

To the High Court or to the Environment and Land Court? Jurisdiction over disputes pertaining a Bank's right to exercise their statutory power of sale overcharged Land.

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A. INTRODUCTION

The commercial value of land can be derived from its ability to be quantified. This quantification of value has enabled land to be used as a commodity, it can be sold, purchased and leveraged. Accordingly, under the provisions of the Land Act (Cap. 280), land can now be used as collateral for financial borrowing.

It is noted prior to 2010, the High Court exercised exclusive original jurisdiction over all matters pertaining to land. However, following the promulgation of the Constitution of Kenya, 2010, **Article 162(2)** established 2 distinct court with similar status as the High Court, one to hear matters pertaining to employment and labour relations (ELRC) and another to hearing matters pertaining to environment and the use and occupation of, and title to, land (ELC). Parliament passed into law specific legislation for each Court; **the Employment and Labour Relations Court (Cap. 8E) and the Environment and Land Court (Cap. 8D).**

B. WHAT IS CHARGED LAND?

Section 2 of the Land Act, defines a charge as an interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a sub charge and the instrument creating a charge including informal, or a customary charge.

Upon the creation of a charge over a property, it denotes that either of the parties, the chargor (borrower) and the chargee(lender), **acquire obligations and rights** in the property. Section 80 of the Land Act, **provides that a charge over land shall have the effect as a security only and shall not operate as a transfer of any interests or rights in land.** It is this effect of security that grants the lender **the rights or remedies to the charge should the borrower default.** Under Sections 90-96 of the Act, the lender is granted a myriad of options to undertake in the event of default.

Given the nature of this transaction several court have been sought to give an interpretation of which between, the ELC and the High Court, have jurisdiction over the matters pertaining to interests in charged property. However, on 26th April 2024, the Court of Appeal at Mombasa **Murgor (JA), Dr. Laibuta (JA) and Odunga (JA)**, rendered its decision in **Mombasa Court of Appeal Civil Appeal No. E055 of 2022 Bank of Africa Kenya Ltd & Another vs TSS Investment Limited & 2 Others**, over the issue and giving clarity over the question of jurisdiction.

C. FACTS OF THE CASE

We note that this is a matter that has been the subject of several proceedings, which we have previously written on in our earlier articles. However, in summary, the Respondents herein had moved to the ELC in Mombasa, seeking inter alia, injunctive orders restraining the Appellant, the Bank, from exercising its statutory power of sale over two properties charged to it – or from selling, offering for sale, advertising, alienating, transferring by public auction or private treaty, disposing of or otherwise completing by conveyance under the powers conferred under Section 90(3) of the Land Act. After the hearing of the matter before the ELC, the court vide a ruling issued on 24th May 2022, granted the sought injunctive orders and dismissed a preliminary objection over its jurisdiction. This necessitated the Bank to file an appeal against the ruling, primarily on the ground that the bank challenged the jurisdiction of the court (ELC) to hear and determine the dispute.

In the ruling of the ELC, the court relied on **Section 13 of the Environment and Land Act**, and stated;

"...I am therefore satisfied beyond doubt that under Section 13 of the Environment and Land Court Act, this court has jurisdiction to entertain any matter that involves land disputes; that jurisdiction is however limited to matters relation to environment and the use and occupation of land."

D. REASONING OF THE COURT OF APPEAL

Whilst considering the issue of Jurisdiction, the Court to Appeal relied on two of its authorities, the case of **Co-operative Bank of Kenya Limited vs Patrick Kangether Njuguna & 5 others [2017] eKLR**, and **Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates vs Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR**. The Appellant Court further noted that the intend of the injunction was to forestall the Bank's exercise of its statutory power of sale. Accordingly, the court noted 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, collections of dues, and rent which fall within the civil jurisdiction of the High Court.**

Furthermore, the court noted that a charge is a disposition that has no direct contractual relation to 'use' of chargor's land. Accordingly, the Court of Appeal determined that the ELC had no jurisdiction to entertain the suit.

Additionally, the issue of *locus standi*, was determined by the court, where it relied on the case of **Nairobi Mamba Village vs National Bank of Kenya [2002] 1 EA 197**, the court noted that only the chargor who could legitimately seek relied against the exercise by the charge of its power of sale. Further the court relied on the Case of **Venture Capital and Credit Ltd vs Consolidated Bank of Kenya Ltd [2004] 1 EA 357**, while noting that a debtor who had partly secured a loan by a charge against a third party's property could not seek to restrain or challenge the chargee's exercise of statutory power of sale for want of proprietary interest in the charged property. **This decision has also affirmed the deletion of Section 103 of the Land Act, by the Land Laws (Amendment) Act, 2015 No. 28 of 2016, which had previous granted relief to the chargor, persons in a joint charge, spouses of chargors and trustees in bankruptcy.**

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