



**Family Bank Limited v Omanga (Suing as the Personal Legal Representative of the Estate of Margaret Adhiambo Omanga - Deceased) & 3 others (Environment and Land Appeal E021 of 2022) [2024] KEELC 6389 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6389 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E021 OF 2022  
GMA ONGONDO, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**FAMILY BANK LIMITED ..... APPELLANT**

**AND**

**MARY ATIENO OMANGA (SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF THE ESTATE OF MARGARET ADHIAMBO OMANGA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**PAUL OJIGO OMANGA ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR HOMA BAY ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from Ruling and Order of the Hon. Tom Mark Olando (Principal Magistrate) delivered on the 8th day of June 2022 in ELC Case No. 64 of 2006 at HomaBay)*

**RULING**

1. By an application dated 9<sup>th</sup> April 2024 initiated under, inter alia, sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the 1<sup>st</sup> respondent/applicant through Odhiambo Oronga and Company Advocates is seeking the orders thus;
  - a. An appeal does not lie the amended memorandum of appeal having been struck out,
  - b. If the court does find that an appeal lies, the court has no jurisdiction to hear and determine the said appeal.
  - c. The costs of the appeal and the application be provided for.



2. The application is premised upon grounds 1 to 10 stated on the face of the same and they include;
  - a. The appeal as filed is incompetent and ripe for striking out.
  - b. The record of appeal lacks fundamental documents like the 1<sup>st</sup> respondent's exhibits produced in the lower court without which no appeal lies for order or decree appealed against has been attacked in the appeal and an attempt by the appellant to introduce the said documents was unsuccessful on dismissal of their notice of motion dated 23<sup>rd</sup> March 2023 and no appeal has been preferred from the said ruling rendered on 12<sup>th</sup> March 2024 and goes to the root of the appeal and not a mere technicality of procedure.
3. Furthermore, the application is supported by an affidavit of fifteen paragraphs sworn on even date where the 1<sup>st</sup> respondent averred in part that the appeal should be struck out in the absence of the record of appeal. That the appeal stems from pleadings over a defective charge document which is a preserve of the High Court. That as such, this court has no jurisdiction over the matter.
4. The other respondents were duly served with the application as revealed in the affidavit of service sworn on 2<sup>nd</sup> May 2024 by Elsie Theuri Advocate of the High Court of Kenya.
5. By a replying affidavit sworn on 8<sup>th</sup> July 2024 sworn by Sylvia Wambani, an Advocate and Senior Legal Officer of the appellant/respondent, reference was made to the record of appeal volume 1 dated 21<sup>st</sup> September 2022 as well as Homa Bay Chief Magistrate's court Environment and Land Court case number 64 of 2018 initiated by a plaint dated 6<sup>th</sup> June 2018 and amended on 3<sup>rd</sup> August 2020 wherein orders sought include; declaration touching on charge instrument being the principal order. That the plaint was amended on 3<sup>rd</sup> August 2020 maintaining all the orders sought therein.
6. Further, the appellant averred by reference to the judgment of the trial court and subsequent ruling and that jurisdiction was a dominant issue relating to the creation of the charge instrument. That the application be dismissed with costs as the record of appeal was proper and urged the court not to rely on procedural technicalities in this matter.
7. Hearing of the application was by written submissions pursuant to orders of the court given on 16<sup>th</sup> May 2024; see also Order 51 Rule 16 of the [Civil Procedure Rules 2010](#).
8. In the submissions dated 18<sup>th</sup> June 2024, learned counsel for the 1<sup>st</sup> respondent/applicant referred to the orders sought in the application, the grounds, the supporting affidavit and that the appellant failed to comply with the directions of 11<sup>th</sup> October 2022. That there is no contest that there is no decree annexed to the record of appeal and the dispute concerns a defective charge hence, the appeal is incompetent and the court lacks jurisdiction over the same.
9. So, counsel implored the court to allow the application with costs to the 1<sup>st</sup> respondent. To buttress the submissions, counsel made reference to [Mohan Meakin \(K\) Ltd v Attorney General](#) (2014) eKLR on amended pleadings as well as the decision of the Supreme Court of Kenya in the case of [Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others](#) (2013) eKLR as regards record of appeal, [Bank of Africa \(K\) Ltd and 2 others v TSS Investment Ltd & 2 others](#) (2024) eKLR and [Cooperative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others](#) (2017) KLR on jurisdiction of this court.
10. In the submissions dated 8<sup>th</sup> July 2024, learned counsel for the appellant, inter alia, urged the court to use the dominant issue test, did not agree with [Bank of Africa](#) and [Cooperative Bank](#) cases (*supra*) and referred to [Owners of Motor Vessel Lillian 'S' v Caltex Oil 9Kenya\) Ltd](#) (1989) KLR 1. Also, counsel cited Articles 162 and 169 of the [Constitution](#) of Kenya 2010, section 9 of the [Magistrates' Court Act](#) 2015, section 26 (3) of the [Environment and Land Court Act](#) 2015 (2011) and Order 42 Rule 13 of



the [Civil Procedure Rules 2010](#) captured at page 723 of the Record of Appeal. That this application is based on a technicality of procedure and relied upon the case of Emmanuel Ngade Nyoka v Kitheka Ngala (2017) eKLR. That the appeal is proper and the application be dismissed with costs.

