



REPUBLIC OF KENYA



**Cherogoe & another v Engen Kenya Limited & another (Environment & Land
Case E011 of 2023) [2025] KEELC 671 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E011 OF 2023
LA OMOLLO, J
FEBRUARY 20, 2025**

BETWEEN

SHADRACK KOSGEI CHEROGOE 1ST PLAINTIFF

JANE ACHIENG MUGA 2ND PLAINTIFF

AND

ENGEN KENYA LIMITED 1ST DEFENDANT

HEGEONS AUCTIONEERS 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion application dated 20th November, 2023 and the Defendants/Respondents Preliminary Objections dated 18th December, 2023 and 10th January, 2024.
2. The application dated 20th November, 2023 is expressed to be brought under Order 40, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The application seeks the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the Defendants by themselves or their agents and assigns from selling, offering for sale, transfer or in any way disposing of all that property known as LR No. Kericho/Kipchimchim/2722.
 - d. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order compelling the 1st Defendant and/or its agents to supply the Plaintiff with a



current Statement of Account and a current valuation Report in respect of LR No. Kericho/Kipchimchim/2722.

- e. That Costs of the application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of Shadrack Koskei Cherogoe, the 1st Plaintiff/Applicant. It is sworn on 20th November, 2023.
4. In response to the application, the Defendants/Respondents filed a Preliminary Objection dated 18th December, 2023 which is on the following grounds;
 - a. In as far as the Notice of Motion application 20th November, 2023 has not been served upon the Defendants/Respondents, the same is in disobedience of Order 2 of the orders of this Court issued on 20th November, 2023.
 - b. The orders of Court made on 20th November, 2023 automatically lapsed by operation of Order 40 Rule 4(2) and (3).
 - c. The Notice of Motion application 20th November, 2023 and the suit herein is in contravention of Section 34 of the *Civil Procedure Act* which provides that ‘All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit’.
5. On 15th January, 2024 the Defendants/Respondents filed ‘An additional Preliminary Objection’ which is on the following ground;

“Kindly take notice the Defendant herein shall in the alternative/without prejudice to the Notice of Preliminary Objection dated 18th December, 2023 shall raise a preliminary objection challenging the jurisdiction of this Court to handle this case on the basis that the jurisdiction lies with the High Court/Commercial Court and not the Environment and Land Court”

Factual Background.

6. The Plaintiffs/Applicants commenced the present proceedings vide the Complaint dated 20th November, 2023 where they seek the following prayers;
 - a. A declaration that the intended sale of all that property known as LR No. Kericho/Kipchimchim/2722 by the Defendants is illegal, wrongful and unlawful.
 - b. Costs of the suit.
 - c. Any other or further relief that this Honourable Court may deem fit to grant.
7. The Defendants/Respondents filed their Statement of Defence on 11th March, 2023 where they deny the averments in the Complaint and seek that the Plaintiff’s suit be dismissed with costs.
8. The application under consideration first came up for directions on 21st November, 2023. The Court granted the Defendants/Respondents time to file their response and ordered that land parcel No. Kericho/Kipchimchim/2722 shall not be disposed off or offered for sale.
9. The matter was mentioned on 19th December, 2023 when the Court directed that both the application dated 20th November, 2023 and the Preliminary Objection dated 18th December, 2023 would be disposed off by way of written submissions.



10. The matter was mentioned on 5th February, 2024 when the Plaintiffs/Applicants were granted leave to file a Further Affidavit in response to the Defendants/Respondents Replying Affidavit.
11. The matter was also mentioned on 5th March, 2024 when the Plaintiffs/Applicants were allowed one more opportunity to file the Further Affidavit.
12. When the matter came up for mention on 8th April, 2024, the parties sought for time to try and settle the matter out of Court. Subsequently, the matter was mentioned severally to confirm the status of the negotiations.
13. Parties informed the court that they were unable to reach an out of Court settlement. On 15th October, 2024, counsel for both parties highlighted their written submissions and the application reserved for ruling.

The Plaintiffs/Applicants Contention.

