Thuo v Ngatho & 2 others (Environment & Land Case 271 of 2014) [2024] KEELC 5475 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5475 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 271 OF 2014

LA OMOLLO, J

JULY 25, 2024

BETWEEN

SAMUEL MUTHINJI THUO ..... PLAINTIFF

AND

SIMON MBARIA NGATHO ..... 1ST DEFENDANT

THE REGISTRAR OF LANDS ..... 2ND DEFENDANT

COOPERATIVE BANK OF KENYA ..... 3RD DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a plaint dated 24th September, 2014 which was subsequently amended on 9th October, 2014.

2. The Plaintiff avers that at all material times to this suit, the suit property L.R NO. 1144/1217 was charged by the 1st Defendant to the 3rd Defendant.

3. He further avers that the 1st Defendant is his nephew and a grandson to Rebecca Nyambura (deceased). He also avers that Rebecca Nyambura (deceased) is his mother.

4. It is the Plaintiff's averment that until 3rd October, 2012 the suit property was registered in his deceased mother's name.

5. The Plaintiff avers that the 1st Defendant originated a fraudulent transfer of the suit property which he purported to have been executed by himself and Rebecca Nyambura (deceased).

6. The Plaintiff lists the particulars of the 1st Defendant's fraud as:

    a. Transfer dated 3rd October, 2011 executed by Rebecca Nyambura Muthinji Posthumously.

7. It is the Plaintiff's averment that the 1st Defendant charged the suit property to the 3rd Defendant for Kshs.3,000,000 which loan was never serviced.

8. He avers that the 3rd Defendant has instructed their agent to sell the suit property at a public auction.

9. The Plaintiff prays for the following orders:

    a. The transfer of all land known as LR 1144/1217 from Rebecca Nyambura Muthinji to the 1st Defendant be declared null and void.

    b. That the title of all land known as LR 1144/1217 be restored back to Rebecca Nyambura Muthinji.

    c. An order that the 2nd Defendant abdicated his duties by effecting a faulty transfer.

    d. Costs of the suit

    e. Interest on (d) above

    f. Any other relief this Honourable Court may deem just and expedient to grant.

10. The 3rd Defendant filed its amended statement of Defence and notice of claim against the 1st Defendant on 6th February, 2015.

11. In its statement of Defence, the 3rd Defendant denies all the averments set out in the Plaint and prays that the Plaintiff's claim against it be dismissed with costs.

12. The 3rd Defendant sets out its claim against the 1st Defendant and prays for judgement against the 1st Defendant for;

    a. Kshs. 4,319,798.30

    b. In the alternative a declaration that the interested party herein was a bonafide chargee for value.

    c. Costs of the notice of 3rd Defendant's claim against the 1st Defendant

    d. Interest on (a) at commercial rates from date of filing suit

    e. Any other or further relief that the court may deem just to grant.

13. The court record does not contain the statement of defence by the 1st and 2nd Defendants.

Factual Background.

14. Pending hearing, the Plaintiff John Thuo Muthinji died and was substituted by one Samuel Muthinji Thuo vide an order made on 22nd July, 2021.

15. After tendering their evidence, the Plaintiff and 3rd Defendant's case was closed.

16. The1st Defendant's case was closed on 21st November, 2023 after he failed to attend court despite being served.

17. On 17th May, 2023, the 2nd Defendant informed the court that it shall not be calling any witness. On this basis, their case was also closed on 21st November, 2023.

Plaintiff's Evidence.

18. Samuel Muthinji Thuo hereinafter referred to as PW1 testified in support of the Plaintiff's case. In his introduction, he stated that he is the Plaintiff in this suit.

19. He testified that Rebecca Nyambura Muthinji (deceased) is his grandmother and that he has the letters of administration in respect of her estate. PW1 went on to testify that his grandmother died on 12th November, 2005. The death certificate was marked and produced as Exhibit P1.