11. The 2<sup>nd</sup> respondent's submissions dated 29<sup>th</sup> July 2024 by Moriasi Osoro refer to the orders sought in the application and that the dispute is based on defective charge not ownership, use or occupation. Counsel relied on Article 162 (2) of the [Constitution](#) of Kenya 2010 and [Bank of Africa](#) and [Cooperative Bank of Kenya](#) cases (Supra). The submissions are in support of the application.
12. The 1<sup>st</sup> respondent's further submissions dated 9<sup>th</sup> April 2024 are to the effect that there is no appeal herein. Reliance was made on Mohan Meakin case (supra) and others.
13. In the foregone, are the orders sought in this application meritorious?
14. It is common baseline that this court rendered a ruling on 12<sup>th</sup> March 2024 in respect of the 1<sup>st</sup> respondent/applicant's notice of motion dated 3<sup>rd</sup> March 2023 as follows;

‘..... the appellant’s amended record of appeal and supplementary record of appeal filed herein on 6<sup>th</sup> February 2023, hereby struck out.’
15. Furthermore, the appellant/respondent's notice of motion dated 23<sup>rd</sup> March 2023 for, inter alia, extension of time to file and serve the said twinned record/amended memorandum of appeal and the supplementary record of appeal, was disallowed by the said ruling whereby the court awarded costs of both applications to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
16. It is noted that the struck out amended memorandum of appeal of 2<sup>nd</sup> February 2023 tended to introduce paragraphs 18A and 18B. Nonetheless, the instant appeal lodged by memorandum of appeal dated 21<sup>st</sup> June 2022 based on 34 grounds and the six orders sought therein, was lodged within the timelines as stipulated under section 75 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya on orders from which appeal lies. Also, Order 43 of the [Civil Procedure Rules 2010](#) provides for appeals from orders...
17. Additionally, the principal order sought in the plaint before the trial court, is the creation of charge instrument. The jurisdiction of this court over the same is challenged by way of this application and the applicant's submissions
18. In *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors* (1969) EA 696, it was held that a preliminary objection consists of a point of law duly pleaded or raised by clear implication out of the pleadings and if argued as a preliminary objection, may dispose of the suit, Examples thereof include; an objection to jurisdiction of the court or a submission.
19. It is established law that that a preliminary objection is a threshold question and best taken at inception. That the same calls for determinative and prompt pronouncement; see [Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2 others](#) (2013) eKLR.
20. The dominant issue in this appeal is the principal order of the creation of charge over the suit land as captured in the orders sought in the plaint in the original suit. A charge is not one of the matters set out under Article 162 (2) (b) of the [Constitution](#) of Kenya 2010 and section 13 of the [Environment and Land Court Act](#) 2015 (2011) hence, this court lacks jurisdiction over the charge.



21. In Cooperative Bank of Kenya case (*supra*), the Court of Appeal held;
- ‘..... the assertion that a charge constitutes use of land within the meaning of Article 162 of the Constitution fails.....’
22. At paragraph 18 of the appellant/respondent’s replying affidavit to the application, it is averred that the allegations and issues raised by the applicant amount to procedural technicalities in contravention of the provisions of the Constitution of Kenya. Indeed, Article 159 (2) (d) of the Constitution of Kenya 2010 and section 19 (2) of the Environment and Land Court 2015 (2011 provide that justice shall be administered without undue regard to procedural technicalities.
23. In Kakuta Hamisi case (*supra*), it was observed that Article 159 920 (d) (*supra*), is not a panacea or whitewash in all manner of ills. Jurisdiction is a fundamental issue and not a technicality of procedure.
24. It is my considered finding that whereas the instant appeal was filed within the timelines set out under section 75 (*supra*), this court is devoid of jurisdiction over the same; see Bank of Africa and Cooperative Bank cases (*supra*).
25. This court subscribes to the reasoning in the case of Owners of Motor Vessel case (*supra*) where the late Nyarangi JA observed;
- ‘...jurisdiction is everything. Without it a court has no power to take one more step.....’
26. Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 9 at page 350 defines ‘Jurisdiction’ thus;
- ‘.....the authority which the court has to decide matters that are litigated before it or take recognizance of matters presented in a formal way for decision.’
27. Lack of jurisdiction renders a court’s decision void as opposed to being merely voidable; see Republic v Karisa Chengo and others (2017) eKLR.
28. To this end, the application dated 9<sup>th</sup> of April 2024, is merited. The same is hereby allowed in terms of prayer number 2 therein.
29. Thus, the present appeal originated by way of memorandum of appeal dated 21<sup>st</sup> June 2022, be and is hereby struck out with no order as to costs.
30. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**G.M.A ONG’ONDO**

**JUDGE**

Present

1. Mr J B Macharia learned counsel for the appellant/respondent
2. Mr O. Oronga learned counsel for the 1<sup>st</sup> respondent/applicant
3. Ms Mwaura instructed by Sarah Juma learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents
4. Mr. J Osoro learned counsel for the 2<sup>nd</sup> respondent
5. Mr, T Luanga, court assistant.

