Mturi & another v Diamond Trust Bank Kenya Limited (Environment & Land Case E54 of 2023) [2024] KEELC 6167 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6167 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE E54 OF 2023

EK MAKORI, J

SEPTEMBER 26, 2024

BETWEEN

JONATHAN DANIEL MTURI .... 1ST PLAINTIFF

PATIENCE SHIKUKU MTURI .... 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED .... DEFENDANT

RULING

1. Notice of Motion application dated and filed on 18th December 2023 seeks the following prayers:

   a. Spent.

   b. Spent.

   c. That pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction restraining the Defendant/Respondent herein or its servants and or employees and or authorized agents or any other persons acting on its behalf from selling by public auction and or private treaty the Plaintiff's property known as title number CR 18746, Subdivision No. 4112, Section I, MN which measures approximately 0.4133 hectares.

   d. That the costs of this application be provided for.

2. The Defendant replied to the Motion dated 18th December 2023 by filing a replying affidavit sworn by Faith Ndonga on 17th January 2024. Because this Court had issued injunctive orders on 18th December 2023, simultaneously, the Defendant filed an application on the even date seeking the following prayers:

   a. This Court be pleased to discharge the ex-parte order of the temporary injunction issued on 18th December 2023 restraining the Defendant, whether by itself, its agents, servants, and such

other persons acting or claiming through it from selling, alienating, disposing, transferring or in any other way dealing with the property known as CR. 18746 Subdivision No. 4112 Section 1, MN, which measures approximately 0.4133 hectares until further orders from this Court.

b. The Plaintiff's suit should be struck out against the Defendant for want of the jurisdiction of this Honourable Court.

c. In the alternative, the Plaintiff's suit should be struck out for being scandalous, vexatious, frivolous, and abusing the Court process.

d. The costs of this application and the suit be borne jointly and severally by the Plaintiff and the Plaintiff's Advocate.

3. The Court, recognizing the jurisdictional issue raised in the second application, directed that the two applications be heard simultaneously and that parties file composite written submissions on the same. I commend the extensive submissions filed by the learned counsels for the parties: Mr. Lewa, learned counsel for the Applicants, and Mr. Shah, learned counsel for the Respondents. The authorities cited by learned counsels will be duly considered by the Court where necessary.

4. The Plaintiff avers that they are the registered proprietors of all the parcel of land known as title number CR 18746, Subdivision No. 4112, Section I, MN, which measures approximately 0.4133 hectares. That they are guarantors of a Term Loan Facility of Kshs. 70,000,000.00 advanced to Ms. Quantum Petroleum Limited by the Defendant. The loan facility was secured by a First Legal Charge dated 15th October 2010 and a Further Legal Charge dated 20th June 2011, created over the suit parcel of land in favour of the Defendant. In exercising its statutory right of sale, Defendant did, through Ms. Dalali Traders, advertise the suit parcel of land for sale by public auction in the Daily Nation newspaper on Monday, the 4th of December 2023. Plaintiff states That before advertising the suit parcel of land for sale by public auction, Defendant did not serve Plaintiffs with a 90-day statutory notice as provided in Section 90 of the *Land Act*. It is against this significant legal background that the Plaintiff herein filed this suit vide a plaint dated 18th December 2023, in which plaint he is seeking, amongst other prayers, a declaration that the proposed sale of the suit parcel of land by public auction by Ms. Dalali Traders on the 19th December 2023, is illegality in law given the fact the same flies in the face of provisions of Section 90 of the *Land Act* 2012 as the Defendant did not serve the Plaintiffs with a statutory notice giving them a chance to redeem their property.

5. The Defendant contends the Plaintiffs executed all letters of offers as Guarantors/Chargors. It was expressly agreed, and more particularly in the Letter of Offer dated 12th February 2013 and Supplemental Letter of Offer dated 23rd December 2013, that the following terms and conditions would apply to the said facility:

a. The Term Loan facility would be repaid within a maximum period of Ninety-Six (96) months by way of equal monthly installments commencing December 2013;

b. Interest on the Term Loan Facility would be paid at the Bank's base lending rate at the time (which was 18% per annum);

c. In the event of default, the Term Loan would attract an additional default interest rate of 10% per annum and

d. In the event of default on the term loan, the total outstanding amounts would be due and payable immediately.

