



**Karuma (Suing as Legal Representative of the Estate of Joseph Karuma Mburu – Deceased) v National Bank of Kenya Ltd & 3 others (Environment & Land Case E088 of 2022) [2024] KEELC 3538 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E088 OF 2022**

**JG KEMEL, J  
APRIL 30, 2024**

**BETWEEN**

**NDEGWA KARUMA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH KARUMA MBURU – DECEASED) ..... PLAINTIFF**

**AND**

**NATIONAL BANK OF KENYA LTD ..... 1<sup>ST</sup> DEFENDANT  
MISTAN AUCTIONEERS LTD ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR, KIAMBU ..... 3<sup>RD</sup> DEFENDANT  
BENARD MUNGAI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant filed the instant Notice of Motion dated 29/11/2022 expressed under Order 2 Rule 15, Order 4 Rule 1, Order 25 Rule 4 and Order 51 Rule 1 of Civil Procedure Rules seeking Orders THAT;
  - a. This Honorable Court be pleased to strike out the Plaintiff's suit for duplicity.
  - b. This Honorable Court be pleased to strike out the Plaintiff's suit on account that this matter is sub judice.
  - c. The Honorable Court be pleased to grant the 1<sup>st</sup> Defendant costs of suit.
  - d. The costs of this application be provided for the 1<sup>st</sup> Defendant.
2. The Application is based on the grounds on the face of it inter alia that the Plaintiff suit is incurably defective and a non-starter for duplicity of suits; the Plaintiff's suit is sub judice; suit is incurably defective as it offends the Provision of Section 8 of the *Civil Procedure Act* and Order 4, Rule 1 of the



Civil Procedure Rules 2010; the Verifying Affidavit filed herein is false as a similar suit to wit Kiambu CMCC No. E086 of 2021; Ndegwa Karuma Vs. National Bank of Kenya Limited, Mistan Auctioneers and the Land Registrar Kiambu (hereinafter the Kiambu suit) involving the same parties herein and arising from the same cause of action is pending in Court and this matter is sub judice on account that a similar case relating to the same matters in issue was filed at the Magistrate Court at Nairobi to wit Nairobi CMCC No.1087 of 2020; Lucy Wanjiku Karuma and Limumatt Superior Supermarket Limited Vs. National Bank of Kenya Limited and Mistan Auctioneers (hereinafter the Milimani Suit) against the 1<sup>st</sup> Defendant herein.

3. The Application is supported by the Affidavit of Chrispus Maithya, the Acting Head Commercial Transactions & Litigation of the 1<sup>st</sup> Defendant. Rehashing the above grounds, the deponent annexed some of the pleadings in the Kiambu and Milimani suits and urged the Court to find that there is duplicity of the Plaintiff's suit and therefore it is sub judice. Copies of the Kiambu suit plaint and Verifying Affidavit are annexed as CNM1 & 2 while CNM3 and CNM4 are copies of the plaint and list of witnesses in Milimani suit.
4. The Plaintiff, Ndegwa Karuma swore his Replying Affidavit on 27/4/2023. He averred that the instant application is malicious and an abuse of Court process. That the Kiambu suit was withdrawn on 17/7/2023 as shown by Notice of Withdrawal attached as N-1. That without prejudice to the forgoing, the Kiambu suit's cause of action was distinct with the instant suit in terms of reliefs suit and further that upon conducting valuation of the suit land, the same was valued at Kshs. 25M as per the valuation report annexed as N-3.
5. Regarding the Milimani suit, the Plaintiff denied any knowledge of the suit adding that it was not filed by the estate of the late James Karuma Mburu. That looking at the annexed pleadings, the instant suit is not sub judice because the parties in both suits are different, Plaintiff in the Milimani suit lodged the suit as borrowers whereas in this case the Plaintiff is suing as the legal representative of the late James. That the letters of administration of James' estate were issued on 13/5/2021 and therefore no one had capacity to sue on behalf of his estate before issuance of the Letters of Administration. Correspondingly that the causes of action in Milimani and herein are different since in the Milimani suit the Plaintiffs sought to bar the auction and in the instant case the auction has already taken place. In addition, that the Milimani Court lacks geographical jurisdiction as the suit land is situate in Limuru, the suit land is valued at Kshs. 25M therefore is beyond the Court's jurisdiction. He beseeched the Court to dismiss the application and determine the matter on merits.
6. On 14/3/2024 directions were taken to canvass the application by way of submissions. The parties were also asked to address it on the question of jurisdiction.
7. It is a truism that jurisdiction is everything and goes to the root of the matter. It is what gives a Court or a tribunal the power, authority and legitimacy to entertain a matter before it. A decision made by a Court of law without jurisdiction is nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae. See the Court of Appeal case of Phoenix of E. A. Assurance Company Limited Vs. S.M. Thiga T/A Newspaper Service (2019) eKLR.
8. The locus classicus case on jurisdiction or want of it is the celebrated case of Owners of the Motor Vessel 'Lilian S' Vs. Caltex Oil (Kenya) Ltd [1989] eKLR in which Nyarangi, J.A., (as he then was), relying, inter alia, on a treatise by John Beecroft Saunders titled "Words and Phrases Legally Defined" held as follows: -

