



REPUBLIC OF KENYA



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**Diamond Trust Bank Kenya Limited v FHH (Civil Appeal  
18 of 2020) [2022] KECA 769 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 769 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 18 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
JUNE 24, 2022**

**BETWEEN**

**DIAMOND TRUST BANK KENYA LIMITED ..... APPELLANT**

**AND**

**FHH ..... RESPONDENT**

*(An appeal from the ruling and orders of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 13th November 2019 in An appeal from the ruling and orders of the Environment and Land Court at Mombasa (Munyao Sila, J.) delivered on 13th November 2019 in ELC Case No. 102 of 2019)*

**JUDGMENT**

1. In this appeal, the appellant, Diamond Trust Bank Kenya Limited (hereafter referred to as “the appellant” or “the Bank”), is challenging a ruling of the Environment and Land Court (ELC) (Munyao Sila, J.) delivered on November 13, 2019 in favour of the respondent, FHH, restraining the appellant by an order of interlocutory injunction, pending the hearing and determination of the suit before the ELC, from exercising its statutory power of sale under a charge on grounds that the respondent’s consent (spousal consent) was not obtained prior to charging the property.
2. There are two issues in this appeal. The first is whether the ELC erred in rejecting the appellant’s contention that it lacked jurisdiction to entertain the respondent’s having regard to the holding by this Court in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR. The second issue is whether, if indeed the ELC has jurisdiction over the matter, did it properly exercise its judicial discretion in granting the temporary injunction?
3. Briefly, the background is that the one KHA, the registered proprietor of a property known as Title Number, Subdivision Number xxxxx (Original Number xxxxx/xx) Section I Mainland North Mombasa (the property), stood as guarantor and charged the property to the appellant under an



instrument of legal charge dated November 16, 2012 to secure advances of Kshs. 17,200,000 extended by the appellant to Siyama Company Limited (the borrower).

4. Registered alongside the legal charge was an instrument of “Spousal consent to create a charge” dated November 16, 2012 (made under Section 79(3) of the Land Act, No. 6 of 2012 and the Land Registration Act, No. 3 of 2012) in favour of the appellant by which one FBS “being the wife of Mr. KHA” stated that she was aware the fact that the property “is registered solely in the name of Mr. KHA” and that the property forms part of matrimonial property; that she was aware that Mr. KHA (the Chargor) intended to create a charge in favour of the appellant and that she thereby consented to the creation of the charge.
5. It would appear that the borrower defaulted in repayment of the facility following which the appellant took steps to sell the property in exercise of its statutory power of sale and a public auction of the property was scheduled to take place on October 22, 2014. That precipitated the filing of a suit by the Chargor against the appellant before the High Court at Mombasa, being Mombasa High Court Civil Case No. 131 of 2014 in a bid to stop the sale.
6. The Chargor applied in that suit, by an application dated 16<sup>th</sup> October 2014, for a temporary injunction to stop the auction that was scheduled for October 22, 2014 on grounds, inter alia, that: he was not served with a statutory notice of sale and that the “house is a matrimonial house” where the Chargor lives with his family; that the property is the only matrimonial home where the Chargor and his family resides and that if sold, he would suffer irreparable damage and his “marriage will break up”; and that he had never been sent a statement of account by the appellant. In his certificate of urgency in support of the application, it was stated that the Chargor was never served with a statutory notice of sale and “neither did the [Chargor] seek his wife (sic) consent to charge the property.”
7. The Bank opposed that application before the High Court Mombasa but in a ruling delivered on July 30, 2015, the High Court (Kasango, J.) found that the 45 days statutory notice served on the auctioneers was sent to the Chargor but it was not sent to his “spouse even though that spouse gave her consent to the property being charged” and that because of that failure to serve the Chargor’s spouse, the Bank could not proceed with the sale of the property relying on the said statutory notice. Accordingly, the Judge restrained the Bank from selling the property until such time the Bank “shall issue statutory notices of sale as required under the law.”
8. Having complied with that order, the Bank, in yet a further effort to realize its security in exercise of its statutory power of sale instructed auctioneers to conduct a public auction which was scheduled for February 26, 2016. That resulted in yet another application by the Chargor dated 22<sup>nd</sup> February 2016 made in Mombasa High Court Civil Case No. 131 of 2014 seeking to restrain the Bank from proceeding with the sale of the property on grounds that the Bank had not complied with the stated ruling of Kasango, J. delivered on July 30, 2015. The Chargor again deponed that he had ignorantly guaranteed the borrower “without involving my family or even informing my wife” and that his wife was threatening to leave him and their children would be left without residence.
9. The Bank successfully opposed that application and, in a ruling, delivered on June 5, 2018, the High Court (P.J. Otieno, J.) was satisfied that fresh statutory notices had been duly served as ordered by the court on July 30, 2015 and that there was “no basis to fault the intended realization of the security” by the Bank. The main suit, we gathered from counsel, is still pending before the High Court.
10. Emboldened by the ruling of June 5, 2018, the Bank took steps towards realizing its security and in that regard a public auction of the property was scheduled and advertised to take place on June 14, 2019. The day before the scheduled auction, on June 13, 2019, the present respondent, FHH, as the wife of the Chargor filed suit before the Environment and Land Court (ELC) in Land Case No. 102



