Thande & another v Tripple N Car Clinic Limited & another (Environment & Land Case E251 of 2024) [2024] KEELC 13579 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13579 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E251 OF 2024

JO MBOYA, J

NOVEMBER 15, 2024

BETWEEN

DEDAN KAMAU THANDE ..... 1ST PLAINTIFF

MARY WANGARI NJONDE ..... 2ND PLAINTIFF

AND

TRIPPLE N CAR CLINIC LIMITED ..... 1ST RESPONDENT

CREDIT BANK PLC ..... 2ND RESPONDENT

RULING

Introduction

1. The subject ruling relates to the Notice of Motion Application dated the 20th June 2024, filed by and on behalf of the Plaintiffs/Applicants and the Notice of Preliminary Objection dated the 3rd September 2024. For coherence, the Preliminary Objection has been filed on behalf of the 2nd Defendant/Respondent.

2. Given that the ruling relates to both the application and the notice of preliminary objection, it suffices to highlight and reproduce the diverse reliefs adverted to at the foot of the application and the preliminary objection.

3. The application beforehand seeks the following reliefs [verbatim]:

    i. The Application herein be certified as urgent, and service thereof be dispensed in the first instance.

    ii. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees and or servants from valuing, advertising to sale by public auction, selling, entering, taking possession of or in any way

interfering with the Plaintiffs use and ownership of land known as LR. No.Dagoretti/ Kangemi/1058 pending inter parties hearing of this Application;

iii. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees and or servants from valuing, advertising to sale by public auction, selling, entering, taking possession of or in any way interfering with the Plaintiffs use and ownership of land known as LR.No.Dagoretti/ Kangemi/1058 hearing and final determination of this Application.

iv. This Honourable Court be pleased to issue a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their agents, employees and or servants from valuing, advertising to sale by public auction, selling, entering, taking possession of or in any way interfering with the Plaintiffs use and ownership of land known as LR.No. Dagoretti/ Kangemi/1058 hearing and final determination of this suit.

v. Any other orders as this Honourable Court deems fit to grant; and

Costs of this Application be provided for.

4. The instant application is anchored on various grounds which have been highlighted at the foot thereof. Furthermore, the application is supported by the affidavit of Dedan Kamau Thande, who is the 1st Plaintiff/Applicant herein. In addition, the application is also supported by a supplementary affidavit sworn on the 23rd September 2024 by the 1st Applicant.

5. Upon being served with the pleadings inclusive of the application beforehand, the 2nd Defendant/ Respondent filed a Replying affidavit sworn on 3rd September 2024. For coherence, the Replying affidavit has been sworn by Wainaina Francis Ngaruiya. Suffice it to posit, that the replying affidavit contains several annexures running into 273 pages.

6. Other than the replying affidavit [details in terms of the preceding paragraph] the 2nd Defendant/ Respondent has also filed a Notice of preliminary objection dated the 3rd September 2024.

7. For ease of appreciation the notice of preliminary objection adverts to the grounds following;

i. That this Honourable Court, being an Environment and Land Court, lacks requisite jurisdiction to hear and determine the present application and the suit challenging the Bank's exercise of statutory power of sale under the *Land Act*.

ii. That the application and the suit contravene mandatory provisions of law per Article 162of *the Constitution* of Kenya and Section 13 (1) and (2) of the Environment and *Land Act* Court. The suit as currently instituted is in contra-statute and nullity ab initio.

iii. That the application and the suit in their entirety are fatally incompetent, incurably defective, an abuse of the process of this Honourable Court and cannot stand in law.

8. Suffice it to state that the 1st Defendant however has neither entered appearance nor filed any pleadings.

9. The instant application came up for hearing on the 24th September 2024, whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submissions. To this end, the court ventured forward and described the timelines for the filing and exchange of the written submissions.

10. Pursuant to the directions by the court, the Plaintiff/Applicants herein filed two [2] sets of written submissions. The first set of written submissions is dated the 23rd September 2024, whilst the second set of submissions is dated the 23rd October 2024. On the other hand, the 2nd Defendant filed written

submissions dated 14th October 2024. Instructively, the three [3] sets of written submissions form part of the record of the court.

