



**Okoth v ABSA Bank Kenya PLC; Trevo Auctioneers (Interested Party) (Land Case E051 of 2023) [2024] KEELC 4684 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE E051 OF 2023  
NA MATHEKA, J  
JUNE 13, 2024**

**BETWEEN**

**CAROLINE OKOTH ..... PLAINTIFF**

**AND**

**ABSA BANK KENYA PLC ..... DEFENDANT**

**AND**

**TREVO AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. The Defendant herein, at the hearing of the Plaintiff's Notice of Motion dated 15<sup>th</sup> December, 2023 opposed the said application on the following point of law;
  1. The matters in issue do not fall within the jurisdiction of the Environment and Land Court given the court's jurisdiction under article 162 (2) of the Constitution and section 13 of the Environment and Land Court Act 2011.
2. The defendant did not respond to the application but instead filed a notice of preliminary objection dated 6<sup>th</sup> February 2024 on the ground that the matter in issue does not fall within the jurisdiction of this court. The circumstances giving rise to this suit are that the plaintiff's house of residence known as L.R No. Mainland North/I/22507, Villa No. 3 Salwa Heights (The Reef Palm Estate), Nyali Mombasa, 4 Bedroom Master Ensuite Massionatte hereafter known as suit property had been advertised for public auction on 18<sup>th</sup> January 2024 allegedly without all the due procedures being followed by the Defendant. It appears to the court that the plaintiff had taken a loan facility from the Defendant and failed to pay, hence, the defendant was exercising its right of statutory sale.
3. I have considered the notice of preliminary objection and the submissions thereto. The issue for determination is whether the defendant's preliminary objection has satisfied the threshold or not.



4. The submissions by counsel for the defendant gave the court more details on the substratum of the suit. The pleadings filed by the Plaintiff failed to include the details needed for the court to be able to fully understand the nature of the case. It is submitted that the plaintiff's husband one Evans Murumba, is the registered owner of the suit property and had obtained a loan facility from the Defendant and a formal charge dated 18<sup>th</sup> October 2021 was registered against the suit property. After the above mentioned failed to pay the loan, the Defendant started the process of exercising its statutory power of sale. Counsel alleged that the bank issued the requisite three months' notice and a further forty days.
5. It is at this point that the said Evans Murumba filed a Mombasa HCCC No. E039 of 2023, Evans Murumba Wekesa vs ABSA Bank Kenya Limited Plc and sought injunctive orders on the ground that he had not been served with the above notice which the court did not give and also awarded costs of Kshs. 30,000 to the Defendant. A notice of preliminary objection was discussed by the Supreme Court in *Hassan Ali Joho & Another vs Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

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... a preliminary objection is in the nature of what used to be a demurrer. It 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”.

6. Similarly, the Supreme Court in *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* (2015) eKLR made the following observation as relates to Preliminary Objections:

... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
7. The point of law the defendant argues is that this court does not have jurisdiction and they cited the case of *Samuel Kamau Wachira vs KCB & 2Others*, Civil Application No. 2 of 2012 (eKLR) where the court held that jurisdiction flows from the *Constitution* or legislation or both. They quoted article 162 (2) (b) of the *Constitution* and section 13 of the *Environment and Land Act*. They emphasize that the dispute arising is on the nature of the sale or the terms of the afore mentioned formal charge and placed reliance on the court of Appeal case of *Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* (2017) eKLR where the court held that the rights acquired by a lender in a charge had nothing to do with the use of the land.
8. In the case of *Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited* (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The issue of whether the ELC court has



jurisdiction on charges or not is not a novel issue. Article 162 (2) & (3) of the Constitution requires inter alia, that;

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a) ...
- b) The environment and the use and occupation of, and title to, land.” Emphasis added.

9. Article 260 of the Constitution, states that unless the context requires otherwise, ‘land’ includes-

- a) The surface of the earth and the subsurface rock;
- b) Any body of water on or under the surface;
- c) Marine waters in the territorial sea and exclusive economic zone;
- d) Natural resources completely contained on or under the surface; and
- e) The air space above the surface.”

10. This definition espouses the doctrine of Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to “whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell”. The arguments by the defendant is that this definition does not include formal charges and that the doctrine restricts the definition of land use to necessary and ordinary use and enjoyment of the land and structures upon it as held in Lord Bernstein of Leigh vs Skyviews and General Limited (1978) QB 479. A charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition as defined by section 2 of the Land Act Cap 280 and the rights so acquired are limited to the realization of the security so advanced as per section 80 of the same statute. Section 150 Land Act provides: -

The Environment and Land Court established in the Environment and Land Court Act and subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

11. The Land Registration Act under section 101 provides for the court that has jurisdiction as follows: -

The Environment and Land Court established by the Environment and Land Court Act, 2011 (No.19 of 2011) and subordinate courts, have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

12. However, in Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Ltd & Another (2018) eKLR Munyao, J commenting on the application of the above highlighted jurisdiction provisions in the Land Act and the Land Registration Act stated thus: -

22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land



Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of Stephen Kibowen -vs- Agricultural Finance Corporation (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

13. the Constitution under Article 165 (5) ousts the High Court’s jurisdiction in matters where the ELC had jurisdiction as follows: -

The High Court shall not have jurisdiction in respect of matters: -

- a. Reserved for the exclusive jurisdiction of the supreme court under this constitution: - or
- b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).”

14. I find from the discussion above, that this court has jurisdiction to entertain the matter as it concerns occupation, use and title to land. In this regard, I dismiss the notice of preliminary objection and with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**N.A. MATHEKA**

JUDGE\*\*

