



**Zamzam v Gulf African Bank Limited (Cause E006 of 2022)
[2022] KEELRC 1618 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E006 OF 2022**

**AK NZEI, J
JULY 28, 2022**

BETWEEN

SAID AHMED ZAMZAM CLAIMANT

AND

GULF AFRICAN BANK LIMITED RESPONDENT

RULING

1. The Claimant/Applicant sued the Respondent vide a statement of claim dated 9th February 2022 and pleaded, inter-alia:-

“3. that by an employment contract entered into on 2nd February 2015, the Respondent engaged the Claimant as a Treasury Sales Officer on permanent and pensionable basis on a basic salary of ksh. 90,000 per month.

5. that the Claimant rose through the ranks and served in various roles and capacities within the Respondent bank, the last being a Customer Service Officer earning ksh. 132,200 per month plus bonuses.

6. that by a letter dated 16th September 2021, the Respondent terminated the Claimant’s employment on grounds that the Claimant showed disrespect for a customer and was careless in the performance of his duties as per Section 44(4) (c) of the Employment Act, and that the termination was unjustified and unfair.

9. that the Claimant had taken a “reducing Musharakah” loan facility with the bank totaling ksh. 5,095,162.54, which he was servicing prior to termination.

10. that through this facility the Claimant had purchased a residential house on plot (subdivision) No. 4119(original No. 160/7) Section 1 Mainland North, on which he had



taken a first legal charge, and was paying monthly instalments of ksh. 36,990.45 in respect of the loan facility.

11. that the Respondent has threatened to unilaterally increase the interest rate (on the loan) from 5% to the market rate (approximately 12.5%), to over ksh. 70,000 which is over 150% increment.

13. that the loan facility was tied to the Claimant's employment and it would be unjust and unfair for the Claimant to continue servicing the loan since he was no longer employed by the Respondent."

2. In the suit, the Claimant seeks reliefs which include compensation for unfair termination, payment of lost future earnings and discharge of the charged property, among others.
3. On 14th April 2022, the Claimant filed a Notice of Motion dated 13th April 2022 seeking orders:-
 - a. that pending hearing and determination of the suit, the Respondent by itself, its officers, servants, agents or otherwise howsoever be restrained from selling the property known as Sub-division Mombasa 4119 (Original Number 160/7) Section 1 Mainland North by Public auction or otherwise howsoever as indicated in their notice dated 29th March 2022, or at any other time thereafter and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the plaintiff/Applicant's interest in the said property.
 - b. that costs of the application be provided for.
4. The foregoing is the application before me, and is supported by the Claimant/Applicant's supporting affidavit sworn on 13th April 2022.
5. The application is opposed by the Respondent, which filed grounds of opposition on 28/4/2022 dated 27/4/2022. The Respondent objected to this Court's jurisdiction over the subject matter in the application and stated, inter-alia:-
 - a. that the ELRC lacks jurisdiction to entertain a dispute relating to the exercise of a chargee's statutory power of sale under the Land Act.
 - b. that ELRC lacks jurisdiction to re-write a contract between the parties. Clause 5.3 of the letter of offer dated 13th November 2015 expressly provides for the applicable profit rate.
 - c. the ELRC lacks jurisdiction to force the Respondent to accept a settlement proposal when that settlement proposal is contrary to the contract between the parties.
6. Whereas the Claimant pleaded that he was employed by the Respondent on 2nd February 2013, the Respondent letter offering a loan facility is dated 13th November 2015 and the charge over the Claimant's property (securing the loan facility) is shown to have been executed by both the Claimant and the Respondent on 7th November 2016.
7. The Claimant's contract of employment and the charge over his property are two different contracts executed under, and governed by two distinct law regimes. Whereas the Claimant's employment and termination of employment are governed by the provisions of the Employment Act 2007, execution of the legal charge and exercise of the chargee's power of sale thereon are governed by the Land Act 2012 and the Land Registration Act. Under Article 162(2) of the Constitution of Kenya 2010, this Court's special jurisdiction is over employment and labour relations matters. Matters relating to environment, use and occupation of, and title to land fall under the Environment and Land Court's Jurisdiction



pursuant to Article 162(2)(b) of the Constitution of Kenya. The manner of exercise of a chargee's rights and power of sale falls within the jurisdiction of the ELC, not this Court.

8. It was held as follows in the case of Margaret Muthoni Njoroge -vs- Housing Finance Company Limited & another [2020] eKLR

“...the manner of exercise of the chargee's right of sale is contained in the Land Act, 2012 and Land Registration Act, 2012, and both statutes provide that it is the Environment and Land Court (and the Magistrate's Court, subject to pecuniary limits) which has jurisdiction to handle disputes arising from the matters in the said statutes. I really do not see the place of the argument that the Environment and Land Court has no jurisdiction to determine issues relating to a charge or the manner of exercise by a chargee of its statutory right to sell.”

9. The issue of jurisdiction on matters charges however changes when the matter in question is not the charge(instrument), but the amount of money owing and payable thereunder. The Court of Appeal had the following to say in the case of Co-operative Bank Of Kenya Limited -vs- Patrick Kangethe Njuguna & 5 others [2017] eKLR

“40...However, it bears repeating that the cause of action herein was never the charge (instrument) but the amount 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.

24. 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 determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other land, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3), the Constitution Provides inter-alia; that:-

- 1) subject to clause (5), the High Court shall have
 - (a) unlimited jurisdiction in criminal and civil matters.”

10. The Applicant's application herein raises issues of exercise of the chargee's right and power of sale and computation/calculation of amounts that the Claimant/Applicant is supposed to pay under the charge. This Court lacks jurisdiction to determine either of the two issues.

11. In the case of Samuel Kamau Macharia -vs- KCB and others [2012] eKLR, the Supreme Court of Kenya held as follows:-

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. It is my finding that orders sought, and matters pleaded in the Notice of Motion dated 13th April 2022 are outside this Court's jurisdiction. The Court cannot arrogate itself jurisdiction beyond that which is conferred upon it by the law. The application is improperly before this Court and is therefore incompetent. The same is hereby struck off with no orders as to costs.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant

..... for Respondent