20. It was his further testimony that his late grandmother owned the suit property. A copy of the title was marked and produced as Exhibit P2.

21. He testified that as at 12th November, 2005 his grandmother had not sold the suit land.

22. PW1 went on to testify that on 3rd October, 2011, there was a transfer from his late grandmother to the 1st Defendant. A copy of the transfer was marked and produced as Exhibit P3.

23. It was his testimony that a charge against the suit property was registered in favour of the 3rd Defendant. The charge document was marked and produced as Exhibit P4.

24. PW1 testified that the 1st Defendant failed to repay the loan which caused the 3rd Defendant to issue a notification of sale of the suit property and write a letter dated 16th April, 2014 requesting him to repay Kshs. 4,000,000. The letter was marked and produced as Exhibit P5.

25. Hs testimony was that the suit property was to be sold by Integra Auctioneers but the same did not happen. A redemption notice dated 18th July, 2014 was marked and produced as Exhibit P6.

26. PW1 went on to testify that he is the one in occupation of the suit land and that he does business on it. He urged the court to grant orders directing that the land reverts back to his late grandmother and the charge be vacated.

27. He testified that the 1st Defendant committed acts of fraud against the estate of Rebecca Nyambura and added that the transfer was done 6 years after his grandmother died.

28. In his witness statement dated 24th November, 2021, he states that he operates his hotel "Guest Inn" on the suit property.

29. He further states that after his grandmother's demise, her original documents of ownership to the suit land which were in the family custody were stolen by the 1st Defendant.

30. He also states that the 1st Defendant fraudulently forged a transfer document purportedly signed by the deceased and charged the suit land to the 3rd Defendant.

31. Upon cross-examination by counsel for the 2nd Defendant, he confirmed that it is the Land Registrar's work to register the land. He admitted that he did not request documents from the Lands office.

32. PW1 was referred to Exhibit P2 and he confirmed that it contains the transferor's photo.

33. PW1 admitted that the Land Registrar would not have known of Rebecca's death.

34. Upon cross examination by counsel for the 3rd Defendant, PW1 confirmed that he had been shown the transfer documents and further confirmed that all the parts requiring a signature had been signed.

35. He also confirmed that it contained a photo of his grandmother.

36. He stated that he had no report to show that the signature is not his late grandmother's. He also admitted that there was a thumbprint and confirmed that he did not have any report showing that the thumbprint was not his grandmother's.

37. He stated that the 1st Defendant is his cousin and added that he was substituted in the instant case on account of letters of administration to represent the estate of John Thuo Muthinji and not his grandmother Rebecca.

38. He confirmed that the thumbprint appearing on the transfer form is alongside Rebecca's name and photograph and further stated that he doubts that it is Rebecca's thumbprint.

39. PW1 went on to state that the transfer forms did not have a photo of the 1st Defendant but only his signature.

40. When referred to Exhibit P2, the title deed, PW1 confirmed that entry number 2 shows a transfer to the 1st Defendant for Kshs. 800,000.

41. When further referred to Exhibit P3, the transfer form, he confirmed that the amount tallies with that on the title deed. He further confirmed that it bore the registrar's stamp dated 24th January, 2012.

42. PW1 confirmed that the suit land has never been his and admitted that the letters of administration should have been in respect of the estate of Rebecca. He denied having the case struck out for lack of capacity.

43. Upon re-examination, PW1 stated that the transfer documents had the stamp of the collector of stamp duty dated 24th January, 2012 and a stamp from the Land Titles Registry, Nairobi.

44. Subsequent to taking the Plaintiff's case, an application was made to recall him for purposes of producing letters of administration to the estate of Rebecca Nyambura Muthinji.

45. The Plaintiff was recalled on 21st March, 2023. He explained that he was back in court to produce the limited grant of letters of administration ad-litem issued on 6th October, 2022.

46. He testified that his father had commenced the suit and upon his death on 23rd October, 2020, (PW1) he instructed his Advocates to regularize his representation in the suit.