- of 2019 seeking a declaration that the decision by the Bank to charge the property, the matrimonial home, without her prior consent, is illegal, null and void; and an order of permanent injunction to restrain the Bank from selling or dealing with the property.
11. Alongside the suit before the ELC, the respondent presented an application dated June 13, 2019 under certificate of urgency seeking an interlocutory order of injunction to restrain the Bank from selling or dealing with the property pending determination of that suit. That application was based on the grounds that the property is matrimonial property registered in her husband's name; that the respondent was not aware of the Charge in favour of the Bank and that she did not consent to the charging of the property; that the purported sale flowing from a defective charge is illegal, null and void; and that the intended sale would render her and her children destitute.
  12. The respondent deposed in her affidavit in support of that application that she married the Chargor on September 3, 1999 and they are blessed with five children; that they subsequently purchased the property as their matrimonial home; that in 2012 she moved back to the United Kingdom to take care of her mother; that she only learnt on May 30, 2019 that the property was advertised and scheduled for sale; that on inquiring from her husband, she learnt that he had offered the family house as security without her knowledge or consent; and that the conduct by the Bank was therefore illegal and the sale of the matrimonial property would occasion her and her children untold suffering, loss and damage.
  13. Opposing the application, the Bank asserted that the matter "is purely a commercial dispute" and that being a commercial dispute, it should have been filed before the High Court; and that the ELC lacked jurisdiction to entertain it. In that regard, the Bank placed reliance on the judgment of this Court in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (above)*. The Bank also asserted that respondent's suit before the ELC offends Section 6 of the [Civil Procedure Act](#), is sub judice, as the subject matter of the suit is also the subject matter of in Mombasa High Court Civil Case No. 131 of 2014.
  14. On the substance of the application, the Bank maintained that there was no basis for stopping it from exercising its power of sale; that spousal consent had been obtained and that all statutory notices had been issued; that the suit was an abuse of the process of the court in view of the pending Mombasa High Court Civil Case No. 131 of 2014.
  15. In the impugned ruling the subject of this appeal delivered on November 13, 2019, the ELC determined that the matter was properly before it; that the issue before the court was on the validity or otherwise of the Charge the contention being whether it was valid for want of spousal consent; that a charge is an instrument granting an enforceable interest in land meaning therefore that the ELC has the jurisdiction to hear disputes relating to charges; that in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above)* this Court did not hold that ELC "would need to drop its tools when the word "charge" is mentioned and that "what the Court of Appeal thought was that the dispute in that case was one of accounts, which could then be heard by the High Court."
  16. On the contention that the matter was sub judice, the Judge held that the issue in the suit before him was clearly distinct from the issue in Mombasa High Court Civil Case No. 131 of 2014 as the issue of who is the Chargor's spouse was never canvassed in that case.
  17. And on whether an injunction should be granted, the Judge held that the respondent had established a prima facie case with a probability of success; that the respondent had displayed her marriage certificate which was not challenged by the Bank and that the Bank "does not pretend" that it got her consent before charging the property; that if the property was sold, the respondent would lose her matrimonial home which would be irreparable loss and that the balance of convenience tilted in favour of preserving the property.



