(b) of the *Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.'



(12) We reiterate the position taken in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna (supra)*, that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land.”

18. In view of the foregoing, the only question that falls to be determined is whether the respondents’ suit against the appellants involved “... matters relating to environment and the use and occupation, and title to land”. We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant’s exercise of its statutory power of sale over the suit properties on the basis of the alleged tenancy relationship with the 3rd respondent.
19. Accordingly, we do not share the learned Judge’s view that the issues in contention between the respondents and the appellants were matters relating to “... the environment and the use and occupation, and title to land” as contemplated in article 162 of the *Constitution*, section 13 of the Environment & Land Court Act, and in section 150 of the *Land Act*. To our mind, such matters could only be subject to litigation between the 1st and 2nd respondents as lessees, and the 3rd respondent as lessor.
20. We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (supra)* where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents’ suit as pleaded.
21. Even though our holding on the jurisdictional issue essentially determines and brings to rest the appeal before us, we nonetheless take cognisance of the fact that it would be remiss of us not to consider and pronounce ourselves on the legal position on the remaining two issues.
22. Turning to the 2nd issue as to whether the 1st and 2nd respondents had locus standi to file the suit, we hasten to observe that the validity of their claim is entirely dependent on the nature of their interest in the suit properties. This court in *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR defined *locus standi* thus:
- “The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding Lack of locus standi and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; literally it means a place of standing - see *Jowitt’s Dictionary of English Law* (2nd Edn). To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
23. We take to mind the fact that the 1st and 2nd respondents were allegedly tenants of the 3rd respondent, and who were said to have been carrying out car bazaar business on the suit premises. They also claimed



- to have sub-tenants together with whom they were aggrieved on account of failure by the 1st appellant to notify them of its intention to exercise its statutory power of sale of the suit properties with the aim of realising its security under a charge by the 3rd respondent.
24. In principle, the 1st and 2nd respondents had no contractual or other legal right of claim under the charge on the basis of which the 1st appellant moved to realise its security. Furthermore, we do not agree with the learned Judge's conclusion that they have locus standi by virtue of section 96(3) of the [Land Act, 2012](#) which recognises the right of the chargors' spouses who consent to the creation of a charge to question the exercise of the chargee's power of sale. Neither do the two have any right or interest recognised under section 24 of the [Land Registration Act, 2012](#). Indeed, they do not fall in any of the categories of persons entitled to seek relief under section 103(1) and (2) of the [Land Act, 2012](#).
25. In our respectful view, the fact that a consenting spouse has a stake in the charged property with the right to be served with the notice of the chargee's exercise of its statutory power of sale, and to challenge the exercise of such powers in appropriate cases, does not of itself avail similar rights to tenants or licensees who are not privy to, or have any stake in, the charge. In any event, once the 1st appellant issued its statutory notice of sale to the 3rd respondent, it was under no statutory or other legal obligation thereafter to issue such notice to any third party claiming under a tenancy or other contractual relationship with the 3rd respondent to which the charge was not subject
26. In *Nairobi Mamba Village v National Bank of Kenya* [2002] 1 EA 197, Ringera, J (as he then was) correctly held that it was only the chargor who could legitimately seek relief against the exercise by the chargee of its power of sale. As the learned Judge observed:
- “In my judgment the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the charger
- Let me also say that the Plaintiff has an interest in the charged property for it is both the security for its indebtedness and the location of its business. However such an interest does not suffice to give it locus standi to obtain an injunction against the chargee. The debtor's interest it has in the property is not a proprietary interest therein and it does not in my view give it standing to question the exercise of the power of sale. The lessee or Licencee's interest too does not suffice for the purpose of questioning the exercise of the power of sale.”
27. Similarly, in *Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* [2004] 1 EA 357, this court found that a debtor who had partly secured a loan by a charge against a third party's property could not seek to restrain or challenge the chargee's exercise of the statutory power of sale for want of proprietary interest in the charged property. In this regard, the court observed:
- “Lastly the Applicant has not shown that if the order of injunction is not granted, the appeal, if successful, will be rendered nugatory. The suit property does not belong to the applicant. The owner of the suit property M/S Komarock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the bank. So, even if the suit property is sold, the applicant will not lose any proprietary right to the property. In the circumstances, if the appeal succeeds damages would be the only relief appropriate to the applicant. It has not been said that the respondent's bank has no means to pay compensation that may be ordered.”
28. It is noteworthy that this hitherto restricted locus was expanded vide section 103(1) of the [Land Act, 2012](#) to include other persons who may seek relief against a chargee. However, the [Land Laws](#)



