



Cooperative Bank of Kenya Limited v Kimani & another (Environment and Land Appeal E033 of 2023) [2024] KEELC 3584 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E033 OF 2023**

JG KEMEI, J

APRIL 12, 2024

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED APPELLANT

AND

PAUL KAMOCHU KIMANI 1ST RESPONDENT

ROBERT MAINA NGURU T/A NGURU AUCTIONEERS 2ND RESPONDENT

RULING

1. The 1st Respondent herein objects to the instant appeal vide his Preliminary Objection dated 9/6/2023 on ground that;

“The transactions between the Appellant and the 1st Respondent were purely commercial in nature and thus the cause of action in the Trial Court was civil in nature and did not relate to environment, use, occupation or title to land. Accordingly, this Honorable Court lacks the jurisdiction to entertain the Appeal in light of Article 162 (2) of the Constitution and section 13 of the Environment and Land Court Act 2011.”
2. On 16/8/2023 directions were taken to canvas the Preliminary Objection by way of written submissions.
3. Supporting the Preliminary Objection, the 1st Respondent through the firm of Saluny Advocates LLP filed submissions dated 2/12/2023. It was submitted that it is trite that jurisdiction flows from either the Constitution or legislation or both. That a Court cannot therefore arrogate itself jurisdiction exceeding that which is donated by law. That without jurisdiction a Court cannot entertain any proceedings as was held in the celebrated case of The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Limited (1989) KLR 1. That the question of jurisdiction is a pure point of law and it has been raised at the earliest opportunity.



4. That the parties' case in the trial Court revolved around accounting and whether or not a loan facility was advanced which are beyond the Environment and Land Court jurisdiction as provided for under Article 162 (2) (b) Constitution of Kenya and Section 13 Environment and Land Court Act. Reliance was placed on the Court of Appeal decision in Co-operative Bank of Kenya v Patrick Kang'ethe & 5 Others [2017] eKLR to the effect that Environment and Land Court lacks jurisdiction to determine a cause of action touching on tabulation of sums owed which is a purview of the High Court.
5. Opposing the Preliminary Objection the firm of G.M Gamma Advocates LLP filed submissions dated 3/1/2024 on behalf of the Appellant and rehashed the jurisdiction of this Court as provided under Article 162 (2) the Constitution of Kenya and Section 13 Environment and Land Court Act and in particular the appellate jurisdiction to hear Appeals from the Subordinate Courts as in the instant case. That the trial suit was properly filed as Ruiru Misc. ELC E013 of 2022 and the Hon. Magistrate correctly exercised the jurisdiction conferred by Section 26 of Environment and Land Court Act subject to the pecuniary jurisdiction set out in the Magistrates' Court Act.
6. The key issue for determination is whether the Objection is a pure point of law. The Black's Law Dictionary, 10th Edition defines a Preliminary Objection as; -

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
7. The parameters for consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
8. Additionally, in the case of Avtar Singh Bhamra & Another v Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
9. The Supreme Court in Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis. Accordingly, jurisdiction goes to the root of a matter and as such it is a pure point of law. In the case of celebrated case of “Lilian S” (*supra*) it was stated thus;

“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.”



10. This Court is established under Article 162 of the Constitution of Kenya which states;

“ 162. System of Courts

- (1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts referred to in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to-
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”

11. Section 13 of the Environment and Land Court Act elaborately provides for the jurisdiction of the Court that;

“ 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. A glean of the grounds in the Memorandum of Appeal dated 13/4/2023 filed herein are necessary to determine whether the Preliminary Objection is merited. Inter alia the grounds are to the effect that the trial Court erred in a raft of findings that the Appellant did not advance the 1st Respondent a loan facility of Kshs. 5,762,007/-; that the Appellant failed to adduce the letter of offer in respect of the loan facility; that the 1st Respondent did not execute the letter of offer dated 24/5/2013; that the 1st Respondent was not in arrears of the loan facility advanced and that the 1st Respondent did not request for restructuring of the loan facility. It is clear therefore that the common thread touches on the subject of a loan facility.



13. The Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR emphasized that the Environment and Land Court lacks jurisdiction in commercial matters in the foregoing terms;

“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...”

14. The above position was affirmed by the same Court in its subsequent decision in the case of *Diamond Trust Bank Ltd v Fatma Hassan Hadi* [2022]eKLR.

15. The upshot of the foregoing binding authorities is that this Court lacks jurisdiction to entertain the instant appeal as filed.

16. The Preliminary Objection is thus merited and it be upheld with costs in favour of the 1st Respondent.

17. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Odiyo HB Gichangi for Appellant

Ms. Samera HB Saluny for 1st Respondent

2nd Respondent - Absent

Court Assistants – Phyllis / Oliver