6. The said facility was secured by:

a. First Legal Charge dated 29th August 2009 over property known as Subdivision No. 1202 Section 1 Mainland;

b. First Legal Charge dated 15th October 2010 over property known as Subdivision No. 4112 Section 1 Mainland North.

c. Further Charge dated 20th June 2011 over the Property known as Subdivision No. 1202 Section 1 Mainland;

d. Second Further Charge dated 13th August 2013 over the Property known as Subdivision No. 1202 Section 1 Mainland.

7. The above facilities were secured by joint and several guarantees by the Plaintiffs herein—Patience S. Mturi and Jonathan Daniel Mturi, alongside other guarantors, James Daniel Mturi and John Evans Mturi.

8. Defendant asserts that in breach of the express terms of the facilities mentioned above, the borrower failed or neglected to make payment punctually as and when the same fell due, thus causing the Term loan facilities to be in arrears and, as a responsible financial institution, the Bank duly commenced recovery procedures by exercising its statutory power of sale.

9. Upon the Bank commencing recovery procedure, the Borrower went to court in Mombasa HCCC No. 97 Of 205—Quantum Petroleum Limited v Diamond Trust Bank Kenya Limited, filed on 23rd July 2015, challenging the Bank's exercise of its statutory power of sale.

10. The Bank duly filed its Statement of Defence and Replying Affidavit dated 24th August 2015 and 25th August 2015 in opposition to the application for injunction.

11. Following lengthy litigation, the borrower's application dated 23rd July 2015 was dismissed on 31st March 2017. The Court held that the Bank was adequately exercising its statutory power of sale and dismissed the application.

12. The borrower subsequently filed an application dated 19th December 2017 seeking a further stay, which Thande J. heard on 21st December 2017, who ordered that the borrower pay the arrears of Kshs. 10,000,000/—, failing which the Bank shall be at liberty to proceed with the sale by auction.

13. The borrower, aggrieved by the order as mentioned above, sought leave to appeal and a stay of any sale in the Court of Appeal via an Application dated 5th June 2018, which application was dismissed on 16th July 2019.

14. Subsequently, on 10th December 2019, the previous suit, Mombasa HCCC No. 97 of 2015, was dismissed for want of prosecution.

15. Despite Thande J's ruling, issued on the 21st of December 2017 in Mombasa HCCC No. 97 of 2015, and the receipt of all Statutory Notices and Auctioneer Redemption Notices, the borrower and Plaintiffs herein have defaulted on the Bank facilities, which amount has fallen into arrears to the tune of Kshs. 257,237,855.08/- which amount continues to accrue interest.

16. The Defendant further affirms that the Plaintiffs have failed to disclose to this Court the occurrences in Mombasa HCCC No. 97 of 2015, wherein, as the Plaintiff's guarantors, various attempts were made to stop the Bank from exercising its statutory power of sale, which efforts were all unfruitful. The Plaintiff failed to prosecute the matter, leading to its dismissal. The Plaintiffs have also failed to disclose that the Defendant issued them with a Statutory Notice over the Suit Property. The Defendant also issued a 40-day Notification of Sale pursuant to section 96 of the *Land Act*, dated 26th March 2015.

Despite the preceding, the Bank did not proceed with its statutory power of sale of the suit property but exercised forbearance, allowing the Plaintiffs to remedy the default. Due to the continued and flagrant default, the Bank was constrained to appoint Ms. Stephen Karanja Kang'ethe T/A as Ms.Dalali Traders Auctioneers to sell the suit properties via public auction. The auctioneers proceeded to cause the public auction advertisement to be published in the newspaper on 4th December 2023. The Plaintiffs, as a result, filed the present suit and application for an injunction, both dated 18th December 2023.

17. From the materials and submissions placed before me, the issues that fall for the determination of this Court are whether – this Court has jurisdiction to hear the application for an injunction and the suit, whether in the event the Court finds it has jurisdiction, whether a temporary injunction should issue and who should bear the costs of the two applications.

18. The Defendant contends that this Court's jurisdiction on the issue at hand is limited as conferred by the following legal provisions – Article 162(2) and Section 150 of the ELC Act, which provide that the Court is to deal with land and use incidental to it. In the instant application and the main suit, the Defendant submits that what is involved is a Charge dated 15th October 2010 over the suit property title number CR 18746, Subdivision No. 4112, Section 1, MN, which was registered in the names of the 1st and 2nd Plaintiffs. The defendant contends that the dispute herein is not the use of the suit property but a commercial dispute. In support of the above contention, the Defendant relies on the Court of Appeal case of Co-operative Bank of *Kenya Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, where the Court set the parameters on what amounts to use of land, what falls within the ELC and the High, significant being that a charge is an interest in land securing the payment of money or money's worth or the fulfillment 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. 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.