(Amendment) Act, 2016 Act No 28 of 2016 deleted section 103(1)(d), which had provided that lessees of the chargors were also entitled to seek relief. Accordingly, the current section 103(1) reads:

103. Application for relief by charger

- (1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 90(3) may be made by—
 - a. the chargor;
 - b. if two or more persons are joint chargors, by one or more of them on their own behalf;
 - c. a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent;
 - d. deleted by Act No 28 of 2016, s 75;
 - e. the trustee in bankruptcy of the chargor.

29. On the authority of *Executive Curtains & Furnishers Limited v Family Finance Building Society* [2007] eKLR), statutory notices are only issued once at the point of default, and the chargee is not required to repeat or reissue the notice once it is issued and served upon the charger, the only party with locus standi to apply for injunction to restrain the Bank from exercising its statutory power of sale (see *Nairobi Mamba Village v National Bank of Kenya* [2002] 1 EA 197; *Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* [2004] 1 EA 357; and *Tazmin Shaffique Allibhai v Shaffique Allibhai & I&M Bank Limited* [2020] eKLR).

30. On the 3rd issue as to whether the issues in contention in the appeal before us were res judicata, it is noteworthy that the 1st and 2nd respondents were not the first or the only ones to resist the 1st appellant's move to realise its security. As we will shortly see, others claiming under the same title had gone before them albeit unsuccessfully over the same subject matter and cause of action in the High Court, the ELC, and on appeal to this court.

31. The decisive elements to be established in determination of whether an issue raised in a particular suit is res judicata were outlined in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) where the Supreme Court held:

“58. Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction

59. 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.

(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)”

32. Likewise, in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, this Court held that:

“ Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised

The issue is not meant to be related, (whatever that may mean) to issues in a previous suit. The requirement is that the issue be directly and substantially in issue

.... The non-commonality of issues apart, the plea of *res judicata* was bound to fail on the basis that the parties between the two sets of proceedings are not the same, or those claiming under the same parties and litigating under the same title.”

33. In *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, Odunga, J. (as he then was) held that:

“42. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else...

45. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.”

34. First in line with regard to the cases identical to the one leading to the impugned ruling was the 3rd respondent company, which resisted sale of the suit properties in Mombasa HCCC No 57 of 2016 filed jointly with its subsidiary companies, and under which they made a number of interlocutory applications seeking temporary injunction, as well as their appeals to this Court in Civil Appeal No



