



Muthui v Standard Chartered Bank Kenya Limited & another (Environment and Land Case Civil Suit E193 of 2023) [2024] KEELC 3852 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E193 OF 2023
MD MWANGI, J
APRIL 23, 2024**

BETWEEN

MARY WANJIRU MUTHUI PLAINTIFF

AND

STANDARD CHARTERED BANK KENYA LIMITED 1ST DEFENDANT

VALLEY AUCTIONEERS 2ND DEFENDANT

(In respect of the Defendants' Preliminary Objection dated 20th December, 2023)

RULING

Background

1. By a Plaint dated 28th November, 2023, the Plaintiff brought this suit against the Defendant seeking prayers for;
 - a. A permanent injunction to restrain the Defendant by itself, servants and/or agents from disposing the first Plaintiff's property known as Dagoretti/Riruta/6809 (Apartment C 01) situated on the property known as PRECIOUS HEIGHTS in Nairobi County by public auction or in any manner whatsoever.
 - b. An order that the Plaintiff do take over the payments due to the 1st Defendant herein and settle her indebtedness with the Defendant after a court ordered audit is undertaken.
 - c. Costs of this suit and interest thereon.
 - d. Any or further relief as this Court will deem fit to grant.
2. The Plaintiff asserts that she is a joint proprietor of the suit property (Dagoretti/Riruta/6809 – apartment C 01) with her former husband. She entered into a commercial loan agreement with the 1st Defendant, Standard Chartered Bank Kenya Limited. She however, contends that despite fulfilling her



obligations under the said agreement, the 2nd Defendant under the instructions of the 1st Defendant intends to auction the suit property.

3. She alleges that the suit property is a family home and any purported sale will cause damage and loss that cannot be compensated by an award of damages. She states that she is ready to take over the payments of the sums due after an audit of the loan account.
4. The Plaintiff was filed alongside a Notice of Motion application dated 28th November, 2023 under certificate of urgency seeking an order of interim injunction to restrain the Defendants from transferring or auctioning the suit property pending the hearing and determination of this suit.
5. Upon service, the Defendants filed a Notice of Appointment of Advocates dated 20th December, 2023 alongside a Notice of Preliminary objection of even date. The Notice of preliminary objection raises three objections as hereunder:
 - a. That this Honourable Court lacks jurisdiction to hear and indeed entertain the interlocutory application and suit as a whole as the same is a purely commercial matter stemming from the 1st Defendant's exercise of its statutory power of sale over Title Number Dagoretti/Riruta/6809 (Apartment C-01) (the "Suit Property") as a result of the Plaintiff's and her co-proprietor's default of a bank loan, which finding on jurisdiction was set out by the Court of Appeal in Co-operative Bank Ltd Vs. Patrick Kangethe Njuguna & 5 Others (2017) eKLR.
 - b. That the Plaintiff is a joint proprietor of the Suit Property and cannot institute and maintain this suit to the exclusion of her co-proprietor and hence the suit should have been instituted in their joint names as their proprietary rights are not distinguishable nor separable.
 - c. That be that as it may in respect of the aforesaid 2 grounds hereinabove, the Suit Property was sold in the auction held on 29th November 2023 and as such, the Plaintiff's and her co-proprietor's right of redemption was extinguished at the fall of the hammer and this suit stands overtaken by events.

Directions by the Court

6. The Court issued directions on 21st February, 2023, directing that the preliminary objection be canvassed by way of written submission. Both parties filed their respective submissions for consideration by the Court. The court has had the opportunity to consider the submissions which now forms part of its record.

Objectors/Defendants' Submissions

7. On the jurisdiction of the court, the Defendants submits that it is clear from the Plaintiff's own pleadings, the Plaintiff and the Supporting Affidavit to the Application, that her suit is strictly commercial. That the Plaintiff has admitted in the Plaintiff at Paragraphs 5, 7, 8 and 10 that there was a commercial agreement with the 1st Defendant which she dutifully paid the amounts owing and that the cause of action arises out of the public auction of the suit premises. She therefore seeks that an audit of the accounts be done and she be allowed to pay any outstanding money. The Defendants cite the Court of Appeal decision in Cooperative Bank of Kenya Limited –vs- Patrick Kangethe Njuguna & 5 Others [2017] eKLR, where it was held that the Environment and Land Court lacks jurisdiction to deal with such disputes to contracts of mortgages, charges, collection of dues and rents and that such disputes fall within the jurisdiction of the High Court.
8. On the second ground of the objection as to whether the Plaintiff as a joint proprietor can institute and prosecute this suit alone, it is submitted that it is evident that the suit premises is registered in the



joint names of Edwin Wanjohi Muhoro and herself as shown on the annexed Title. The Defendants submit that although the Plaintiff alleges that she has since divorced her husband, divorce in itself does not override joint registration of proprietors of land. They ought to have instituted the suit jointly.