Parties' Submissions:

a. Applicant's Submissions:

11. The Applicant herein filed two [2] sets of written submissions, namely, the submissions dated the 23rd September 2024 and the ones dated 23rd October 2024. Suffice it to state that the Applicants have adopted the grounds contained at the foot of the application. Similarly, the Applicants have also reiterated the averments contained in the supporting affidavit and the further affidavit, respectively.

12. Other than the foregoing, learned counsel for the Applicants has highlighted and canvassed four [4] salient issues for consideration and determination by the court.

13. Firstly, learned counsel for the Applicants has submitted that the 1st Applicant herein is the lawful and registered proprietor of the L.R No. Dagoreti/Kangemi/1058 [hereinafter referred to as the suit property]. Furthermore, it has been contended that the suit property had hitherto been charged to and in favour of M/s Equity Bank Ltd and that the charge in favour of M/s Equity Bank Ltd has never been discharged or otherwise.

14. Nevertheless, learned counsel has contended that the charge that had hitherto been registered in favour of M/s Equity Bank Ltd was some how discharged and thereafter the title of the suit property was charged to and in favour of the 2nd Defendant/Respondent.

15. Be that as it may, learned counsel for the Applicants has submitted that the discharge of charge of the suit property from M/s Equity Bank Ltd and the subsequent charge of the suit property in favour of the 2nd Defendant/Respondent, were undertaken without the knowledge and involvement of the 1st Applicant. Consequently and in this regard, learned counsel for the Applicants has therefore contended that the charge in favour of the 2nd Defendant was fraudulently and illegally registered over the suit property.

16. Additionally, learned counsel for the Applicants has also submitted that the charge instrument in favour of the 2nd Defendant/Respondent also indicates that the spousal consent of the 2nd Plaintiff/Applicant was procured and obtained. However, it has been posited that the 2nd Plaintiff/Applicant works and resides in Washington DC, in the United States of America [USA]; and has not returned to Kenya. In any event, it has been contended that it was not possible for the 2nd Plaintiff/Applicant to have appeared before an advocate/commissioner of oaths in Nairobi as alleged at the foot of the spousal consent.

17. Furthermore, learned counsel for the Applicants has also submitted that the charge which was registered in respect of the suit property is said to have been procured on the basis that the 1st Applicant is a director of the 1st Defendant. Nevertheless, it has been posited that the 1st Applicant herein has never been a director of the 1st Defendant/Respondent.

18. Other than the foregoing, learned counsel for the Applicant has also submitted that the enlistment of the 1st Applicant has a director of the 1st Defendant/Respondent was illegal and unlawful. Furthermore, it has been posited that there are no documentation[s] obtainable at the registrar of companies to underpin the manner in which the 1st Applicant became a director of the 1st Defendant/Respondent.

19. It was the further submissions by learned counsel for the Applicants that the minutes of the 1st Defendant/Respondent that posited that the 1st Applicant herein participated in the meeting of the

1st Defendant/Respondent leading to the authorization of the charge, were equally illegal. Instructive, learned counsel for the Applicants has contended that the minutes of the 1st Defendant/Respondent, which were relied upon to procure the registration of the charge were equally illegal.

20. In a nutshell, learned counsel for the Applicants has submitted that the Applicants herein have established and demonstrated the existence of a prim facie case with probability of success. Pertinently, it has been posited that the impugned charge in favour of the 2nd Defendant/Respondent was illegally registered and thus same warrants due investigations by the court.

21. In support of the submissions that the Applicants have established and demonstrated the existence of a prima facie case with probability of success, learned counsel for the Applicants has cited and referenced inter-alia the case of Giella v Cassman Brown & Company Ltd [1973] EA 358 and Nguruman Limited v Jan Bode Nielsen & 2 Others [2014]eKLR, respectively.

22. Secondly, learned counsel for the Applicants has submitted that the Applicants herein shall be disposed to suffer irreparable loss if the orders of temporary injunction are not granted. In particular, it has been submitted that the 2nd Defendant/Respondent shall proceed to exercise its statutory power of sale over and in respect of the suit property.

