

Finance & Banking

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Jurisdiction of the Environment and Land Court in enforcement of securities over land



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Jurisdiction of the Environment and Land Court in enforcement of securities over land

"Jurisdiction is everything" reads part of the decision of the Court of Appeal in the Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited [1989] KLR 1.

Prior to the promulgation of the Constitution of Kenya in 2010, all disputes relating to land were heard and determined by the High Court on account of its unlimited original jurisdiction to hear and determine civil matters.

To give effect to Article 162(2)(b) of the Constitution, the Environment and Land Court (ELC) was established in 2011, upon the enactment of the Environment and Land Court Act (ELC Act), as a court of equal status with the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

Despite the description of the mandate of the ELC in the ELC Act and Article 162(2)(b) of the Constitution, confusion seems to have arisen around electing the appropriate forum to hear and determine disputes concerning land, which has resulted in the institution of suits relating to land in either the High Court or the ELC.

The confusion appears to stem from the provisions of section 101 of the Land Registration Act, 2012 and section 100 of the Land Act, 2012 which stipulate that the ELC has jurisdiction to hear and determine disputes, actions and proceedings concerning land.

Additionally, pursuant to section 13(2)(d) of the ELC Act, the ELC has jurisdiction to hear and determine disputes relating to **"contracts, choses in action or instruments granting any enforceable interests in land"**.

The Court of Appeal's findings

In seeking to provide clarity, the Court of Appeal pronounced itself on the jurisdiction of the ELC in the case of *Bank of Africa Kenya Limited and Another v TSS Investments Limited and Two Others* (Civil Appeal Number E055 of 2022). The suit was filed in the ELC by tenants of the property which had been charged to the bank. The bank advertised the property for sale by public auction since the registered proprietor had defaulted in its obligations to the bank under the charge. Coupled with the suit, the tenants filed an application for injunction to forestall the public action. The bank raised a preliminary objection, seeking to strike out the application for injunction together with the suit on the grounds that the ELC lacked jurisdiction to hear and determine a matter involving the exercise of statutory power of sale, as jurisdiction for that lay with the High Court. The ELC dismissed the preliminary objection, citing that it had jurisdiction to hear and determine the application and the suit on grounds that the suit involved a dispute over land by virtue of the provisions of section 13 of the ELC Act.

Disgruntled, the bank appealed and in allowing the appeal, the Court of Appeal held that the ELC had no jurisdiction to hear and determine the matter as the dispute did not relate to the environment and the use and occupation of, and title to land. The Court of Appeal also reiterated that it is only the owner of land or a spouse of the owner of land that has been charged to a lender that can seek relief under the Land Act, 2012 where a lender seeks to exercise statutory power of sale.

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The Court of Appeal followed the decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and Five Others* (Civil Appeal 83 of 2016) in which it was held that the ELC has jurisdiction to deal with disputes connected to the use of land and contracts incidental to such use, but that mortgages and charges do not constitute contracts incidental to the use of land. In the *Patrick Kangethe case*, the court took the view that a charge over land is distinct from the use of that land and, as such, the dispute was one of accounts (a purely civil matter).

It is quite evident from the Court of Appeal's decisions that any issues surrounding the enforcement of charges and in particular the exercise of statutory power of sale are matters that fall within the jurisdiction of the High Court and not the ELC.

With the Court of Appeal having clarified the mandate of the ELC regarding disputes relating to the environment, its use, occupation and title to land, it remains to be seen whether the ELC will decline to accept jurisdiction when faced with a dispute relating to the enforcement of charges over land and whether the High Court will also limit its original unlimited jurisdiction to civil matters that do not relate to the environment, its occupation, use and title to land.

Stella Situma

Chambers Global 2024 Results

Finance & Banking

Chambers Global 2021–2024 ranked our Finance & Banking practice in:
Band 2: Capital Markets: Debt and Capital Markets: Equity.

Ludwig Smith recognised as a "Senior Statesperson" in Banking & Finance.

Jacqueline King ranked by Chambers Global 2017–2024 in
Band 2: Capital Markets: Debt.

Deon Wilken ranked by Chambers Global 2021–2024 in
Band 3: Banking & Finance.

Sammy Ndolo ranked by Chambers Global 2023–2024 in
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Peter Hesselning ranked by Chambers Global 2023–2024 in
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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