14. The Supporting Affidavit is sworn by the 1st Plaintiff/Applicant.
15. He contends that the 2nd Plaintiff/Applicant is his wife and that he has her consent and authority to swear the affidavit on her behalf. He also contends that he is the registered owner of land parcel No. Kericho/Kipchimchim/2722.
16. He further contends that in the year 2001, the 1st Defendant/Respondent advanced to him a loan facility of Kshs. 2,150,000/= which was secured by a legal charge registered against the suit property.
17. It is his contention that after the registration of the charge, a dispute arose when the 1st Defendant/Respondent purported to exercise its statutory power of sale.
18. It is also his contention that he together with the 2nd Plaintiff/Applicant approached the Court for reprieve and the Court found that the 2nd Plaintiff/Applicant had an overriding interest since it was matrimonial property. The said determination was made in Kericho ELC Case No. 14 of 2013 consolidated with Civil Suit No. 92 of 2009.
19. It is further his contention that the Court in the said judgement set aside the purported sale and held that the 1st Defendant/Respondent was at liberty to exercise its statutory power of sale in strict conformity with the law.
20. He contends that the 1st Defendant/Respondent instructed the 2nd Defendant/Respondent to sell the suit property and it was advertised for sale at a public auction that was to take place on 23rd November, 2023.
21. He also contends that despite making several requests, the 1st Defendant/Respondent has refused to supply him with a current statement of accounts.
22. He further contends that he has been advised his Advocates on record that the 1st Defendant/Respondent is legally obligated to serve him with a redemption notice before advertising the suit property for sale which obligation the 1st Defendant/Respondent has neglected to discharge.
23. It is his contention that the 1st Defendant/Respondent did not issue the notice contemplated under Section 99(1), (2) & (3) of the [Land Act](#), the statutory notice under Section 96(2) & (3) of the [Land Act](#), 2012 and neither did it conduct a proper forced sale valuation as provided for under Section 97(1) and (2) of the [Land Act](#).



24. It is also his contention that he was only served with a Notification of Sale in the month of October. The Notification of Sale stated that the suit parcel was being sold to recover a sum of Kshs. 38,186,020/= and yet the amount advanced to him was kshs. 2,150,000/=. He adds that he is advised by his Advocates on record that the claim of Kshs. 38,186,020/= against the principal sum of Kshs. 2,150,000/= is a clear violation of the in duplam rule and it only serves to curtail his right of redemption of the subject property.
25. It is further his contention that the forced sale value of kshs. 11,300,000/= for the suit parcel that has been set by the Defendants/Respondents represents a gross undervaluation of the land. This is because the parcel measures 3 and a half acres and it is situated within Kericho Municipality.
26. He contends that he is apprehensive that the Defendants/Respondents are likely to dispose of the suit property at an unreasonable price without issuing the requisite statutory notices.
27. He also contends that he stands to suffer irreparable harm if the Defendants/Respondents are not restrained from proceeding with the intended sale.
28. He ends his deposition by stating that it is in the interest of justice that the application be allowed as prayed.

Defendants/Respondents Response.

29. The Defendants/Respondents filed a Replying Affidavit sworn by one Stanley Njiru on 26th January, 2024 in addition to the two notices of preliminary objection.
30. He deposes that he is the treasurer of the 1st Defendant/Respondent and duly authorized to swear the affidavit.
31. He also deposes that the 1st Defendant/Respondent filed a Notice of Preliminary Objection because the Plaintiffs/Applicants suit is incompetent. He adds that the Plaintiffs/Applicants admit at paragraphs 5 and 6 of the Complaint that there was a previously instituted suit being Kericho ELC Civil Suit No. 14 of 2013 (Consolidated with Civil Suit No. 92 of 2009) where the Court directed that the suit property could be sold.
32. He further deposes that any matters relating to the sale should have been canvassed therein.
33. It is his deposition that the Court in the said judgement found that the Chargor had been served through the addresses appearing on the charge and that the 1st Defendant/Respondent was not a banking institution and therefore the in duplam rule did not apply to it.
34. It is also his deposition that the said suit that had been instituted by the Plaintiffs/Applicants only succeeded because the Chargor's spouse had not been served with the statutory notices. He adds that the Chargor's suit was dismissed.
35. It is further his deposition that the Plaintiffs/Applicants have raised four issues which he will respond to. The said issues are as follows;
 - a. That the property is undervalued.
 - b. That the Applicant was not served with the statutory notices under the [Land Act](#).
 - c. That the loan amount is disputed.
 - d. That the Applicant has not been issued with a statement of account.