23. In addition, it has been contended that the sale/alienation of the suit property by the 2nd Defendant/ Respondent shall place the suit property beyond the reach of the Applicants. In this regard, learned counsel has posited that the imminent loss would thus be irreparable and not compensable in monetary terms.

24. Other than the foregoing, learned counsel for the Applicants has also submitted that it is imperative that the substratum/ gravamen of the suit herein be preserved pending the hearing and determination of the suit. To this end, learned counsel for the Applicants has invited the court to take cognizance of the decision in the case of Otieno v Ougo & Another [1987]eKLR.

25. Thirdly, learned counsel for the Applicants has submitted that the balance of convenience tilts in favour of the Applicants. In particular, it has been posited that the suit property comprises of the family land wherein the Applicants have established their matrimonial home.

26. Besides, learned counsel for the Applicants has also submitted that the Applicants have also erected various residential units on the suit property. In this regard, it has been contended that the Applicants therefore have huge sentimental attachment to the suit property.

27. Arising from the foregoing, it has been submitted that the extent of inconvenience to be suffered by the Applicants would be greater than any prejudice/ inconvinience, if any, that the 2nd Defendant/ Respondent may suffer if the orders of temporary injunction are granted.

28. In support of the submissions touching on and concerning balance of convenience, learned counsel for the Applicants has cited and referred the holding in the case of Puis Kipchirchir Kogo v Frank Kimeli Tenai [2018]eKLR, where the concept of inconvinience was discussed and elaborated upon.

29. Lastly, learned counsel for the Applicants has submitted that though the 2nd Defendant/Respondent has adverted to and contended that the Applicants are guilty of non-disclosure, the 2nd Defendant has however failed to plead the particulars of [sic] the non-disclosure in question.

30. At any rate, learned counsel for the Applicants has submitted that where the particulars of non-disclosure have not been availed, the court ought not to allow the 2nd Defendant/Respondent to canvass such issues in the submissions.

31. Additionally, learned counsel for the Applicants has submitted that submissions cannot be used for purposes of introducing and canvassing new issues which were neither adverted to nor espoused in the pleadings and affidavits. In this regard, learned counsel for the Applicants has invited the court to disregard the question of non-disclosure.

32. To buttress the foregoing submissions, learned counsel for the Applicants has cited and referenced the holding in Mungai v Ngunya & 3 Others [land case E154 of 2023] [2024] KLR.

33. In view of the foregoing submissions, learned counsel for the Applicant has implored the court to find and hold that the application for temporary injunction is meritorious. In this regard, the court has been invited to grant the reliefs sought at the foot of the application and thus to preserve the substratum of the suit pending the hearing and determination of the Suit herein.

b.2nd Respondent's Submissions:

34. The 2nd Respondent filed written submissions dated the 14th October 2024 and wherein same [2nd Defendant/Respondent] has canvassed the preliminary objection dated the 3rd September 2024.

35. First and foremost, learned counsel for the 2nd Respondent has submitted that the dispute beforehand touches on and concerns the validity of the charge and the further charge that were registered in favour of the 2nd Defendant. To the extent that the suit touches on and concerns inter-alia the validity of the charge and further charge, it has been contended that the dispute falls outside the jurisdictional remit of the Environment and Land court.

36. To buttress the foregoing submissions, learned counsel for the 2nd Respondent has cited and referenced inter-alia the case of Republic c Karisa Chengo & 2 Others [2017]eKLR, Cooperative Bank of Kenya Ltd v Patrick Kange'the Njuguna & 5 Others [2017]eKLR and Mwandali v Nairobi City County & 3 Others (Environment and Land Petition No. 81 of 2018) [2024] KEELC 5717 [KLR], respectively.

37. Secondly, learned counsel for the 2nd Respondent has also submitted that another aspect of the dispute beforehand touches on the propriety or validity of the spousal consent which was issued to facilitate the charge. In this regard, learned counsel for the 2nd Respondent has submitted that the question of the spousal consent is also outside the jurisdictional remit of the Environment and land court.

38. Additionally, it has been submitted that the suit beforehand is calculated to challenge the exercise of the 2nd Respondent's statutory power of sale. In this regard, learned counsel for the 2nd Respondent has equally posited that such a dispute can only be raised and canvassed before the High court and not otherwise.

