



REPUBLIC OF KENYA



**Amanye General Suppliers Limited & another v Rafiki Microfinance
Bank Lmt & another (Environment & Land Case E078 of 2024)
[2024] KEELC 13207 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E078 OF 2024
EK MAKORI, J
NOVEMBER 13, 2024**

BETWEEN

AMANYE GENERAL SUPPLIERS LIMITED 1ST PLAINTIFF

AGNES MAKU MTURI 2ND PLAINTIFF

AND

RAFIKI MICROFINANCE BANK LMT 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. Application dated 24th July 2024, which is quite expansive (23 pages), significantly seeks:
 - a. Temporary injunction restraining the Defendants/Respondents from disposing of, transferring, alienating, entering into, dwelling upon, interfering with the application, open, peaceful, quiet, lawful continuous, exclusive, and uninterrupted possession, enjoyment, and derivative use of all that land parcel No. Kambe/Ribe/Kikomani/Makobeni/236 (0.30 Ha.) situate in Kilifi Municipality- Kilifi County.
 - b. Taking of accounts between parties on account of loan facility availed by the 1st defendant to the 1st plaintiff with effect from 24th December 2018.
 - c. Production of documents directed at the 1st defendant on the loan in question.
 - d. Orders of compliance directed at the OCS Rabai, Kilifi County.
 - e. Costs.
2. The application is supported by the reasons proposed in the body of the application and the supporting affidavit by Allan Mutsitsa Fitina Mbae, Director of 1st Plaintiff, and Agnes Maku Mturi, 2nd Plaintiff.



3. Significantly, the applicants contend that a charge was created on the suit property on 24th December 2018 for a loan facility from the 1st Respondent to the tune of Kshs 2,500,000/—and a further charge on 18th July 2019 for Kshs 2,500,000/-. In July 2023, the Respondents trespassed on the suit property and conducted a valuation on allegedly loan arrears accrued on the loan facility. The applicant questions the valuation and the interest on the suit due after taking accounts. Applicants contend the unilateral valuation and the statutory notice of sale are illegal and will crave at the hearing demand for the taking of accounts and the supply concerning the loan facility, hence the current application. According to the applicants, the acts by the respondents have resulted in damages to the applicants, including ill health, for which they will seek compensation at the hearing hereof.
4. The application is opposed through a replying affidavit deposed by one Samuel Njoroge, Assistant Manager of the Debt Recovery Unit Department of the respondent, deposed on the 6th of August 2024. He avers that the applicant took a loan facility with the respondent and placed the suit property Kabe/Ribe/Kikomani/Makobeni/236 as security. A charge and further charge were created to secure repayment of the loan. It was part of the arrangement that in case of default, the respondent had a right to sell the property and recover the loan arrears by exercising a statutory power of sale. It is admitted applicants fell into arrears, as shown in the statement of accounts. The respondent started the recovery process by issuing the relevant notices of sale. Valuation of the suit property was done. Once put as security, the property is a commodity for sale once there is a default. Therefore, the current suit and application for injunction is unmeritorious. The loan is due for repayment, and the 1st respondent has a right to recover the arrears by exercising its statutory power of sale.
5. The application was canvassed by written submissions under the directions of the Court.
6. I frame the issues for the court's determination as whether an injunction is germane under the circumstances prevailing in this matter, whether this Court has jurisdiction to deal with the current application and suit, and who should bear the costs of the application.
7. Whenever an issue of jurisdiction is raised or is reckoned by the Court – it is dealt with at once.
8. Jurisdiction is everything when raised or reckoned; 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.”
9. The jurisdiction question here is whether the ELC or the High Court is vested with jurisdiction on matters relating to charges, which is the predominant question in the plaint and the application. That question has been with us since the ELC was constituted in 2012.
10. Defining what land use means vis-a-vis the jurisdiction of the ELC, the Superior Court in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR 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.



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.
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.”
11. 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.”

12. 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).
13. 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.”

14. Angote J. was of the same view in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* (2021) eKLR, where the Court held:

“The Court of Appeal whose decision is binding this court has held that where the predominant issues in suit involve 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 charge, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

15. The Superior Court adopted the same stance recently in *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):

“We form this view taking to mind this Court’s decision in the afore-cited case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (*supra*) where it was held that the ELC only has jurisdiction to deal with disputes connected to “use” of land and contracts incidental to the “use” of land, which do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to “use” (by a tenant or licensee) as in this case, of a chargor’s land. In view of the foregoing, we agree with



learned counsel for the appellants that the learned Judge had no jurisdiction to entertain the respondents' suit as pleaded.”

16. Looking at the plaint, the plaintiff in this suit will seek to impeach the statutory power of sale the 1st respondent is due to exercise and demands the supply of all documents relating to the charge and the taking of accounts concerning the loan in question. There is no dispute about the ownership of the suit property, that it was placed as security, and that the loan is due for repayment. That is a matter within the purview of the High Court. I down tools.
17. I need not consider the application's merits as I will do so without jurisdiction. However, from the evidence adduced, the loan has fallen into arrears. A loan is for repayment, and security, once placed, is for sale in the exercise of the statutory power of sale. The 1st respondent has a right to exercise its statutory right of sale.
18. The application dated 24th July 2024 is hereby dismissed with costs to the Respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF NOVEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Ngonze, for the Plaintiff/Applicant

Mr. Kitila, for the Defendants/Respondents

Happy: Court Assistant

