



**Bady v Kanyi & another (Environment and Planning Civil Case
E006 of 2023) [2024] KEELC 13694 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13694 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND PLANNING CIVIL CASE E006 OF 2023
NA MATHEKA, J
DECEMBER 11, 2024**

BETWEEN

BADY TWALIB BADY PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT

MIDDLE EAST BANK KENYA LIMITED 2ND DEFENDANT

RULING

1. The application is dated 11th June 2024 and is brought under Article 165(3)(a) of *the Constitution*, Order 2 rule 15 of the Civil Procedure Rules and the Inherent Powers of the Court for the suit to be dismissed or struck out on the following grounds that this Honourable Court does not have any jurisdiction to hear and determine this suit or any of the alleged causes actions pleaded. Under Article 165(3)(a) of *the Constitution* it is the High Court of Kenya which has the exclusive and unlimited jurisdiction to consider the alleged causes of actions pleaded in the Plaint and or to grant reliefs sought by the Plaintiffs in respect thereof. That this Honourable Court does not have any jurisdiction to determine the alleged breaches of contracts for sale of units situated on the suit property. This Honourable Court does not have any jurisdiction determine alleged fraud, lack of due diligence or negligence by the Second Defendant visa vis the Plaintiffs. That this Honourable Court does not have jurisdiction to determine whether the Second Defendant can duly exercise its statutory power of sale under the Charge in its favour;
2. This Honourable Court does not have any jurisdiction to declare that the Charge over the suit property in favour of the Second Defendant is illegal, fraudulent and oppressive. v, This Honourable Court does not have any jurisdiction to declare that the Plaintiffs is a bona fide purchaser of a portion of the suit properties. This Honourable Court does not have any jurisdiction to issue a mandatory injunction that title be issued to the Plaintiff;



3. Alternatively, the Plaintiff does not have any locus standi to question the exercise by the Second Defendant of its power of sale or the validity or legality of the Charge in favour of the Second Defendant.
4. The 2nd Defendant relied on the decision of the Court of Appeal delivered on 26th April 2024 in Mombasa Civil Appeal Number E055 of 2022 - Bank of Africa Kenya Limited vs TSS Investments Limited (2024) KECA 410 (KLR) and to other authorities referred to therein.
5. This matter was consolidated with ELC Nos 26, 27, and 28, with the current file being the lead file. The respondents state that they are purchasers without notice of plot No. Kilifi/Mtwapa/3260 and which is pending transfer to them. That the 1st defendant fraudulently charged to the 2nd defendant who did not exercise due diligence. That this court has jurisdiction because the issue at hand is not about the contract between the 1st and 2nd defendants on the loan but the proprietary interest which the applicants risk losing should the 2nd defendant proceed and sell the properties to recover the loan.
6. I have considered the notice of motion and the submissions thereto. The same is actually a preliminary objection as it seeks to have this suit struck off as this court does not have jurisdiction. The issue for determination is whether the 1st defendant's preliminary objection has satisfied the threshold or not. The leading decision on Preliminary Objections is the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".
7. Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

"... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."
8. The point of law the 2nd defendant argues is that this court does not have jurisdiction and they cited the case of in the matter of the Interim Independent Electoral Commission (2014) 1 EA where the court held that jurisdiction flows from [the constitution](#) or legislation or both. They quoted article 162 (2) (b) of [the Constitution](#) and Section 13 of the Environment and [Land Act](#). They emphasize that the dispute arising is on the nature of the sale or the terms of the afore mentioned formal charge and placed reliance on the court of Appeal case of Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR where the court held that the rights acquired by a lender in a charge had nothing to do with the use of the land.



9. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The issue of whether the ELC court has jurisdiction on charges or not is not a novel issue. 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.” Emphasis added.

10. Article 260 of *the Constitution*, states that unless the context requires otherwise, ‘land’ includes-

- a) The surface of the earth and the subsurface rock;
- b) Any body of water on or under the surface;
- c) Marine waters in the territorial sea and exclusive economic zone;
- d) Natural resources completely contained on or under the surface; and
- e) The air space above the surface.”

11. This definition espouses the doctrine of Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to “whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell”. A charge is an interest in land securing the payment of money or money’s worth or the fulfillment of any condition as defined by section 2 of the *Land Act* Cap 280 and the rights so acquired are limited to the realization of the security so advanced as per section 80 of the same statute. Section 150 *Land Act* provides: -

“The Environment and Land Court established in the *Environment and Land Court Act* and subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act”

12. The *Land Registration Act* under section 101 provides for the court that has jurisdiction as follows: -

“The Environment and Land Court established by the *Environment and Land Court Act*, 2011 (No.19 of 2011) and subordinate courts, have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

13. However, in Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Ltd & Another (2018) eKLR Munyao, J commenting on the application of the above highlighted jurisdiction provisions in the *Land Act* and the *Land Registration Act* stated thus;

22. It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the *Land Act* and *Land Registration Act*. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale by chargee, which is what is questioned in this case, is a process that is laid down in the *Land Act* and *Land Registration Act*, (formerly in the Registered *Land Act* now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual



to another (see the case of Stephen Kibowen -vs- Agricultural Finance Corporation (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the [Land Act](#) and [Land Registration Act](#), and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction.”

14. [The constitution](#) under Article 165 (5) ousts the High Court’s jurisdiction in matters where the ELC had jurisdiction as follows: -

“The High Court shall not have jurisdiction in respect of matters: -

- a. Reserved for the exclusive jurisdiction of the supreme court under this constitution: - or
- b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).”

15. I find from the discussion above, that this court has jurisdiction to entertain the matter as it concerns occupation, use and title to land which I find is the dominant issue in the instant case. In this regard, I find that the application is not merited and I dismiss the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

