



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbiuki v Mutisya & another (Cause E957 of 2022)  
[2023] KEELRC 1879 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1879 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E957 OF 2022**

**SC RUTTO, J  
JULY 31, 2023**

**BETWEEN**

**FELIX GITARI MBIUKI ..... APPLICANT**

**AND**

**JOSEPH LABAN (AKA J.L) MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**MACHAKOS COUNTY ASSEMBLY SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What comes up for Ruling is the Claimant's Notice of Preliminary Objection dated March 8, 2023.
2. The Preliminary Objection is premised on grounds that this Honourable Court lacks jurisdiction to adjudicate upon the Counterclaim. The Claimant has further termed the Respondents' Counterclaim as fundamentally defective, misconceived, bad in law and in violation of the provisions of Article 162(2) (a) and (b) of the *Constitution* as read together with Section 12 of the *Employment and Labour Relations Act*. The Claimant contends that the mortgage is pegged on a mortgage facility advanced to him by the 2<sup>nd</sup> Respondent and secured by a registered charged instrument against Title No Karingani/Gitareni/2155 and is therefore an interest in land.
3. According to the Claimant this Honourable Court has no jurisdiction in view of Section 12 of the *Employment and Labour Relations Court Act* to entertain matters emanating from land disputes as those fall squarely under Section 13 of the *Environment and Land Court Act*.
4. On March 28, 2023, both parties consented to have the Preliminary Objection canvassed by way of written submissions.



## Submissions

5. It was the Claimant's submission that the mortgage facility transaction has no place in this Court and the Respondents' Counterclaim is misconceived, vexatious, frivolous, scandalous and a blatant abuse of the court process and the same should be struck out. On this core, the Claimant placed reliance on the cases of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* (1989) KLR 1 and *The Clerk, Nakuru County Assembly & Others vs Kenneth Odongo & Others* (Nakuru Civil Appeal No. E136 of 2022).
6. The Claimant further contended that even though the main suit falls within the purview of this Court as it relates to an employer/employee relationship, the Counterclaim invites the Court to interpret and enforce the terms of a loan secured through the instrument of a charge which is an interest in land. That the Respondents ought to have filed and enforced its Claim if any, at the Environment and Land Court since it is the relevant Court to handle such cases.
7. On its part, the Respondents maintained that the Court does have the jurisdiction to hear the Counterclaim and also has the authority to grant the prayers sought therein. It was the Respondents' argument that Section 12 (1)(a) of the *Employment and Labour Relations Court Act* provides the jurisdiction of this Court to include hearing disputes relating to and arising out of employment between an employer and an employee. That it is a fact that the mortgage facility granted to the Claimant and forming the basis of the Counterclaim arose from the course of the Claimant's employment and was specifically pursuant to a Circular from the Salaries and Remuneration Commission. It thus maintained that this Court has jurisdiction to determine the rights of parties as per the mortgage facility agreement. In support of this position, the Respondents placed reliance on the case of *Abraham Nyambane Atsiago vs Barclays Bank of Kenya* (2013) eKLR.

## Analysis and Determination

8. The singular issue that stands out for determination is whether this Court has jurisdiction to hear and determine the Respondents' Counterclaim. As stated herein, the gist of the Claimant's Preliminary Objection is that this Court lacks jurisdiction to entertain the counterclaim in view of Section 12 of the *Employment and Labour Relations Court Act*.
9. The Respondents aver in its Counterclaim that the Claimant was employed by the 2<sup>nd</sup> Respondent as the Clerk of the Assembly, Accounting officer and its Secretary. That as one of the benefits to the staff, the 2<sup>nd</sup> Respondent advanced the Claimant a sum of Kshs 20,000,000.00 being a mortgage facility. The loan was to be repaid within a period of fifteen years or the remaining period of service of the officer, whichever is less. The Respondents further state that as at December 30, 2022, the Claimant had an outstanding loan balance of Kshs 15,331,410.98 which he has been servicing at a monthly rate of Kshs 112,077.00. It is on this account that the Respondents seek to recover the said sum which it alleges is outstanding.
10. This Court's jurisdiction is founded on the provisions of Article 162 (2) (a) of the *Constitution*. Further, and to give effect to the aforesaid constitutional provision, Section 12(1) of the *Employment and Labour Relations Court Act* provides for this Court's jurisdiction to determine disputes relating to employment and labour relations including:
  - a. disputes relating to or arising out of employment between an employer and an employee;
  - b. disputes between an employer and a trade union;
  - c. disputes between an employers' organisation and a trade unions organisation;



- d. disputes between trade unions;
  - e. disputes between employer organizations;
  - f. disputes between an employers' organisation and a trade union;
  - g. disputes between a trade union and a member thereof;
  - h. disputes between an employer's organisation or a federation and a member thereof;
  - i. disputes concerning the registration and election of trade union officials; and
  - j. disputes relating to the registration and enforcement of collective agreements.
11. The question now is whether the matter herein falls within this Court's jurisdiction as outlined above.
12. It is not in dispute that the Claimant was employed by the 2<sup>nd</sup> Respondent and that the mortgage facility in question was extended to him as a benefit and in his capacity as an employee of the 2<sup>nd</sup> Respondent. Indeed, without the existence of the employment relationship, the Claimant would not have benefited from the mortgage facility. It may very well be said that the Counterclaim cannot exist outside the employment relationship.
13. As it is, the dispute relating to the mortgage facility is so intertwined with the employment relationship and cannot be viewed as standalone commercial transaction between the Claimant and the 2<sup>nd</sup> Respondent. It may very well be said that it is an employment dispute falling within this Court's jurisdiction under Section 12 of the *Employment and Labour Relations Court Act*.
14. It is therefore my finding that this Court has jurisdiction to determine the Counterclaim, as the same relates to a mortgage facility which was advanced to the Claimant within the context of the employment relationship.
15. Aside from that, it would not be practical to mutilate the dispute and have another portion thereof, determined in another Court without taking into context the circumstances under which the mortgage transaction took place. It is only prudent that the entire dispute be handled by one Court and this being the Court vested with the primary jurisdiction to determine the main dispute, which is employment in nature, has jurisdiction to determine all the ancillary issues arising therefrom.

### Orders

16. The total sum of my consideration is that the Claimant's Preliminary Objection dated March 8, 2023 is declined.
17. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

### Appearance:

Mr. Ngwele for the Claimant

Mr. Muuo for the Respondents

Abdimalik Hussein Court Assistant



## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