39. In a nutshell, learned counsel for the 2nd Respondent has submitted that the entirety of the dispute beforehand does not fall within the jurisdiction of this court, namely, the Environment and Land Court. In this regard, learned counsel for the 2nd Respondent has implored the court to find and hold that the suit is premature and misconceived.

40. To vindicate the importance of jurisdiction of the court, learned counsel for the 2nd Respondent has cited and referenced inter-alia the holding in the case of Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd [1989]eKLR; S K Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012]eKLR and Phoenix of East African Assurance Company Ltd v S M Thiga T/s Thiga Newspapers Services [2019]eKLR, respectively.

41. Flowing from the foregoing submissions, learned counsel for the 2nd Respondent has therefore invited the court to find and hold that the Environment and Land court is divested of the requisite jurisdiction

to entertain the subject suit. In this regard, the court has been implored to strike out both the suit and the application.

Issues For Determination:

42. Having reviewed the pleadings; notice of motion application and the notice of preliminary objection and upon taking into account the written submissions filed on behalf of the respective parties, the following issues do arise [crystalise]and are thus worthy of determination.

    i. Whether the Honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the subject dispute or otherwise.

    ii. Whether the Applicants herein have established and demonstrated the existence of a prima facie case with probability of success.

    iii. Whether the Applicants have espoused the likelihood of irreparable loss accruing or otherwise.

Analysis And Determination

Issue Number 1 Whether the Honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the subject dispute or otherwise.

43. Learned counsel for the 2nd Defendant has contended that the dispute beforehand touches on and concerns the question of validity of the charge and further charge that were registered in respect of the suit property. In particular, it has been contended that the crux of the Applicant's case is to the effect that the charge and further charge were procured by fraud and illegality.

44. Furthermore, learned counsel for the 2nd Defendant/Respondent has submitted that the Applicant's primary contention is that the 1st Applicant was not and has never been a director of the 1st Defendant. In any event, it has been contended that the Applicants are also challenging the propriety of the directorship of the 1st Applicant as well as the validity of [sic]the minutes deployed by the 1st Defendant/Respondent in procuring the impugned banking facility.

45. Additionally, learned counsel for the 2nd Defendant/Respondent has also submitted that the other aspect of the Applicants's suit touches on and concerns the validity of the exercise of the 2nd Defendant's/Respondent's exercise of the statutory power of sale.

46. Arising from the foregoing, learned counsel for the 2nd Defendant/Respondent has therefore implored the court to find and hold that the issues that underpin the dispute before the court do not fall within the jurisdictional remit of the Environment and land court. In this regard, the court has been implored to strike out the suit and the application thereunder;

47. Suffice it to point out that upon being served with the notice of preliminary objections, learned counsel for the Applicants chose to file a replying affidavit sworn on the 23rd September 2024. Instructively, learned counsel for the Applicants have contended that the dispute beforehand challenges the validity of the charge and the process attendant to its registration.

48. On the other hand, learned counsel for the Applicant has also submitted that the predominant question before the court is the validity of the impugned charge. In this regard, it has been posited that the subject suit therefore touches on and concerns an interest in land.

49. Arising from the foregoing submissions, learned counsel for the Applicants has therefore implored the court to find and hold that the entirety of the dispute beforehand falls within the jurisdiction of the

Environment and land court. In this regard, learned counsel for the Applicants has cited and referenced the provisions of Article 162[2][b] of *the Constitution* 2010.

50. Having reviewed the rival submissions, I beg to take the following position. Firstly, the crux of the Applicant's case before the court touches on and concerns the question of validity of the charge and further charge that were registered in favour of the 2nd Defendant/Respondent.

51. To the extent that the suit beforehand seeks to challenge and impugn the validity of the charge and further charge, it is my humble albeit considered position that same [suit] does not fall within the jurisdictional remit of the Environment and land court.

52. There may arise reservations and continuous debate on the question that a charge creates an interest in land and that the validity of such a charge, no doubt impacts on the title to and interest over land. Furthermore, the discourse may very well take a trajectory that a charge constitutes a contract for disposition of an interest in land. However, the discourse turning on the said issues and the true import of Section 13[2] of the *Environment and Land Court Act*, may have to await further consideration by a Five-judge bench of the Court of Appeal in due time.