47. He further testified that they got a limited grant ad litem on 27th April, 2021. He testified that his Advocates advised that getting a grant in the estate of John Thuo instead of Rebecca Nyambura was a mistake.

48. He urged the court to order that the title reverts back to them adding that his cousin had fraudulently sold the suit land when his grandmother had already died.

49. Upon further cross-examination by counsel for the 3rd Defendant, PW1 admitted that he came back to produce the letters of administration for the estate of Rebecca Nyambura. He confirmed that he is the administrator of the estate of Rebecca Nyambura. He explained that the case had been initially instituted by his late father John Thuo.

50. PW1 stated that the document is attached to the supplementary list of documents dated 6th October, 2022.

51. He further confirmed that item number 2 of the order states that Rebecca Nyambura died on 12th November, 2005 and also confirmed that it did not state to whom it is issued.

52. Subsequent to this testimony, the Plaintiff sought and was by consent granted leave to substitute the supplementary list of documents and to again recall the Plaintiff to produce the document annexed to the substituted supplementary list of documents.

53. On 17th May, 2023, the Plaintiff took the witness stand for a third time. He explained that he was in Court to produce the document attached to the supplementary list of documents dated 21st March, 2023. He further explained that it was a grant of letters of administration ad litem issued on 3rd October, 2022. The same was produced as Exhibit P7.

54. Upon cross-examination by counsel for the 3rd Defendant, he stated that he is the administrator of the estate of Rebecca Nyambura Muthinji. He explained that the suit was initially instituted by his father John Thuo Muthinji. He went on to state that he is not the administrator of the estate of his father and confirmed that he only has authority to administer the estate of Rebecca Nyambura.

55. Upon reexamination he restated that the suit revolves around Rebecca's land and that his late father instituted the suit in pursuit of the suit parcel which belonged to Rebecca.

56. He further stated that his late father had not instituted any claim on his own behalf.

57. The Plaintiff closed his case.

3Rd Defendant's Evidence.

58. The 3rd Defendant John Ouma Mbuja testified as DW1.

    In his introduction he stated that he works as a business banker with the 3rd Defendant. He explained that his role is to support the processing of customers request for loans and monitor their performance.

59. He stated that he had recorded a statement dated 19th November, 2021 and prayed that the said statement be adopted as part of his evidence-in-chief.

60. He further testified that he filed a list of documents on 24th November, 2014, a further list of documents dated 15th February, 2022, 9th November, 2023 and 17th November, 2023.

61. The documents were produced and marked as follows:

    1. Copy of charge dated 23rd February, 2012 – Exhibit D1
    2. Copies of statement of account – Exhibit D2
    3. Statutory Notice of sale dated 16th April, 2014- Exhibit D3
    4. 45 days Redemption notice dated 18th July, 2014 by Integra Auctioneers- Exhibit D4
    5. Statement of account number 016F299878001- Exhibit D5
    6. Statement of account numbers 016980998780001, 016C809987800 and 0189409987800- Exhibit D6 (a) (b) and (c)
    7. Statement of loan account number 016C8099878000- Exhibit D7

62. DW1 testified that the suit results from the 3rd Defendant's actions in realizing its security through sale of the suit property.

63. He testified in 2012, the 1st Defendant approached the bank for a loan and the bank after consideration, approved a loan of Kshs. 3,000,000.

64. He testified that the customer accepted and executed the offer letter after which the bank proceeded to conduct a valuation of the suit property which was to be used as a security for the loan.

65. He went on to explain that upon satisfaction that the value of the suit land could secure the loan, the 3rd Defendant's lawyers conducted due diligence which involved conducting a search and added that the search showed that the 1st Defendant was the owner of the suit property.

66. It was his testimony that on 23rd February, 2012, a charge was registered against the suit property adding that at the time of registration of the charge, there was no indication of any adverse claim or encumbrances on the suit land.