“...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.”

9. In *Samuel Kamau Macharia & Anor. Vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR the Supreme Court held as follows on jurisdiction:-

“ [68]. A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.”

10. The Environment and Land Court is created pursuant to Article 162 (2)(b) which provides that Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

11. Parliament enacted the *Environment and Land Court Act* (ELCA) to give effect to the above Article and established the Environment and Land Court and the jurisdiction of the Court at Section 13 of the ELCA in the following terms;

“ 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.”

12. Having outlined the scope of this Court’s jurisdiction under *the Constitution* of Kenya and statute it is pertinent for this Court to satisfy itself that it has jurisdiction to determine the case before it. This is because the above section gives quite a wide scope of disputes that this Court can entertain.

13. Relevant to this case, a glean of the plaint filed herein impugns the alleged auction carried out at the instance of the 1<sup>st</sup> Defendant which had advanced a loan guaranteed by the late James. That the auction took place after the demise of the late James and without issuance of relevant notices to his estate as provided for under Section 96 *Land Act* and gross undervaluation of the suit land. To that end the Plaintiff prays for Judgment inter alia; cancellation of sale of all that parcel of land known as Limuru/



Kamirithu/3239; an order for cancellation of title no Limuru/Kamirithu/3239 or in the alternative of the forgoing, an order for refund of the current value of the property and special damages.

14. To my mind the gist of the case challenges the manner in which the 1<sup>st</sup> Defendant exercised its statutory power of sale over the suit land that secured a loan facility lent to Limumatt Supermarket.
15. Does this Court have jurisdiction to entertain this dispute as filed? The answer is traced to the Court of Appeal case of Cooperative Bank Vs. Patrick Kangethe Njuguna & 5 Others [2017]eKLR which held that a charge/mortgage does not constitute use of land and as such does not fall within the jurisdiction of the Environment and Land Court as broken down in Article 162 Constitution of Kenya and Section 13(2) *Environment and Land Court Act*. The learned Judges held;

“35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, the air above it or ground below it is adapted. To the law, therefore, land use entails the application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted. Neither the *cujus* doctrine nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.”

“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.”

16. The Court of Appeal went on to rule that a charge does not constitute use of land within the definition in Article 162 Constitution of Kenya. It was stated;

“40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

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. The High Court has been seized of disputes dealing with charges and affirmed its jurisdiction thereat in light of the Kangethe case (supra). See the recent cases of Mary Juster Chepleting Vs. Agricultural Finance Corporation & 4 Others [2021] eKLR and [\*Furnicon Limited Vs. Middle East Bank Kenya Limited \(Civil Case E382 of 2022\)\*](#) [2024] KEHC 1499.
18. The position taken by the Court of Appeal and which is binding on this Court is that a dispute touching on charges/mortgages do not fall under the ambit of Environment and Land Court and accordingly this Court finds that it has no jurisdiction to entertain this suit.
19. I order that the suit and Notice of Motion dated 29/11/2022 be struck out with no orders as to costs.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Plaintiff – Absent

Munene HB Rimui for 1<sup>st</sup> Defendant

2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants - Absent

Court Assistants – Phyllis/Oliver