18. Dissatisfied, the Bank filed this appeal based on the ten grounds of appeal set out in the memorandum of appeal. During the virtual hearing of the appeal before us on March 14, 2022, learned counsel Mr. H. Shah appeared for the Bank while learned counsel Mr. Kahuthu appeared for the respondent. They orally highlighted their written submissions.
19. For the appellant, it was submitted that the ELC does not have jurisdiction over the matter which involves enforcement of a legal charge, a commercial matter, it was submitted. On the merits of the application, it was urged that the Judge erred in concluding that the respondent had established a prima facie case; that contrary to the finding by the Judge, the appellant demonstrated that it had, pursuant to Section 79(3) of the [Land Act](#), obtained spousal consent from the Chargor's spouse living in the property; that the respondent did not establish that the property was her matrimonial home or that she was living on the property as at the time the charge was entered into. In that regard the case of [Stella Mokeira Matara v Thaddues Mose Mangenya & another](#) [2016] eKLR was cited.
20. It was submitted that there was evidence that the respondent was resident in UK since 2012 and was not residing on the property and the claim, and finding by the learned Judge that the respondent would suffer irreparable loss was unfounded. Moreover, counsel urged, the appellant has the financial means to meet an award of damages should it ultimately be found that the exercise of its statutory power of sale is irregular. In that regard, the case of [John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Limited](#) [2006] eKLR was cited.
21. Counsel for the respondent, on the other hand, submitted that the ELC has jurisdiction over the matter; that the respondent is not privy to the instrument of Charge; that the issue before the ELC is an issue relating to use, ownership and interest in the property and in that regard reference was made to Section 28 of the [Land Registration Act](#), Section 79(3) of the [Land Act](#) and Section 12(1) of the [Matrimonial Property Act](#) and therefore, the ELC has jurisdiction.
22. On the merits, counsel for the respondent submitted that the respondent produced a marriage certificate on the basis of which it was demonstrated that she is the wife of the Chargor; that her consent to charge the property was not sought or obtained and the ELC was therefore justified in granting the interlocutory injunction to protect her interest; that absent spousal consent the proposed sale of the property by the Bank in exercise of its power of sale would be illegal and the loss of the matrimonial home would be irreparable and the learned Judge was right in restraining the Bank from dealing with the property. In support of his submissions, counsel relied on the case of [Geoffrey Mungai & another v Progressive Credit Limited](#) [2018] eKLR as well as the case of [Joseph Siro Mosiona v HFCK & 3 others](#) [2008] eKLR.
23. We have considered the appeal and the submissions. As noted at the beginning of this judgment, there are two main issues. First is whether the ELC erred in rejecting the appellant's contention that it lacked jurisdiction to entertain the matter. Second is whether, assuming the ELC had jurisdiction, it properly exercised its judicial discretion in granting the temporary injunction.
24. We start with the matter of jurisdiction. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR the Supreme Court of Kenya was categorical that without jurisdiction, a court cannot entertain any proceedings. It pronounced that:

“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 to itself jurisdiction exceeding that which is conferred upon it by law.”