9. On the third ground of objection, the Plaintiff submits that the equity of redemption was extinguished at the fall of the hammer. The Defendants affirm that the suit property was sold in the public auction of 29th November, 2023 and the purchaser, who acquired legal rights in the property, ought to have been joined as a party to the proceedings herein. These proceedings are therefore fatally defective and should be struck out with costs.

Plaintiff's submissions

10. The Plaintiff opposed the preliminary objection through submissions dated 27th February, 2024. she contended that her suit was properly before this Court by dint of Article 162 (2) (b) of *the Constitution*. She submits that the issue of jurisdiction in this suit does not amount to preliminary objection as it involves facts that require the exercise of judicial discretion.
11. On the second ground, the Plaintiff submits that the same cannot be treated as a Preliminary Objection as it raises questions of both law and fact. She cites the case of Shamsi Hauliers Ltd. -vs-Kenya Revenue Authority, where the court emphasized that a preliminary objection must raise pure points of law only and not facts.
12. On the third ground, the Plaintiff reiterates her assertions in the Plaint that she only learnt about the Defendants' move through a flier announcing the auction and that the equity of redemption was not therefore extinguished as alleged. She is before this court to ascertain whether upon divorce, the rights of the Plaintiff are extinguishable, which issue can only be determined at a trial. The Preliminary Objection should therefore be dismissed with costs as it is premised on both points of law and fact.

Analysis and Determination

13. I have considered the preliminary objection, the written submissions filed on behalf of the parties and the authorities cited. The only issue for determination is whether the preliminary objection is merited.
14. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR pellucidly captured the legal principle on preliminary objections when it stated as follows:

“...A Preliminary Objection 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...”
15. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court restated that:

“.... 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”. [emphasis added]
16. The core issue in the preliminary objection by the Defendants is on the jurisdiction of this Court. There is no doubt that the issue of jurisdiction is a point of law.



17. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR Nyarangi, JA expressed himself as follows:

“Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

18. From an analysis of the pleadings herein, the Plaintiff’s suit relates to monies due and owing to the 1st Defendant pursuant to a charge created over the suit property and the sale or otherwise of the security therein. Looking at the prayers sought by the Plaintiff, she seeks an order requiring an audit of the loan account after which she be allowed to take over the repayment of the loan.

19. In circumstances where a matter pertains to issues potentially falling within the jurisdiction of multiple courts, the question of which court is best suited to determine it is addressed by applying the predominant purpose test. The test was explained in the case of Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR as follows:

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.”

20. I will therefore resolve the issue by utilizing the predominant purpose test. The purpose of the suit is predominantly to audit the loan account and allow the Plaintiff to take over payment of the monies owed and ultimately halt the intended sale of the suit property.

21. The Court of Appeal in the case of Cooperative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR, determined that the ELC jurisdiction to deal with disputes connected to ‘use’ of land does not include mortgages, charges, collection of dues and rents. These are within the civil jurisdiction of the High Court. The Court further held that exclusive jurisdiction of the ELC is limited to Articles 162 (2) (b) of *the Constitution* and Section 13 of the ELC Act which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by Article 165(3) of *the Constitution*.

22. As for the second ground on the non-joinder of the co-owner of the property, the law allows for joinder of a party in the course of proceedings. The court has the power to allow for amendment of pleadings and allow for joinder of the other owner of the suit property.

23. On the third ground, although the Defendants allege that the right of redemption was extinguished at the fall of the hammer, the Plaintiff has disputed the alleged sale of the suit property through a public auction. The Defendant has not provided any evidence to support the allegation that the suit property was sold during the auction. That cannot certainly be by way of a preliminary objection.



24. It is therefore my finding that the Defendants' preliminary Objection succeeds on the first limb only. I find that that this matter falls within the jurisdiction of the High Court (Commercial and Tax Division).
25. In the premises, I hereby direct that this file be placed before the presiding Judge of the Commercial and Tax Division of the High Court, Nairobi for further action. The Deputy Registrar of this Court is directed to facilitate the same and inform the parties accordingly.
26. The costs of the Preliminary Objection will be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Karanja for the Defendants

Mr. Onsomu for the Plaintiff.

Court Assistant: Yvette.

M.D. MWANGI

JUDGE