67. He went on to testify that the funds were then released to the 1st Defendant. He explained that it was agreed that he repays the loan in monthly instalments but he defaulted.

68. He testified that on account of this default, the bank initiated a recovery process by first issuing demand notices to the 1st Defendant. He explained that the said demand notices were attached to the affidavit in support of the Plaintiff's in the injunction application dated 25th September, 2014.

69. DW1 went on to testify that paragraph 5 of the amended plaint confirms that the suit land was charged.

70. It was his testimony that at paragraph 6 of the plaint, it is averred that the Plaintiff is the 1st Defendant's nephew. He testified that this averment is irrelevant and added that the said information was not useful to the bank as the security provided was already in the borrower's name.

71. He also testified that paragraph *7* states that until 3rd October, 2012 the suit land was in Rebecca's name and that the bank registered a charge on the suit land on 23rd February, 2012. He explained that as at that date, the suit land was in the 1st Defendant's name. He further testified that as at 2005, the bank had not dealt with the suit property and therefore Rebecca's death was not relevant to the bank.

72. DW1 went on to testify that the 3rd Defendant was not aware of any fraud and not a party to any fraud. He added that the charge would not have been registered if there were ownership problems.

73. He denied that the bank committed any illegality in charging the suit property. He testified that they sought the Land Control Board consent and followed all procedures.

74. It was DW1's testimony that by 9th February, 2015 when they filed the amended defence, the amount owing was Kshs. 4,319,798.30.

75. He urged the court to grant orders allowing them to realize the security. He stated that the cross claim filed in 2015 is against the 1st Defendant. He also urged the court that in the event it finds that the charge was fraudulent, the cross claim be allowed.

76. He stated that there are three accounts and added that the bank uses computer systems in support of its work. He further stated that from the time the 1st Defendant took the loan, they have had three systems. DW1 explained that the principal loan amount never changed with the changing of the system.

77. It was his evidence that after February, 2013, there was an interest arrears account which keeps on changing. He testified that in line with Exhibit D7, the total amount due stands at Kshs. 6,011,234.56.

78. Upon cross examination by counsel for the Plaintiff, DW1 confirmed that he has been working with the 3rd Defendant from 16th November, 2009.

79. He stated that he presented the charge documents and added that the title was with the bank. He was referred to Exhibit P2 title deed for the suit land where he confirmed that it was the same one referred to in the charge.

80. He confirmed that entry number two of the title showed that there was a transfer to the 1st Defendant on 24th January, 2012.

81. He further confirmed that the plaint showed that the suit property was in the name of Rebecca Nyambura until 3rd October, 2012.

82. DW1 was referred to Exhibit P3 the transfer form, where he confirmed that it was dated 3rd October, 2011 and that Rebecca was the Vendor and 1st Defendant was the purchaser.

83. He was also referred to Exhibit P1, Rebecca's death certificate, and he confirmed that she died on 12th November, 2005 and added that it would not have been possible for her to sign the transfer form. He also confirmed that the charge was registered in 2012.

84. DW1 stated that John Thuo was the former Plaintiff before the current one was substituted. He admitted that he had no evidence that the Plaintiff and 1st Defendant were signatories or beneficiaries of the three accounts.

85. DW1 stated that he was not aware if the Plaintiff visited the bank and added that they normally send notices by registered post.

86. He stated that they were sent to the 1st Defendant and added that he didn't have evidence that they were returned. He further stated that if the Plaintiff has them, then it could have been obtained from the 1st Defendant or the bank.

87. In conclusion, he stated that the loan was not insured and that they have not claimed compensation from any insurance company.

88. Upon re-examination, DW1, on the question of notices, stated that a letter dated 18th July was written to the 1st Defendant.

89. On the question of the transfer form, DW1 stated that entry number two on the title showed that the title was transferred to the 1st Defendant on 24th January, 2012 and added that the charge was registered on 29th February, 2012.