25. Earlier, *in the Matter of Interim Independent Electoral Commissions*, Constitutional Application No. 2 of 2011 [2011] eKLR, the Supreme Court had similarly expressed that: where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits; it cannot expand its jurisdiction through judicial craft or innovation; nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.
26. In *Republic v Karisa Chengo & 2 others* SC Petition No. 5 of 2015 [2017] eKLR the Supreme Court was clear that the High Court, the ELC and ELRC are different and autonomous courts with “different and distinct jurisdictions” and that:
- “As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.” [Emphasis added]
27. With the foregoing in mind, we must first determine the nature of the dispute before the ELC so as to establish whether that court has jurisdiction as held by the learned Judge. As already noted, in her suit and the accompanying application before the ELC, the respondent sought an order of injunction to restrain the Bank from exercising its power of sale on the basis that the instrument of legal charge based on which the Bank was seeking to do so is invalid because her consent, spousal consent, was not obtained. As the Judge put it, the issue before the court was on the validity the charge, the contention being that it was invalid for want of spousal consent.
28. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above)* it had been contended that the High Court lacked jurisdiction to entertain a matter where the plaintiffs therein had sought to restrain a bank therein from taking steps to sell charged property in exercise of statutory power of sale and that the jurisdiction over the matter lay with the ELC. It was contended in that case that charging the suit land constituted “use” of land within Article 162(2)(b) of the Constitution. In rejecting that contention, this Court stated:
- “36. By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any the 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 of 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 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 of a charger.
37. Further, Section 2 aforesaid recognizes a charge as a disposition in land. A disposition is distinguishable from land use.”
29. The Court went on to say that “in addition, the cause of action herein was not the validity of the charge, but a question of accounts.” The other contention on jurisdiction in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above)* that was rejected by this Court was the contention that the dispute fell under ELC on account of Section 13(2)(d) of the Environment and Land Court Act which provides that the ELC has power to hear and determine disputes “relating to... land and contracts, choses in action or other instruments granting any enforceable interests in land”. In that regard, the Court expressed that the jurisdiction of the ELC to deal with disputes relating to contracts should be understood within the context of the court’s jurisdiction to deal with disputes connected to “use” of land; that such contracts ought to be incidental to the “use” of land and do not



include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

30. The holding by the learned Judge in the present case that “a charge is an instrument granting and enforceable interest in land meaning therefore that this court has jurisdiction to hear disputes relating to charges” therefore flies in the face of the decision of this Court in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above)*. Recently, this Court in *P. J. Dave Flowers Limited v Limuru Hills Limited*, Malindi Civil Appeal No. 123 of 2019 in affirming that the ELC had, in the circumstances of that case, jurisdiction to entertain the dispute noted that the appellant therein “clearly had an interest in the suit premises as a purchaser” and had therefore acquired interest that conferred jurisdiction on the ELC to hear and determine the matter.
31. In the present case, although the respondent is not privy to the instrument of legal charge, there is no doubt that what the respondent is seeking before the ELC, is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (above)*, is a commercial matter for adjudication before the High Court. In our view therefore, the Judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.
32. There is another reason why we think this matter should have been filed before the High Court. As already noted, there is already pending before the High Court, Civil Case No. 131 of 2014 over the same subject matter in which the respondent’s husband had made two previous failed attempts failed to obtain injunctive relief to restrain the appellant from exercising its power of sale under the charge. In one of those failed applications, the husband had asserted in the certificate of urgency that one of the grounds on which he was seeking restraining orders on basis of urgency was that he did not “seek his wife (sic) consent to charge the property”. The issue of spousal consent therefore is not an issue that was being raised for the first time by the respondent herein before the ELC. It would be farfetched to assume that the respondent was not aware of that suit. It was subsequent upon rejection of the husband’s second failed attempt to restrain the exercise of the power of sale that the respondent instituted the suit before the ELC. It smirks of forum shopping and an abuse of process of the court, a practice the Supreme Court frowned upon and cautioned against in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR where it stated:

“What is emerging from the above observations is a situation where disputing parties have options to choose the forum to approach in the quest for justice which in our view is an injustice in itself and a mortification of our judiciary and the jurisdictional competence set by *the Constitution* in our judicial hierarchy. Such bridled state of events leaves the powers of the courts to the whims of judicial forum seeking litigants who practise before our courts to decide and choose at their own will the fora for dispute resolution in total disregard to the jurisdictional limits set out in *the Constitution*. It portends an imitable case of judicial forum shopping and an abuse of the court process.”
33. In conclusion therefore, we are satisfied that the proper forum for adjudication of the respondent’s suit is the High Court and not the ELC and the learned Judge erred in asserting jurisdiction. Being of that view, we need not address the question whether the Judge judiciously exercised his discretion in granting the interlocutory injunction.
34. The appeal succeeds. It is hereby allowed. The ruling of the ELC is hereby set aside and is substituted with an order striking out the respondent’s application for injunction dated June 13, 2019. It follows that the respondent’s suit having been instituted in a court without jurisdiction, the same is hereby struck out with costs to the appellant.



Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF JUNE 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