36. He deposes that the 1st Plaintiff/Applicant obtained a loan facility of Kshs. 2,150,000/= and a charge registered over land parcel No. Kericho/Kipchimchim/2722. He adds that the said charge was created to secure payment of the principal amount and any other charges attendant to the facility until payment in full.
37. He also deposes that the rate of interest applicable was 3% per month. This was stated in the charge instrument.
38. He further deposes that it was both an express and implied term of the agreement that the 1st Plaintiff/Applicant had the obligation of repaying the loan by way of monthly installments as scheduled. Failure to which, there would be a default and the bank would have the right to realize the security to recover any outlay due to it.
39. It is his deposition that the issue of default is not disputed as the Court in the earlier matter issued a green light for realization of the security.
40. It is also his deposition that the Plaintiffs/Applicants were aware of the default but did not take any steps to settle the loan amount which continued to accrue the monthly interest.
41. It is further his deposition that after the 1st Plaintiff/Applicant failed to discharge his obligations, the 1st Defendant/Respondent issued the Plaintiffs/Applicants with a three-month statutory notice dated 22nd February, 2023 demanding for the regularization of the account.
42. He deposes that the Plaintiffs/Applicants failed to regularize their accounts after service of the three-month statutory notice and so they issued a 40 days' notice.
43. He also deposes that he is advised by the 1st Defendant/Respondent's advocates on record that the law requires a notice to be served upon the Chargor by way of registered postage at the last known address.
44. He further deposes that the Plaintiffs/Applicants were served through the address provided for in the charge instrument which is P.O. Box 840 Kericho. The said address was re-affirmed by the Court in the previous suit.
45. It is his deposition that the 1st Plaintiff/Applicant's contention that they were not served with the notices is untrue and a ploy to unjustifiably clog the 1st Defendant/Respondent's right to realize its security.
46. It is also his deposition that despite the service of the said notices, the Plaintiffs/Applicants failed to comply and this prompted the 1st Defendant/Respondent to instruct the 2nd Defendant/Respondent to issue redemption notices and proceed with the realization of the security and advertise the property for sale. He adds that the Plaintiffs/Applicants admit to being served with the said notices.
47. It is further his deposition that the 1st Defendant/Respondent conducted a valuation of the property in compliance with Section 97 of the *Land Act* and therefore the 1st Plaintiff/Applicant's argument that the valuation was below the market price is unfounded.
48. He deposes that no other value has been provided and that since the property is to be sold by public auction, the best possible price will be obtained.
49. He also deposes that the amount demanded is not in violation of the in duplam rule as contended by the 1st Plaintiff/Applicant as the Court already found that the said rule does not apply to the 1st Defendant/Respondent. That being the case, the issue is res judicata.



50. He further deposes that even though the 1st Plaintiff/Applicant claims to have sought statements and none were availed, no evidence has been tendered to demonstrate the said request.
51. It is his deposition that the Plaintiffs/Applicants have not established any basis for grant of an injunction as they are in default of repayment of the loan. An injunction cannot issue where there is a debt due and all the statutory notices leading to the realization of the security complied with.
52. He ends his deposition by urging the Court to dismiss the application for being an abuse of the Court process.
The Plaintiffs/Applicants Response to the Defendants/Respondents Replying Affidavit.
53. In response to the Defendants/Respondents Replying Affidavit, the Plaintiffs/Applicants filed a Further Affidavit sworn by the 1st Plaintiff/Applicant on 13th March, 2024.
54. He deposes that he forgot to annex a valuation report to his affidavit in support of the application which he had obtained on 20th November, 2023 with respect to land parcel No. Kericho/Kipchimchim/2722.
55. He also deposes that he was granted leave to file the said valuation report which states that the value of the suit property is Kshs. 45,000,000/=.
56. He further deposes that the valuation report notes that the suit property is a prime residential property located within 4.5 kilometers of the Kericho central business district.
57. It is his deposition that the value of the developments on the land was placed at kshs. 10,000,000/= and therefore the Defendants/Respondent's valuation report dated 14th August, 2023 valuing the suit property including the developments made thereon at kshs. 15,000,000/= is a gross undervaluation of the property.
58. It is also his deposition that the said undervaluation is a deliberate attempt to unlawfully deprive him and the 2nd Plaintiff/Applicant the true value of the suit property.
59. He ends his deposition by stating that the said affidavit is in further support of his application dated 20th November, 2023.