53. Nevertheless, as things stand now, the obtaining legal position [jurisprudence] is to the effect that disputes touching on and concerning mortgages and charges and the validity thereof, do not fall within the jurisdictional remit of the Environment and land court.

54. Pertinently, the foregoing position of the law was espoused and elaborated upon by the Court of Appeal in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 others [2017] eKLR, where the court stated thus;

> 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. In Paramount Bank Limited vs. Vaqvi Syed Qamara & another [2017] eKLR, this Court while discussing the jurisdiction of the Employment and Labour Relations Court over a claim of malicious prosecution expressed itself thus,
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> > "The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately."
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> By parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender. [emphasis supplied]

55. The second aspect of the Applicant's claim before the court touches on and concerns the propriety and validity of the spousal consent which is said to have been given by the 2nd Applicant. In this regard, it

suffices to recall that the Applicants contend that the 2nd Applicant works and resides at Washington DC in the United States of America.

56. Additionally, it has been contended that the 2nd Applicant herein has not returned to Kenya and hence it is inconceivable that same [2nd Applicant] could be said to have appeared before an advocate/ commissioner of oaths in Nairobi for purposes of executing the spousal consent.

57. Premised on the contention based on [sic] the impropriety and invalidity of the spousal consent, learned counsel for the Applicant has therefore contended that the charge and further charge before the court are invalid and thus illegal.

58. Yet again, I beg to underscore that the aspect of the suit which highlights [sic] the invalidity of the spousal consent was also discussed and considered by the court of appeal. Similarly, the court of appeal held that the question of the spousal consent is intertwined with the charge/mortgage and hence same falls within the jurisdictional remit of the high court.

59. To buttress the foregoing exposition of the law, it suffices to cite and reference the holding in the case of *Diamond Trust Bank Kenya Limited vversus Fatma Hassan Hadi; Mombasa Civil Appeal No. 18 of 2020*; [Uunreported], where the court stated as hereunder;

> "In the present case, although the Respondent is not privy to the instrument of the legal charge, there is no doubt that what the Respondent is seeking before the ELC is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this Court in Co-Operative Bank of Kenya Limited vs. Patrick Kang'ethe Njuguna & 5 others (above), is a commercial matter for adjudication before the High Court. In our view therefore, the judge erred in holding that the ELC was the correct forum and that it was properly seized of the matter.

60. The third perspective which has been canvassed by the Applicants herein touches on and concerns the exercise of the 2nd Defendant/Respondent statutory power of sale. In particular, it has been contended that the 2nd Defendant/Respondent is endeavouring to exercise its statutory powers of sale illegally and unlawfully. [See paragraph 13 of the plaint dated 20th June 2024].

61. To my mind, the question of the validity and legality of the exercise of the 2nd Defendant/Respondent statutory power of sale is also a matter that has received due consideration by the Court of Appeal.

62. Suffice it to posit, that the Court of Appeal has held that such an issue does not fall within the jurisdictional parameters of the Environment and land court.

63. To buttress the foregoing position, it suffices to cite and reference the case of Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment), where the court stated thus;

> 16.In Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR, this Court held that:"
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> 25. The respective jurisdictions of the ELC and the High Court are well spelt out by our Constitution. With regard to the ELC, 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 ....
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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 fulfilment 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.

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.

.....

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."

64. The fourth perspective that flows from the Applicants' suit beforehand touches on whether or not the 1st Applicant is a director of the 1st Defendant/Respondent or whether the enlisting of the 1st Applicant's name as a director of the 1st Defendant/Respondent was illegal and unlawful.

65. To my mind, the interrogation and/or investigations of this complaint will entail examination of various company records held by the Registrar of companies. Furthermore, the determination of this aspect would also involve interrogation of various provisions of the Company Act 2015. To my mind, this aspect of the dispute touches on and concerns jurisdiction of the High court. [See Section 2 of the *Companies Act*, 2015].

66. The fifth perspective that also flows from the Applicant's case relates to the propriety of validity of the minutes of the 1st Defendant/Respondent and wherein the 1st Applicant is contended to have participated. Instructively, these are the minutes that culminated into the charge of the suit property in favour of the 2nd Defendant/Respondent.

