



REPUBLIC OF KENYA



**Masumbuko v National Bank Kenya Ltd (Environment & Land Case
113 of 2020) [2024] KEELC 5454 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 113 OF 2020**

NA MATHEKA, J

JULY 23, 2024

BETWEEN

OMAR MASUMBUKO PLAINTIFF

AND

NATIONAL BANK KENYA LTD DEFENDANT

RULING

1. The Defendant raised a Preliminary Objection on the following grounds, namely:
 - a. That this Honourable Court lacks jurisdiction to entertain the suit herein pursuant to the provisions of Article 162 (2) of the *Constitution* as read with the provisions of section 13 of the *Environment and Land Act*, 2011 and section 128 and 150 of the *Land Act*.
 - b. That the nature of the claim and relief sought raised by the Plaintiff in his Complaint arise from a commercial dispute therefore the court has no jurisdiction at this point.
 - c. The Complaint is therefore an abuse of the process of this Honourable court and should be dismissed with costs.
 - d. This Honourable Court lacks the jurisdiction to not only conduct the Pre-Trial Conference scheduled for 18th March 2024 but also to hear and determine the claim.
2. I have considered the preliminary objection and submissions therein. A notice of preliminary objection was discussed by the Supreme Court in *Hassan Ali Jobo & 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”.

3. 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.”

4. 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.

5. 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.

6. 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.”

7. 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”

8. 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.”

9. 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.”

10. 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).”

11. Be that as it may and in a more recent binding case of *Bank of Africa Kenya Limited & another vs TSS Investment Limited & 2 others* (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment), the court of appeal held that;

In view of the foregoing, the only question that falls to be determined is whether the respondents' suit against the appellants involved “... matters relating to environment and



the use and occupation, and title to land”. We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for the injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant’s exercise of its statutory power of sale over the suit properties on the basis of the alleged tenancy relationship with the 3rd respondent.

Accordingly, we do not share the learned Judge’s view that the issues in contention between the respondents and the appellants were matters relating to “... the environment and the use and occupation, and title to land” as contemplated in Article 162 of the Constitution, section 13 of the Environment & Land Court Act, and in section 150 of the *Land Act*. To our mind, such matters could only be subject to litigation between the 1st and 2nd respondents as lessees, and the 3rd respondent as lessor.

We form this view taking to mind this Court’s decision in the afore-cited case of Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (supra) where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we agree with learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents’ suit as pleaded.”

12. Therefore, in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land. I have perused the current matter I find that the dispute arises out of a commercial dispute and is on the nature of the sale or the terms of the afore mentioned formal charge. In this regard, I find the preliminary objection is merited and I strike out this matter with costs.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