Issues for determination.

60. The Plaintiffs/Applicants filed their submissions on 28th February, 2024 while the 1st Defendant/Respondent filed its submissions on 2nd February, 2024. The Plaintiffs/Applicants filed further submissions on 1st October, 2024.
61. The Plaintiffs/Applicants submit on the following issues;
 - a. Whether the instant application and suit are in violation of Section 34 of the [Civil Procedure Act](#).
 - b. Whether this Honourable Court has the jurisdiction to hear and determine the Applicants claim.
 - c. Whether the Applicants are entitled to the prayers sought.
62. With regard to the first issue, the Plaintiffs/Applicants rely on Section 34 of the [Civil Procedure Act](#) and submit that in the present suit, their claim is with regard to the violation of the law by the Defendants/Respondents in the purported exercise of their statutory power of sale.



63. They also submit that this cannot be deemed to be a question arising from the execution and/or discharge of the decree issued in Kericho ELC Case No. 14 of 2013 Consolidated with Civil Suit No. 92 of 2009.
64. They further submit that the Court in its judgement that was delivered in the above stated suit, made an order that the 1st Defendant/Respondent was at liberty to exercise its statutory power of sale in strict conformity to the law.
65. It is the Plaintiffs/Applicants submissions that the said order declared the 1st Defendant/Respondent's right to exercise its statutory power of sale and that it did not give any positive order capable of execution.
66. It is also the Plaintiffs/Applicants submissions that Section 34 of the *Civil Procedure Act* does not bar this suit as it challenges the legality of the Respondent's subsequent exercise of its statutory power of sale.
67. It is further the Plaintiffs/Applicants submissions that the 1st Defendant/Respondent contends that it served them with statutory notices vide P.O Box 840 – 20200 and yet their current address of service is P.O Box 838 – 20200. They add that they used their current address in the previous suit and therefore the 1st Defendant/Respondent cannot claim that their address is P.O Box 840 – 20200.
68. The Plaintiffs/Applicants submit that the previous suit focused solely on matrimonial interest while the present suit focuses on valuation discrepancies and procedural violations which issues necessitate a separate suit.
69. With regard to the second issue, the Plaintiffs/Applicants rely on Article 162(2)(b) of *the Constitution* of Kenya, the judicial decision of Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & another [2018] and reiterates that the amounts that the 1st Defendant/Respondent seeks to recover are in violation of the in duplam rule.
70. The Plaintiffs/Applicants admit that the Court in its judgement delivered in the previous suit held that the in duplam rule does not apply to the 1st Defendant/Respondent. They submit that the said determination was premised on a mistake of law and was as such issued per incuriam.
71. The Plaintiffs/Applicants rely on the judicial decisions of Senate & 2 Others v Council of County Governors & 8 others (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights), Mugure & 2 Others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (CIV) and submit that the Court's determination that the in duplam rule does not apply to the 1st Defendant/Respondent as it is not a banking institution amounts to unfair discrimination and violates Articles 27 and 46 of *the Constitution* of Kenya.
72. With regard to the third issue, the Plaintiffs/Applicants rely on the judicial decision of Giella v Cassman Brown (1973) EA 358 and reiterate that the 1st Defendant/Respondent failed to comply with Sections 90, 96 and 97(1) of the *Land Act*.
73. The Plaintiffs/Applicants conclude their submissions by urging the Court to dismiss the 1st Defendant/Respondent's preliminary objections and allow their application as prayed.
74. The 1st Defendant/Respondent submits on the following issues;
 - a. Whether the suit before Court is competent.
 - b. Whether the Plaintiff/Applicant was served with the requisite notices.



