



**Cabro Mombasa Limited v Rafiki Microfinance Bank Limited (Civil Case 28 of 2023) [2024] KEELC 7494 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7494 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL CASE 28 OF 2023  
FM NJOROGE, J  
NOVEMBER 13, 2024**

**BETWEEN**

**CABRO MOMBASA LIMITED ..... PLAINTIFF**

**AND**

**RAFIKI MICROFINANCE BANK LIMITED ..... DEFENDANT**

**RULING**

**Application**

1. The Plaintiff's application dated 2<sup>nd</sup> May 2024 and brought under Orders 40(1) and 51 (1) and (3) of the Civil Procedure Rules and Sections 1A, 1B, 3A of the *Civil Procedure Act* has been placed before this court for determination. It seeks orders of temporary injunction to restrain the respondent of its agents from interfering in any manner whatsoever with the suit property which is known as Kilifi/Mtwapa/1582 and 1583 pending the hearing and determination of the present suit.
2. The application is supported by the grounds on the face of the application and supporting affidavit sworn by Alfred Nyadimo Agunga on even date. The grounds are as follows: that the plaintiff is the registered proprietor of the suit property; that he has erected fully furnished apartments thereon; that he secured a loan facility from the defendant who charged the suit property as security; that the plaintiff has been servicing the loan but the defendant has nevertheless decided to dispose of the property and has invited buyers to view the property without notice to the plaintiff; that the defendant may exercise his statutory power of sale unprocedurally; that the defendant has frustrated the plaintiffs attempts to settle the balance outstanding; that the plaintiff is unable to get its current loan statement to enable it confirm the status of the loan; and no proper accounts for repayment have been provided to it; that the plaintiff stands to suffer irreparable loss if the orders sought are not issued.



### **The response.**

3. The defendant filed a replying affidavit of its Assistant Manager Debt Recovery one Samuel Njoroge, dated 24/5/2024. In it the deponent avers that there was a similar application dated 29/9/23 (which is correct) and that it was dismissed with costs and litigation must come to an end; that though there was an intimation in that application that the applicant craved to pay the balance no amount has been shown to have been paid since the date of that application to date; that a valuation report is valid for 12 months; that statutory notices need only be issued once; that the applicant has always been supplied with his loan accounts statements and is at liberty to request the defendant for them at any given time; that there has been breach of contract by the applicant in that there has been default in the repayment of the loan and the defendant is entitled to realize the security and an injunction is underserved; that the defendant has the first pre-emptory right on the sale of the property in satisfaction of the loan facility and that the balance of convenience tilts in favour of the defendant and the suit is a ploy to buy time.

### **Determination.**

4. The court ordered the application to be disposed of by way of written submissions. I have noted that the plaintiff filed submissions but none were filed for the defendant.
5. In both the application and the reply and the filed submissions the issue of jurisdiction of this court does not arise but this court will delve into preliminarily it as it is an issue of law.
6. I have considered the application before me. It is not in dispute that the title documents to the suit land are in the name of the applicant and that the respondent is just a financier who secured a loan facility by way of a charge over the suit property. There is no dispute over ownership. However, the dispute is in respect of whether the applicant is in breach of contract between him and the respondent. A further issue that arises between the parties is the status of accounts which can be settled by way of provision of statements of accounts and appropriate computation.
7. The jurisdiction of this court as granted by the provisions of Article 162(2) (b) is to resolve disputes relating to the environment and the use and occupation of, and title to, land.
8. Section 13(1) of the *Environment and Land Court Act* 2012 provides as follows:
  13. Jurisdiction of the Court
    - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
    - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
      - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
      - (b) relating to compulsory acquisition of land;
      - (c) relating to land administration and management;
      - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



- (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
  - (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (f) restitution;
  - (g) declaration; or
  - (h) costs.

9. It is clear that the dispute before court is not a dispute over environment or land title. is it a dispute over use and occupation of land? The Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR case decision will have to be called in to assist this court in determining that. In that case it was stated as follows by the Court of Appeal:

“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.



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...

.....

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.”

10. Drawing from the above decision it is now apparent that the issues before this court in the present suit are not those envisaged by Article 162(2)(b) of *the constitution*. The ineluctable conclusion is that this court lacks jurisdiction to hear and determine the present application and the main suit and consequently, both the application dated 2/5/2024 and the plaint dated 29/9/2023 are hereby struck out with costs.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