67. For good measure, the 1st Applicant contends that the impugned minutes are fraudulent and illegal, insofar as same [1st Applicant] was neither party nor privy to same. Furthermore, the 1st Applicant has also contended that his signature was forged.

68. Similarly, I hold the humble view, that the interrogation of the minutes of the 1st Defendant/Respondent which led to the creation of the charge also falls outside the purview of the Environment and land court.

69. Finally, it is not lost on this court that the Applicants have also contended that the creation of the impugned charges [charge and further charge] violates Article 21 of the 1st Defendant's articles of association. [See paragraph 18 of the supporting affidavit. See also paragraph 12 of the Plaint].

70. Pertinently, whether or not the provisions of Article 21 of the 1st Defendant's/Respondent's articles of association were complied with or otherwise is a question that touches on the management of the 1st

Defendant/Respondent and its affairs. Yet again, the subject issue falls within the jurisdictional remit of the High court [See Section 2 of the *Companies Act*, 2015].

71. Arising from the foregoing discourse, there is no gainsaying that the entirety of the claim being propagated by the Applicants falls outside the jurisdictional remit of the Environment and land court.

72. Suffice it to point out that jurisdiction is everything and without jurisdiction, a court of law is divested of the requisite authority/mandate to adjudicate upon a dispute. Furthermore, the jurisdiction of the court to engage with a matter must be expressly donated by *the constitution* or statue; or both. At any rate, the Court is prohibited from assuming jurisdiction by way of innovation or craft.

73. The importance of jurisdiction of a court to engage with and/or adjudicate upon a particular dispute was elaborated by the Supreme Court of Kenya in the case of In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling), where the court held as hereunder;

> 29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."
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> 30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

74. The discernment of whether or not a court is vested with jurisdiction was also highlighted by the supreme court of Kenya in the case of Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), where the court held as hereunder;

> 68. A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.
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> This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

75. The legal implication and the consequence[s] attendant to proceedings and orders handed down by a court without jurisdiction was also underscored in the case of Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR.

76. For coherence, the Court of Appeal stated and hold thus;

> 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
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> 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context".

77. Flowing from the foregoing analysis, my answer to issue number one [1] is to the effect that the Environment and land court is devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the issues adverted to at the foot of the subject matter.

Issue Number 2 Whether the Applicants herein have established and demonstrated the existence of a prima facie case with probability of success.

78. Having come to the conclusion that this court is devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the subject matter, it would have been apposite to strike out the suit and down my tools. Indeed, that is the just thing to do.

79. However, the parties herein agreed to canvass both the application and the notice of preliminary objection simultaneously. In this regard, the court is therefore enjoined to venture forward and consider whether or not the Applicant has established a prima facie case with probability of success.

80. To start with, it is imperative to discern and appreciate what is the meaning and import of the term prima facie case. Suffice it to posit that the definition of what constitutes a prima facie case has received judicial interpretation in various cases.

81. In the case of Mrao Ltd v First American Bank of Kenya [2003]eKLR, the Court of Appeal defined a prima facie case to mean;

> 4. A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

82. Furthermore, what constitutes a prima facie case was revisited by the court of appeal in the case of Nguruman Limited v Jan Bonde Nielson and Others [2014] eklr.

83. For ease of appreciation, the honourable Court of Appeal stated as hereunder

> " Prima facie" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the American Cyanamid Co. Ethicon Ltd [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332.
>
> Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:
>
> "In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case.
>
> It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.
>
> We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely.

84. Duly guided by the definition of what constitutes a prima facie case, it is now apposite to revert to the instant matter and to discern whether the Applicants have established and demonstrated a prima facie case with probability of success.

85. Firstly, the 1st Applicant has contended that the suit property was hitherto charged in favour of Equity Bank Ltd. Furthermore, it has been posited that the charge in favour of Equity Bank Ltd had not been discharged.

86. Nevertheless, the 1st Applicant has contended that the charge in favour of M/s Equity Bank Ltd was discharged without his [1st Applicant's] knowledge and involvement. In this regard, what I hear the 1st Applicant to be stating is that there was fraud and illegality in the discharge of the charge from Equity Bank Ltd.