90. He went on to state that as at the time of registration of the charge, the title of the suit property was in the 1st Defendant's name.

91. In conclusion, he stated that Rebecca signed the transfer in the presence of an Advocate but confirmed that it was not clear when she signed it as there was no date.

92. The 3rd Defendant closed its case.

Issues for Determination.

93. The 3rd Defendant filed its submissions on 24th January, 2024. In its submissions, it gives a background of the suit and identifies the following issues for determination:

    1. Whether or not the 3rd Defendant herein exercised due diligence before charging the suit property.

    2. Whether or not fraud is proven and whether the Plaintiff is entitled to the orders sought.

3. Whether or not the 3rd Defendant has alternative remedies.

94. On the first issue, the 3rd Defendant submits that it exercised due diligence before executing the charge in its favour. It goes on to submit that it was very keen in ascertaining that the 1st Defendant was the owner of the suit property before accepting it as security.

95. The 3rd Defendant relies on the judicial decision of Esther Ndegi Niiru & Another V Leonard Gatei [2014] eKLR and submits that apart from the official search, it went further to get the transfer dated 3rd October, 2011 from the previous owner to the 1st Defendant before charging the suit property.

96. It submits that every other reasonable man could have been fully satisfied by the observations that the ownership of the suit property had legally passed to the 1st Defendant.

97. The 3rd Defendant submits that the name at the Registrar of Lands is prima facie evidence that the suit land belongs to the 1st Defendant.

98. In support of its submissions, the 3rd Defendant further cites the judicial decisions in Patrick Kivai Nduva V Noah Moneria Ole Kurrarru & 2 Others [2021] eKLR and Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others [2015] eKLR.

99. On the second issue, the 3rd Defendant submits that the Plaintiff has not exhausted his burden of proving the allegation of fraud. It relies on Section 107 of the *Evidence Act*.

100. The 3rd Defendant submits that the allegation by the Plaintiff that the 1st Defendant stole the title from him was not proved. It submits that in the event that Plaintiff had the title, he was negligent in keeping the same and he cannot use the court to aid him in his carelessness.

101. The 3rd Defendant further submits that it was not or could not have been aware of any fraud if any by the 1st Defendant. It also submits that it did not participate or collude with the 1st Defendant in acquiring the suit property.

102. It submits that the charge cannot be considered illegal and its right to charge supersedes that of any other party. It relies on the judicial authority in Paul Gatete Wangai V Capital Realty Ltd & Another [2020] eKLR.

103. It is the 3rd Defendant's submission that the Plaintiff only asserts that the 3rd Defendant abdicated its duties by effecting a faulty charge. It adds that the Plaintiff could not prove how the charge was faulty as he alleges.

104. The 3rd Defendant cites the judicial authority in Monica Waruguru Kamau & Another V Innercity Properties Ltd [2020] eKLR and submits that the Plaintiff upon losing the title never reported the same to the police station for investigation thus his allegation of fraud does not stand. The 3rd Defendant adds that the 2nd Defendant had an opportunity to investigate the title before registering it in the 1st Defendant's name.

105. The 3rd Defendant submits that the Plaintiff was indolent in protecting the title if at all it was in his custody. It further submits that the Plaintiff only bothered about the suit land after he was served with the proclamation letter and the redemption notice from it.

106. The 3rd Defendant further submits that the Plaintiff acknowledged that he made the report to the CID offices and complaints to the Ministry of Lands only after learning of the intended sale.

107. It was further the 3rd Defendant's submission that the Plaintiff's actions were done two years after the time of the alleged loss of the title. It relies on the judicial case of Amina Karama V Njagi Gachagua & 3 Others [2020] eKLR.

108. On the third issue, the 3rd Defendant submits that in the unlikely event the court finds that the 1st Defendant was not the legal owner of the charged land, it urges the court to find that it was a chargee for value.