- c. Whether due process was followed when the bank intended to sell the property.
- d. Whether the Plaintiff has satisfied the conditions for granting of an order of temporary injunction.
75. With regard to the first issue, the 1st Defendant/Respondent relies on Section 34 of the *Civil Procedure Act* and reiterates that the Plaintiffs/Applicants admit to the existence of another matter where the Court in its judgement gave directions on the sale of the suit parcel.
76. The 1st Defendant/Respondent also submits that the current process for sale of the suit parcel is in furtherance of the said position and therefore the Provisions of Section 34 of the Civil Procedure Rules apply.
77. The 1st Defendant/Respondent further submits that since the Plaintiffs/Applicants are challenging the process of sale following the said decision, any questions arising from the intended sale can only be brought in that suit.
78. The 1st Defendant/Respondent relies on the judicial decisions of *Richard Bhoke Chacha & 3 Others vs Linus Kaikai & anor* [2021] eKLR, *Nazir Jinnah vs Azmahan Peterson & 2 Others* [2013] eKLR and urges the Court to strike out the suit.
79. The 1st Defendant/Respondent also submits that the Plaintiffs/Applicants have sought orders of injunction in their application but there is no corresponding prayer for a permanent injunction in the suit.
80. The 1st Defendant/Respondent relies on the judicial decisions of *Yang Guang Property Design & Manufacturing Limited v China Wu Yi Company (K) Limited* [2021]eKLR, *Sunrise Properties Limited v Fifty Investments Ltd & another* [2007]eKLR and submits that the Courts have held that where a party seeks an order of temporary injunction in an application, such prayer must be anchored in the Plaint as well.
81. With regard to the preliminary objection dated 10th January, 2024 the 1st Defendant/Respondent relies on Article 162 (2)(b) of *the Constitution* of Kenya, Section 13 of the Environment and Land Court Act, the judicial decisions of *Cooperative Bank Limited vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR and submits that the Court of Appeal held that matters relating to charges, mortgages and collection of dues and rent falls within the jurisdiction of the High Court and not the Environment and Land Court.
82. With regard to the second issue, the 1st Defendant/Respondent relies on Section 131 of the *Land Act* and submits that all the requisite notices were served upon the Plaintiffs/Applicants.
83. The 1st Defendant/Respondent also submits that the said notices were served through their last known address and copies of certificates of postage annexed to their Replying Affidavit.
84. The 1st Defendant/Respondent relies on the judicial decision of *Karige Kihoro versus Equity Bank Limited* and another [2016] eKLR in support of its submissions.
85. With regard to the third issue, the 1st Defendant/Respondent relies on Section 97 of the *Land Act* and submits that it conducted valuation of the property.
86. The 1st Defendant/Respondent reiterates that the issue of the in duplam rule was already determined in the previous matter. It submits that the Plaintiffs/Applicants received the funds in the year 2001,



failed to pay the same and instead opted to engage in endless litigation. The consequence thereof is that the loan facility continued to accrue at the rates provided for in the agreement of the parties.