19. Consequently, the defendant proceeds to assert that a charge does not constitute the use of land within the meaning of Article 162 of *the Constitution*. 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 Court's jurisdiction to deal with disputes connected to the 'use' of land as discussed above. Such contracts should be incidental to land use; they do not include mortgages, charges, collection of dues, or rents that fall within the High Court's civil jurisdiction.

20. The Defendant believes that The Court of Appeal unequivocally held that disputes relating to Charges do not touch on the issue of land use (which falls within the purview of the Environment and Land Court) but rather fall within the civil jurisdiction of the High Court. In light of the above, the

Defendant submits that the Plaintiffs erroneously filed this suit in the Environment and Land Court, failing to appreciate that this Court lacks the requisite jurisdiction to attend to this matter.

21. On the other hand, Plaintiff submits that contrary to Defendant's contention, the Court is clothed with the requisite jurisdiction to hear and determine the application and the suit herein in general for the following reasons - the decision in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR did not divest the Court herein of its jurisdiction in matters to do with charges in general. Instead, the said decision was specific that it is only in matters of charges in which there is a dispute in accounts relating to charges on land, amount of money owing, and due where the Court with jurisdiction is the High Court of Kenya and not this Court.

22. In support of that view, the Plaintiff cites the case of *Mathew Namusei Chahasi v Cooperative Bank Limited & another* [2021] eKLR, which noted with approval in the decision in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2018] eKLR, The ELC has jurisdiction regarding instruments created in respect to land. By virtue of Sections 150 and 101 of the *Land Act* and the Registration of Titles Act, respectively, the ELC is the only Court with jurisdiction over disputes that arise concerning instruments created on land in relation to the statutes. This would include their validity, enforcement, and the process of their realization. This does not mean that the Court of Appeal was wrong in its reasoning in the Cooperative Bank of Kenya case. The issues of rendering accounts on those instruments and collection of levies and dues stand alone and in the jurisdiction of the Commercial division of the High Court. The judge in the *Namusei Chahasi Case* (supra)believed this is a fine distinction, which often confuses, leading to a conclusion that the ELC has no jurisdiction on matters dealing with charges.

23. The Plaintiff believes the decision in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 Others* [2017] eKLR is distinguishable from the facts obtained in the suit herein for, amongst other reasons, the following - the cause of action in the dispute herein is not about a matter of accounts between the Borrower and the Defendant as was the case in *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR. Instead, the cause of action and or the predominant issue in the suit herein is the contention by the Plaintiffs that they were not served with the 90-day notice before the Defendant put up the suit property for sale in the exercise of its statutory power of sale thus rendering the exercise of the said right by the Defendant void ab initio. The Plaintiff herein is not the Borrower of the financial facility as in the case of *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others* [2017] eKLR. Instead, the Plaintiffs herein are only Guarantors of the loan facility between the Borrower and the Defendant. Sections 150 of the *Land Act* and Section 101 of the *Land Registration Act* give the Court the requisite jurisdiction to hear and determine disputes where land is concerned. See Mathew Namusei Chahasi v Cooperative Bank Limited & another(supra).

24. Jurisdiction is everything when raised; the Court should deal with it immediately. See Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

25. The jurisdiction question is whether the ELC or the High Court is vested with jurisdiction on matters relating to charges. That question has been with us since the ELC was constituted in 2012. Mr. Shah learned counsel for the Defendant, cites the decision of the Court of Appeal in *Co-operative Bank Limited v Patrick Kang'ethe Njuguna & 5 others* [2017]; eKLR provides the manner to reckon

that question. Mr. Lewa learned counsel for the Plaintiffs distinguishes it by quoting several other authorities that interpreted that decision and concluded that the ELC has jurisdiction to hear matters relating to charges.

26. Defining what land use means vis-a-vis the jurisdiction of the ELC, the Superior Court said:

> "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.
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> 36. By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment 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.
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> 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."

27. On the ELC's jurisdiction, Section 13 (2) (d) of the *ELC Act*, this is what the Court of Appeal in the Kang'ethe Case (supra) proceeded to state:

> "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."

28. To my mind, the Court of Appeal, whose decisions are binding on this Court, provides that the ELC has no jurisdiction to deal with mortgages, charges, collection of dues, and rents—the same falls within the civil jurisdiction of the High Court. (underlined for emphasis).