109. The 3rd Defendant relies on the judicial case of Tejprakash Sehmi V Petroafric Company Limited & 3 Others [2020] eKLR. It submits that it would be in the interest of justice to the innocent chargee if the court finds in its favour.

110. The 3rd Defendant relies on Section 80 of the *Land Registration Act* and the judicial decision in Eunice Grace Njambi Kamall and Another V The Hon. Attorney General and 5 Others Civil Suit No. 976 of 2012.

111. In conclusion, the 3rd Defendant urges the court to decline the invitation by the Plaintiff to set aside any defect and/or fraud against it as it has proved to be a bonafide chargee for value.

112. The Plaintiff, 1st and 2nd Defendants did not file their submissions.

Analysis and Determination.

113. After considering the pleadings, testimony and submissions of the 3rd Defendant, the following issues arise for determination:

    a. Whether or not the transfer of the suit property from Rebecca Nyambura Muthinji (deceased) to the 1st Defendant was valid.

    b. Whether the charge by the 3rd Defendant on the suit property was valid.

    c. Whether the Plaintiff is entitled to the orders sought.

    d. Whether the 3rd Defendant's claim against the 1st Defendant is sustainable.

    e. Who should bear costs of this suit?

A. Whether or not the transfer of the suit property from Rebecca Nyambura Muthinji (deceased) to the 1st Defendant was valid.

114. The Plaintiff testified that his grandmother was the registered owner of the suit land. He contends that the 1st Defendant stole the title deed from the custody of the family and fraudulently had the suit land transferred to himself.

115. He also testified that the 1st Defendant took a loan with the 3rd Defendant and that the suit land was used as security for payment of the said loan.

116. The Plaintiff's evidence is that he doubts that the signature appearing on the transfer forms belongs to his deceased grandmother. He however admitted that he had no report to show that the signature in form of a thumbprint was not that of his deceased grandmother.

117. The 3rd Defendant on the other hand went into great lengths to testify that prior to charging the suit land, it had conducted its due diligence. It was its testimony that before charging the suit property, it confirmed that the 1st Defendant was the registered owner. I however note that the 3rd Defendant did not produce any certificate of search in support of this aspect of its testimony.

118. This court has also perused the court records and it is clear that Rebecca Nyambura Muthinji (deceased) died on 12th November, 2005. This is evidenced by the certificate of death produced by the Plaintiff.

119. It is not in dispute that the transfer of the suit property from the deceased to the 1st Defendant was done on 3rd October, 2011.

120. The 3rd Defendant conceded that if indeed Rebecca Nyambura Muthinji died on 12th November, 2005, then she could not have signed the transfer forms on 3rd November, 2011 whose effect was to transfer the suit property to the 1st Defendant.

121. It is also important to note that the 1st Defendant steered clear of these proceedings despite service.

122. In view of the forgoing, it is evident that the transfer of the suit property from Rebecca Nyambura Muthinji (deceased) to the 1st Defendant was invalid.

B. Whether the charge registered by the 3rd Defendant against the suit property was valid.

123. The 3rd Defendant's case is that upon conducting due diligence they proceeded to register a charge on 23rd February, 2012.

124. The 3rd Defendant contends that it ascertained that the suit property was registered in the 1st Defendant's name before executing the charge in its favour.

125. This court has perused the charge and bank statements and it is not in dispute that the 1st Defendant took a loan of Kshs. 3,000,000 with the 3rd Defendant and failed to pay as agreed.

126. It was the 3rd Defendant's case that from the statements, the outstanding loan amount is Kshs. 6,011,234.56.

127. The Supreme Court in the judicial authority of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the judicial case in Munyu Maina V Hiram Gathiha Maina [2013] KECA, where the court held as follows:

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. <u>It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register</u>." [Emphasis mine]

128. The charge was registered against the suit parcel on the strength that the 1st Defendant was the registered owner.

129. I also note that the 3rd Defendant never produced the copy of the title deed in the name of the 1st Defendant. It is not clear how they might have registered a charge without it.