87. With regard to the fourth issue, the 1st Defendant/Respondent relies on the judicial decision of *Giella vs Cassman Brown & Co. Limited* [1973] EA 358.
88. The 1st Defendant/Respondent also relies on *Mrao Ltd versus First American Bank of Kenya Ltd & 2 Others* [2003] eKLR, *John Karanja Njenga & another versus Bank of Africa Nairobi HCC No. 577 of 2015* as was cited in *Brade Gate Holdings Limited & another versus Jamii Bora Bank Limited* [2016] eKLR and submits that the Plaintiffs/Applicants have not established a prima facie case with a probability of success as there is no dispute as to indebtedness arising from the breach and default.
89. The 1st Defendant/Respondent also submits that it is trite law that Courts are hesitant to interfere with a financier's exercise of its powers to recover loans and/or debts from delinquent borrowers.
90. The 1st Defendant/Respondent relies on the judicial decision of *Ibrahim Seikei T/A Masco Enterprises versus Delphis Bank* [2004] eKLR in support of its submissions.
91. The 1st Defendant/Respondent also relies on the judicial decisions of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014]eKLR, *Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited* [2019] and submits that the Plaintiffs/Applicants will not suffer irreparable damage if the orders sought are not granted.
92. The 1st Defendant/Respondent concludes its submissions by urging the Court to dismiss the Plaintiffs/Applicants application with costs.
93. In their further submissions, the Plaintiffs/Applicants rely on the judicial decision of *Cyrus Shakhlanga Khwa Jirongo vs Soy Developers Ltd & Others* Petition No. 38 of 2019 and submit that the 2nd Plaintiff/Applicant did not sign the charge instrument and yet the suit property was her matrimonial home where she lives with her three children.
94. The Plaintiffs/Applicants also submit that the cause of action is not premised on the charge but is on the interest of the 2nd Plaintiff/Applicant over the property.
95. The Plaintiffs/Applicants reiterate their averments in their affidavit in support of the application and submit that the issues raised ought to be determined after a full hearing. They rely on Article 50 of [*the Constitution*](#) of Kenya in support of their submissions.
96. The Plaintiffs/Applicants submit that in the present matter they are challenging the fraudulent manner in which the Defendants/Respondents want to acquire interest on the suit property without following the laid down procedure.
97. The Plaintiffs/Applicants submit that the Environment and land Court and the High Court have similar powers and therefore nothing precludes this Court from transferring the present suit to the High Court in tandem with the requirements of Article 159 (2)(d) of [*the Constitution*](#) of Kenya.
98. The Plaintiffs/Applicants also submit that the previous suit to wit *Kericho ELC No. 14 of 2013* was consolidated with *Kericho HCC No. 92 of 2009* which was a matter had been filed before the High Court.
99. The Plaintiffs/Applicants further submit that this shows that no Court is inferior to the other and that both Courts have jurisdiction to deal with issues which arise over land but those issues can only be addressed during the hearing.



100. The Plaintiffs/Applicants rely on the judicial decision of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696 and submit that the 1st Plaintiff/Applicant was a mere guarantor and that the 2nd Plaintiff/Applicant was not involved in any way.
101. The Plaintiffs/Applicants reiterate their earlier filed submissions, rely on the judicial decision of Dina Management Limited v County Government of Mombasa & 5 Others [2023] eKLR and submit that the earlier judgement delivered by the Court has not been set aside.
102. The Plaintiffs/Applicants conclude their submissions by urging the Court to determine who between the Plaintiffs/Applicants and the Defendants/Respondents holds a genuine title.
103. Counsel for the Plaintiffs/Applicants and the Defendants/Respondents were given opportunity to orally highlight their submissions and this was done on 15th October, 2024.
104. Counsel for the Defendants/Respondents reiterated that their Preliminary Objection is on two limbs. The first limb is brought under Section 34 of the Civil Procedure Rules which provides that issues arising from a suit are best addressed in the said suit and not in a separate suit.
105. Counsel reiterated that there was a previous suit in which judgement was delivered on 9th May, 2019 where the Court stated that if the amount is not fully paid, the statutory power of sale could be exercised.
106. Counsel submitted that the second limb of the preliminary objection is premised on Section 13 of the [Environment and Land Court Act](#) and Article 162 (2)(b) of [the Constitution](#) of Kenya.
107. Counsel submits that the High Court is the only Court that deals with questions relating to charges.
108. In response, Counsel for the Plaintiffs/Applicants reiterated their submissions dated 27th February, 2024 and 1st October, 2024. He conceded that there was a previous matter between the parties adding that the said suit was ELC Case No. 14 of 2013 and Kericho High Court Case No. 92 of 2009 where the main issue was on the illegal sale and transfer of the suit property. It was his submission that Court cancelled the sale and ordered the 1st Defendant in the said suit to refund the purchase price. It is his further submission that since the Court cancelled the sale, they cannot go back to litigate in the said suit.
109. Counsel also submitted that the Court in the previous suit found that there was no valid charge and it cancelled the transfer to the 5th and 6th Defendants and the property reverted back to the Plaintiffs/Applicants herein.
110. Counsel further submitted that as per the charge instrument, the 1st Plaintiff/Applicant was a guarantor and not a borrower and that one Samuel Gachunge was the borrower.
111. It was counsel's submissions that the issue of whether or not the 1st Plaintiff/Applicant was a guarantor or a borrower is for trial. Counsel also submits that the issue of whether or not the property was charged properly is another issue for trial.
112. Counsel referred to paragraph 54 of the judgment delivered in ELC Case No. 14 of 2013 and submitted that the Court found that the 2nd Plaintiff/Applicant had an overriding interest in the property and the issue of whether or not she signed the charge is an issue for trial.
113. Counsel further submitted that the cause of action in the present suit is set out in paragraph 9 of the Complaint and that it related to fraud. He urged the Court to allow the Plaintiffs/Applicants application and that the preliminary objections be dismissed.