87. However, despite the colourful arguments by learned counsel for the Applicants, it is not lost on the court that the 1st Applicant herein has neither raised nor lodged a criminal complaint with the Directorate of criminal investigation [DCI] as pertains to the impugned fraud.

88. Additionally, it is also worth pointing out that the discharge of the charge by M/s Equity Bank Ltd without the participation and involvement of the Applicant would also constitute misconduct on

the part of M/s Equity Bank Ltd. To this end, one would have expected the 1st Applicant to lodge a complaint with M/s Central Bank of Kenya for due investigations and appropriate sanction.

89. Thirdly, the 1st Applicant has also contended that the charge and further charge in favour of the 2nd Defendant/Respondent were also procured illegally and fraudulently. In particular, the 1st Applicant contends that his signature on the impugned charge and further charge were forged.

90. Suffice it to point out that fraud and forgery are serious cognizable offenses. In this regard, a reasonable and conscientious Kenyan, the 1st Applicant not excepted, would have been expected to lodge a criminal complaint for due investigations.

91. Fourthly, the 1st Applicant has also contended that same [1st Applicant] has also been enlisted as a director of the 1st Defendant/Respondent albeit without his knowledge. Instructively, the 1st Applicant contends that his enlistment as a director of the 1st Defendant/Respondent is equally a fraud and an illegality.

92. If the foregoing averments were true, one would have expected the 1st Applicant to raise a complaint with the Registrar of companies. Furthermore, one would also have expected the 1st Applicant to file a suit before the High court seeking to have his name struck out and/or expunged from the records of the Registrar of companies.

93. However, there is no gainsaying that the 1st Applicant has not done anything to that effect. For good measure, the 1st Applicant seems to be content with making omnibus allegations without any endeavour to interrogate the legal consequences attendant to same.

94. The other perspective that merits consideration is the averments by the 1st Applicant that the minutes of the land control board were also forged. Despite the foregoing contention, there is no gainsaying that the 1st Applicant has also not challenged the impugned land control board minutes and the consent. Notably, no suit has ever been filed to that effect.

95. In addition, the 1st Applicant has also contended that the minutes of the 1st Respondent seems to suggest that same [1st Applicant] was privy and party thereto. If the 1st Applicant was not privy thereto and his signature has been forged, nothing would have been easier than for the 1st Applicant to raise a complaint with DCI for purposes of investigations and appropriate actions.

96. Curiously, the 1st Applicant herein has posited elsewhere that the 1st Respondent company was incorporated by his son. In this regard, it appears that if there was any fraud [if] then same was in-house and the 1st Applicant must be party thereto.

97. Perhaps, the failure by the 1st Applicant to take precipitate action including reporting [sic] the fraud and illegality is informed by the fact of family involvement in the impugned transactions.

98. On the other hand, the 1st Applicant has also raised a complaint that though same [1st Applicant] did not execute the charge and further charge, it is contended that same [1st Applicant] appeared before some advocates who [sic] attested his [Applicant's] signature.

99. Confronted with the attestation of his signature, the 1st Applicant contends that same did not appear before the various advocates/commissioners of oaths. Easier said than done.

100. Assuming for the sake or arguments only, that the 1st Applicant did not appear before the named advocates for purposes of executing the charge and the further charge, then a serious question of fraud, forgery and misconduct arises. In this regard, one would have expected the 1st Applicant to lodge a compliant with the Advocates Complaints Commission or the Advocates Disciplinary Tribunal. [See Sections 57, 58, 59 and 62 of the *Advocates Act* Chapter 16 Laws of Kenya].

101. Without exhausting the complaints which the Applicants seeks to ventilate before the court, it is apposite to address the issue that the spousal consent was also forged. In this respect, it has been contended that the 2nd Respondent works and resides in Washington DC, United States of America [USA]; and was not therefore able to appear before an advocate/commissioner of oaths in Nairobi in the manner alleged at the foot of the spousal consent.

102. This is yet another serious complaint. One would have expected the 2nd Applicant to lodge and mount a criminal complaint so that the culprits, if any, can be investigated and prosecuted.