130. Furthermore, the 3rd Defendant stated that upon conducting their due diligence, the records at the Lands confirmed that the 1st Defendant was the registered owner of the suit land. The certificate of search was not produced in evidence. How can the court find that the 3rd defendant had no notice of defect in the title of the 1st Defendant?

131. The foregoing, coupled with my finding that the purported transfer by Rebecca Nyambura Muthinji to the 1st Defendant was fraudulent leads to a further finding that the charge registered on 23rd February, 2012 was null and void.

C. Whether the Plaintiff is entitled to the orders sought.

132. Section 24 of the *Land Registration Act* provides as follows:

> " Subject to this Act,
>
> a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
>
> b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease."

133. Section 25 of the *Land Registration Act* accords protection to a proprietor of land and states that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act.

134. Section 80 of the *Land Registration Act* gives the Court the power to order for rectification of the register.

135. The Plaintiff produced a copy of the title in the name of Rebecca Nyambura Muthinji (deceased). The validity of the said title has not been challenged.

136. As things remain, Rebecca Nyambura Muthinji (deceased) is the proprietor of the suit parcel. She died before her purported transfer of the suit land to the 1st Defendant. Her Estate is deserving of protection to the extent that the 1st Defendant and by extension the 3rd Defendant cannot and should not be allowed to benefit from acts of fraud.

D. Whether the 3rd Defendant's claim against the 1st Defendant is sustainable.

137. It is the 3rd Defendant's case that it advanced a loan facility of Kshs. 3,000,000 to the 1st Defendant and in order to secure the loan, it registered a charge on the suit parcel i.e. LR No. 1144/1217.

138. The 3rd Defendant contends that the 1st Defendant defaulted in the repayment of the said loan and the amount now owing is Kshs. 4, 319, 798/30.

139. The 3rd Defendant's claim against the 1st Defendant is for;

    a. Kshs. 4, 319, 798/30

    b. In the alternative a declaration that the interested party herein was a bonafide chargee for value.

    c. Costs of the Notice of 3rd Defendant's claim against the 1st Defendant.

    d. Interest on (a) at commercial rates from the date of filing the suit.

    e. Any other or further relief that the Court may deem just to grant.

140. The 1st Defendant did not respond to the 3rd Defendant's claim against it.

141. An analysis of the 3rd Defendant's Claim discloses that the 3rd Defendant is seeking orders against the 1st Defendant on the basis of the charge registered over LR No. 1144/1217.

142. 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."

143. As was held in the above cited judicial authority, this Court does not have jurisdiction to hear and determine disputes arising from money lent and secured by registration of a charge over a parcel of land.

144. Consequently, the 3rd Defendant's claim against the 1st Defendant lacks merit and is hereby struck out.

E. Who should bear costs of this suit?

145. The general rule is that costs follow the event. This is 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.

146. In the result, I find that Plaintiff's suit succeeds.

147. The 3rd Defendant's claim against the 1st Defendant is struck out with no order as to costs.

148. Consequently, I hereby enter judgment in favour of the Plaintiff in the following terms:

   a. A declaration is hereby made that the transfer of all that parcel of land known as LR 1144/1217 from Rebecca Nyambura Muthinji (deceased) to the 1st Defendant is null and void.

   b. The 3rd Defendant is hereby ordered to surrender the title deed of all that parcel of land known as LR 1144/1217 held by it to the 2nd Defendant for cancellation.

   c. The 2nd Defendant is hereby ordered, order in (b) notwithstanding, to correct the register in respect of all that parcel of land known as LR 1144/1217 by deleting the name of the 1st Defendant and replacing it with the name of Rebecca Nyambura Muthinji (deceased).

   d. The Plaintiff shall have costs of this suit and interest thereon from the date of this judgment until payment in full.

149. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25TH DAY OF JULY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kago for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. Kisilah for the 3rd Defendant.

Court Assistant; Mr. Joseph Makori.