114. In a rejoinder, Counsel for the Defendants/Respondents submitted that the issues addressed by Counsel for the Plaintiffs/Applicants are not part of the pleadings filed in the present matter and reminded the court that parties are bound by their pleadings.
115. Counsel also submits that the Court did not invalidate the charge and that it set aside the sale because the notices were not served upon the 2nd Plaintiff/Applicant.

Analysis and Determination.

116. I have considered the application, the preliminary objections, the replying affidavit and the written and oral submissions.
117. The Defendants/Respondents filed two preliminary Objections.
The first one is dated 18th December, 2023 and the second one is dated 10th January, 2024.
118. In the preliminary objection dated 18th December, 2023 the Defendants/Respondents state that the Plaintiffs/Applicants application dated 20th November, 2023 and the suit herein contravene Section 34 of the *Civil Procedure Act*.
119. The only ground on the preliminary Objection dated 10th January, 2024 is that this Court does not have the jurisdiction to hear and determine the matter as the jurisdiction lies with the High Court.
120. I will first determine the preliminary objection dated 10th January, 2024 as it challenges the jurisdiction of this Court. If it is found to be without merit, I will then determine the preliminary objection dated 18th December, 2023 and then the application.
121. The issues for determination are therefore as follows;
 - a. Whether this Court has the jurisdiction to hear and determine this matter.
 - b. Whether this suit offends the Provisions of Section 34 of the *Civil Procedure Act*.
 - c. Whether the application dated 20th November, 2023 has merit.
 - d. Who should bear costs of the application.

A. Whether this Court has the jurisdiction to hear and determine this matter.

122. The Defendants/Respondents submit that this suit relates to the exercise of statutory power of sale in respect of property which had been offered as security for a loan.
123. The Defendants/Respondents also submit that the Court of Appeal has held that matters relating to charges, mortgages, collection of dues and rent falls exclusively within the jurisdiction of the High Court.
124. The Defendants/Respondents therefore urge this Court to find that it lacks jurisdiction to hear and determine this suit.
125. In response, the Plaintiffs/Applicants submit that this Court has the jurisdiction to hear and determine this suit for the reason that the issue for determination relates to failure to serve various notices upon them before the exercise of statutory power of sale as required by law.
126. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR held that where a predominant issue in a matter involves mortgages and/or charges it is



the High Court and not the Environment and Land Court that has the jurisdiction to deal with the said issue. The Court of Appeal stated thus;

- “ 35. Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, 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.
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. Else we would neither speak of absentee landlords nor would principles like adverse possession ever arise. If a disposition were held to constitute land use, an absentee landlord with a subsisting legal charge over his land would never have to contend with the consequences of adverse possession, for he would always be said to be ‘using’ his land simply by virtue of having a floating charge/ disposition over the property.
38. Consequently, the assertion that a charge constitutes use of land within the meaning of Article 162 of *the Constitution* fails. In addition, the cause of action herein was not the validity of the charge, but a question of accounts.
39. Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of Section 13 (2) (d) of the ELC Act. The said section provides that;
2. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-



- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...

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. In *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,

“The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/ employer relationship, where the Appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the Court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the Court could entertain the dispute in all its aspects and award damages appropriately.”

By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the ELC Act and Section 150 of the *Land Act*; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of



the High Court over accounting matters is without doubt, for under Article 165(3) of *the Constitution* provides inter alia, that;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant's objection on jurisdiction was rightly dismissed.”