- 109 of 2016 and Civil Appeal No 158 of 2018. In our view, that explains their inaction in the 1st and 2nd respondent's suit leading to the ruling subject to appeal herein.
35. Secondly came Mombasa HCCC No 57 of 2016 - Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited & 4 others. In a ruling dated January 25, 2022, the High Court dismissed yet another application seeking to restrain the bank from exercising its statutory power of sale on the grounds that it was *res judicata*, and an abuse of court process.
 36. According to the appellants, other suits and appeals in which similar issues were raised and determined on their merit include Mombasa Civil Appeal No 99 of 2016 – Bank of Africa v Juja Coffee Exporters Limited & 4 others (consolidated with Civil Appeal No. 109 of 2016 – TSS Transporters Limited & 2 others v Bank of Africa Limited & another. The consolidated appeals related to the case in the High Court of Kenya at Mombasa HCCC No 57 of 2016 in which Juja Coffee Exporters Limited was granted a conditional temporary injunction against exercise by the bank of its statutory power of sale of several properties (including the suit properties herein) that were charged to secure financial facilities executed by the directors of Juja Coffee Exporters Limited and two other related companies (the 3rd respondent and TSS Transporters Limited). The Bank filed an appeal challenging the injunction as a whole, while the 3rd respondent, TSS Transporters Limited and Tahir Sheikh Ahmed filed a separate appeal opposing the condition imposed for grant of an injunction in terms that they deposit Kshs 2.5 million. In a judgment dated January 25, 2018, this court allowed the bank's appeal; dismissed the 3rd respondent's appeal; and dismissed the application for injunction filed by Juja Coffee Exporters in the High Court case aforesaid.
 37. In Mombasa HCC No 80 of 2018 – Osman Tahir Sheikh Said & 2 others v Bank of Africa Limited (the 1st appellant herein), the executors of the will of the late Tahir Sheikh Ahmed also filed suit against the Bank challenging the exercise of its statutory power of sale of the suit properties. In a ruling dated October 7, 2018, the High Court vacated orders granting the plaintiffs temporary injunction.
 38. In Mombasa Civil Appeal No 158 of 2018 – Juja Coffee Exporters Limited & 2 others v Bank of Africa Limited & another, this court, In a judgment dated June 18, 2021, dismissed the appeal filed by the 3rd respondent and its two related companies seeking to set aside a ruling of the High Court in Mombasa HCC No 57 of 2016 dated April 5, 2018 dismissing their application seeking an injunction to restrain the Bank from exercising its statutory power of sale over the suit properties on the basis that the application was *res judicata*.
 39. Likewise, in Mombasa HCC No 86 of 2019 – Osman Tahir Sheikh Said & 2 others v Bank of Africa Limited, the executors of the will of the late Tahir Sheikh Ahmed filed yet another suit against the Bank seeking temporary injunction to restrain the Bank from interfering with several properties including the suit properties herein. The High Court dismissed the application vide a ruling dated November 15, 2019, having found that the application was *res judicata* in view of the fact that similar issues had been raised and determined on merits by the High Court in HCC No 80 of 2018 and, subsequently, on appeal to this court.
 40. The multiple proceedings instituted by individuals and corporate entities not party to the charge over the suit properties to which only the 1st appellant and the 3rd respondent were privy clearly demonstrate the spirited albeit unmerited attempts by third parties to obstruct the 1st appellant's rightful exercise of its statutory power of sale. The multiplicity of suits, the motions for injunctive relief, and the ensuing appeals determined in favour of the 1st appellant go a long way in demonstrating that the issues in contention in the respondents' suit were *res judicata*, having been determined with finality on their merits by courts of competent jurisdiction, over the same subject matter, and the same cause of action. To our mind, it matters not that the 1st and 2nd respondents were not party to the suits aforesaid. The



fact that those suits and Motions raised issues similar to those in contention between the appellants and the respondents herein, and over the same subject matter, and on the same cause of action, rendered them res judicata.

41. It is also noteworthy that the impugned ruling was rendered in the face of this Court's decision in *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others* [2018] eKLR; *Juja Coffee Exporters Limited & 2 others v Bank of Africa Limited & Another*, Mombasa Civil Appeal No 158 of 2018 (UR); the High Court decision in *Osman Tahir Sheikh Said & 2 others v Bank of Africa Limited*, Mombasa HCC No 86 of 2019 (UR); and the ELC decision in the case of *Tahir Sheikh Investments Limited v Bank of Africa Limited* [2020] eKLR, by which the matters in contention had been determined with finality. Yet, those are the very decisions which the impugned ruling purported to reverse.
42. To our mind, the impugned ruling was against the grain of this Court's decision in *Mwai Kibaki v Daniel Toroitich Arap Moi* [1999] eKLR in which the court held that the High Court has no power to overrule this court; that it has no jurisdiction to flout the first principles of stare decisis; and that the High Court must in the end follow the decisions of this court, unless they can be distinguished from the case under review on some other principles.
43. Having carefully considered the record of appeal, the impugned ruling, the appellants' submissions, the afore-cited authorities and the law, we reach the inescapable conclusion that the ELC had no jurisdiction to entertain the respondents' suit; that the 1st and 2nd respondents had no locus standi to sue the applicants for, inter alia, the injunctive relief sought; and that the issues raised in the suit and the Motion in issue were res judicata. Consequently, we find that the appeal succeeds and is hereby allowed with costs to the appellants. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