29. This Court has in the past taken the same view see *Kinuthia v Kanyi & another* (Environment & Land Case E007 of 2023) [2024] KEELC 1625 (KLR) (20 March 2024) (Ruling). The position is further elaborated by this Court in the case of *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & another* [2021] eKLR, Ombwayo J, having analyzed the averments in the plaint in a matter before him, stated as follows:

> "The substratum of the suit therefore relates to the legal charges and the subsequent statutory power of sale. The court that has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the chargee has since been settle by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR where the court held as follows......"

Significantly, he proceeded to state:

> "The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit."

30. At the moment, we are dealing with a charge. The Plaintiffs do not dispute that. Their dispute revolves around the statutory notice of sale, which they claim was never served on them. They do not address the issues of the rigorous litigation, pitting the borrower, Ms. Quantum Petroleum Limited (whom they guaranteed), and the Bank in Mombasa HCCC No. 97 of 2015. It was over the same issue: debt and statutory notice of sale. At that time, the jurisdiction of the High Court was not challenged – over the same debt. In the ruling by Otieno J. in *Quantum Petroleum Limited v Diamond Trust Bank Kenya Ltd* [2017] eKLR and his lamentations on how investors will not set foot in this Country because of injunctions from our Courts, he stated:

> "I am in no doubt that with the debt and default acknowledged and no fault being laid on the obligations of the defendant to comply with the law under the *Land Act*, there cannot be said to exist prima facie with a probability of success.

13. Even the conduct of the plaintiff, even if a prima facie case had been established, would still disentitle it to the equitable order of injunction. I say so, noting that by the conduct set out by the defendant and not controverted by the plaintiff, the plaintiff has acted in a dilatory, dexterous, and unconscionable manner with no sign of any clean hands. This I say noting that no explanation has been offered on how the arrangement with Co-operative Bank evaporated. Equally, since 10th July 2015, when Chase Bank gave intent to take over the debt, this application was heard some 8 months later, and no progress could be reported on the takeover. One need not wonder if that letter was not but a smokescreen. However that may itself not the reason for failing to discern prima facie case by the plaintiff. The reason is that a debt is only resolved by payment and where a debt is acknowledged, it would be unconscionable, unlawful and unjust to stop the creditor from collecting his debt unless the creditor is shown to act unlawfully. Here, in this case, nothing has been shown to be unlawful in the conduct of the defendant, and to grant an injunction on the facts revealed would be to re-write the contract between the parties. That is not the duty or right of this court. The Court of Appeal in *Mrao Ltd vs First American Bank* [2003] eKLR, having cited with approval, Halburys Laws of England said: -

> "If courts are going to allow debtors to avoid paying debts by taking some of the defences I have seen in recent times, for instance, challenging contractual interest rates, banks will be crippled if not driven out of business together, and no serious investor will bring their capital into a country whose courts are a haven for defaulters."

31. A look at how the plaint is couched also reveals that the Plaintiffs will, in this suit, seek the taking of accounts, as the Borrowers did in Mombasa HCCC No. 97 of 2015—see paragraph 7(c) of the plaint:

> " The Defendant has declined to issue the borrower with particularised loan statement despite the fact that the Borrower requested for the same way back on 20th July 2020."

See also prayers c of the plaint:

> " An order directing the Defendant to furnish the Plaintiff and or the Borrower with a particularised statement of accounts for the loan facility secured by the charges created over the suit parcel of land, the First legal charge dated 15th October 2010 and fourth legal Charge dated 20th June 2011"

32. Looking keenly at the plaint suggests we are niftily returning to Mombasa HCCC No. 97 of 2015, which represents an abuse of the Court process. The issues here were discussed there. We have gone back. It is a reincarnation of the Mombasa case through the side door.

33. I need not proceed to consider whether to issue an injunction. I have downed tools. This Court has no jurisdiction to hear the matter further. It belongs to the High Court. If there are two schools on interpreting the Kang'ethe Case (supra) by the ELC, Mr. Lewa learned counsel for the Plaintiff could take the chance to prefer an appeal for clarification by the Court of Appeal. Perhaps it will enrich our jurisprudence and thinking around this area.

34. The upshot is that the application dated 18th December 2023 is hereby dismissed, and the entire suit is struck out with costs. The application dated 17th January 2024 succeeds on the jurisdiction question, with costs to the Defendants.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 26TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr.Lewa, for the Plaintiff

Mr. Shah, for the Defendant

Happy: Court Assistant