127. In the plaint filed in the present suit, the Plaintiffs/Applicants aver that the 1st Plaintiff/Applicant is the registered owner of land parcel No. Kericho/Kipchimchim/2722.
128. The Plaintiffs/Applicants also aver that that sometime in the year 2001, the 1st Defendant/Respondent advanced to the 1st Plaintiff/Applicant a loan of kshs. 2,150,000/= and a charge registered over the suit property.
129. The Plaintiffs/Applicants further aver that the 1st Defendant/Respondent intends to exercise its statutory power of sale without issuing the proper notices and they therefore seek for among other orders that the Court makes a declaration that the intended sale by the Defendants/Respondents is wrongful.
130. In the affidavit in support of the application, the 1st Plaintiff/ Applicant contends that despite making several requests, the 1st Defendant/Respondent has refused to supply him with a current statement of accounts. One of the prayers on the face of the application is as follows
 - a. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order compelling the 1st Defendant and/or its agents to supply the Plaintiff with a current Statement of Account and a current valuation Report in respect of LR No. Kericho/ Kipchimchim/2722.
131. The dominant issue, as can be read from the Plaint is the impending sale by the 1st Defendant/ Respondent. The sale results from default in repaying a loan of Kshs. 2,150,000/= taken by the 1st Plaintiff/Applicant sometime in the year 2001. In the present application, the plaintiffs/Applicants are seeking an order to compel the 1st Defendant/Respondent to issue accounts.
132. It is important to note that the Plaintiffs/Applicants in their submissions contend that there are two title deeds with respect to the suit property and that the 1st Plaintiff/Applicant did not take a loan from the 1st Defendant/Respondent.
133. They further contend that the 1st Plaintiff/Applicant was a guarantor of the individual who took the loan and that their plaint raises issues of fraud.
134. A perusal of the pleadings filed in this matter show that the said issues submitted on by the Plaintiffs/ Applicants are not pleaded.
135. In the judicial decision of FMS v MAS [2020] eKLR the Court held as follows;

“It is trite law that Submissions are not pleadings and that new issues cannot be raised in submissions. In Republic vs. Chairman Public Procurement Administrative Review Board



& another Ex parte Zapkass Consulting and Training Limited & another [2014] Korir, J. stated:

“The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”

136. As was held in the above cited judicial decision, new issues cannot be raised in submissions. That being the case, this Court will disregard the submissions by the Plaintiffs/Applicants on the question of existence of the two title deeds and the question whether or not the 1st Plaintiff/Applicant was a guarantor.
137. Having dealt with the issues introduced in submissions, I shall go back to my analysis of the pleadings herein.
138. It is evident is that the filing of this suit has been occasioned by an impending sale of the suit parcel. It is not in dispute that suit property was charged as security for money advanced to the 1st Plaintiff. It is also the Plaintiffs’/Applicants contention that they have asked the 1st Defendant/Respondent to issue accounts and it has failed to do so. This, therefore, is substantially a commercial dispute.
139. As was held in the judicial decision of Co-operative Bank of Kenya Ltd Vs Patrick Kangethe Njuguna and five others (supra) cited above, the jurisdiction of the Environment and Land Court is limited to the determination of disputes connected to the use of land and its jurisdiction does not include mortgages, charges or collection of rent and/or dues. The latter falls within the jurisdiction of the High Court.
140. Taking the foregoing into consideration, I find that this court lacks jurisdiction to hear and determine this suit.

B. Whether this suit offends the provisions of Section 34 of the Civil Procedure Act.

141. Given my determination on issue (a) above. It shall not be necessary to consider this question.

C. Whether the application dated 20th November, 2023 has merit.

142. Having found that this Court lacks jurisdiction to hear and determine this suit, it shall not be necessary to consider this question.

D. Who should bear costs of the application.

143. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

144. I find that the Defendants/Respondents’ preliminary objection dated January 10, 2024 is merited. Consequently, this suit is hereby struck out with costs.

The Preliminary Objection having been upheld, it shall not be necessary to determine the application.

145. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 20TH DAY OF FEBRUARY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: DIVISION -

No appearance for the Plaintiffs/Applicants.

Mr. Maondo for the Defendants/Respondents.

Court Assistant; Mr. Joseph Makori.

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