103. Nevertheless, the 2nd Applicant, just as the 1st Applicant, seems to be content with status quo. Suffice it to posit that there appears to be much more that what is adverted to in the body of the supporting affidavit and the further affidavit, respectively.

104. To my mind, the serious questions which have been highlighted in the preceding paragraphs, negate and impact upon proof of a prima facie case. Instructively, a prima facie case must be a genuine and arguable case. Where there is doubt about fidelity and honesty in the allegations underpinning a suit, then the existence of a prima facie case is watered down.

105. In my humble view, I am afraid that the Applicants herein have neither established nor demonstrated a prima facie case with a probability of success. If anything, the Applicants herein appear to be less than candid with the Court.

Issue Number 3 Whether the Applicants have espoused the likelihood of irreparable loss accruing or otherwise.

106. The Applicants herein had contended that the suit property is family land and furthermore the Applicants have erected/constructed various residential units thereof. To this end, it was contended that if the suit property is alienated and/ or disposed of, then the Applicant would suffer irreparable loss.

107. In particular, the Applicants have contended that on the basis of being family land and coupled with the developments thereof, the value of the suit property, cannot be compensated by an award of damages. [See paragraph 54 of the supporting affidavit].

108. Notwithstanding the position taken by the Applicants, it is imperative to state and underscore that the suit property has a monetary value and same can be ascertained by way of valuation. Furthermore, the improvements, if any, on the suit property can also be subjected to valuation.

109. Other than the foregoing, it is not lost on this court that the moment the suit property was offered as security same [suit property] became a commodity for sale. In this regard, where a default arose, the chargee would be at liberty to alienate or dispose of the suit property. Such disposal can only arise where the property in question is capable of being valued and a value being assigned thereto.

110. Other than the foregoing, the court is also alive to the provisions of Section 97 of the *Land Act*, 2012 which underpins the requirements for statutory valuation before sale of a charged property.

111. Arising from the foregoing and taking into account the provisions of Sections 97 and 103 of the *Land Act*, it is common ground that the suit property has a monetary value. Such value can be discerned and/ or ascertained through the process of valuation.

112. Other than the foregoing, it is also worth recalling that the 2nd Defendant/Respondent is a banking institution of repute. In this regard, where a situation does arise for compensation, there is no doubt that the 2nd Respondent would be in a position to do so.

113. For good measure, it is instructive to posit that the Applicants herein did not question and or dispute the financial capability of the 2nd Defendant/Respondent. In this regard, it is my finding and holding that the 2nd Defendant/Respondent would be in a position to pay for damages, if any.

114. Arising from the foregoing discussion, it is my finding and holding that the Applicants herein have neither established nor demonstrated that there is a likelihood of irreparable loss accruing or at all. In any event, there is no gainsaying that irreparable loss is that loss which is neither quantifiable nor compensable in monetary terms.

115. Before departing from this issue, it suffices to cite and reference the decision in the case of Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR, where the Court of Appeal defined and highlighted what constitutes irreparable loss.

116. For coherence, the court stated and held thus;

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

Final Disposition:

117. Flowing from the analysis [details enumerated in the body of the ruling], it must have become crystal clear that the Applicants herein are not deserving of the reliefs sought at the foot of the Application beforehand.

118. Critically and at any rate, it must also have become crystal clear that the suit by and on behalf of the Applicants is premature and misconceived. In any event, there is no gainsaying that the Environment and land court is devoid and divested of the requisite jurisdiction to entertain the subject dispute.

119. In the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Notice of preliminary objection dated the 3rd September 2024 be and is hereby allowed.

    ii. The Plaintiffs'/Applicants' suit vide Plaint dated 20th June 2024 be and is hereby struck out.

    iii. The Notice of motion application dated the 20th June 2024 be and is hereby struck out.

    iv. Cost of the preliminary objection; application and the suit be and are hereby awarded to the 2nd Defendant.

120. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2024

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – court Assistant.

Ms. Kamau for the Plaintiffs/Applicants.

Mr. Arunga Michael h/b for Mr. Mugisha for the 2nd Defendant/Respondent.

N/A for the 1st Defendant/Respondent.