



REPUBLIC OF KENYA



**Nyanza Fish Processors Limited v Barclays Bank of Kenya Limited (Civil Suit 40 of 2005)  
[2023] KEHC 1641 (KLR) (Commercial and Tax) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1641 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 40 OF 2005  
EC MWITA, J  
FEBRUARY 24, 2023**

**BETWEEN**

**NYANZA FISH PROCESSORS LIMITED ..... PLAINTIFF**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was heard by Odero, J and the hearing concluded on September 15, 2020. The judge was however transferred from the Division before judgment could be delivered. The file was later allocated to me to write the judgment based on the evidence on record, which I proceeded to do.
2. The suit challenged the legality of the charge dated June 15, 1995 registered over the property known as Kisumu Municipality/Block 3/123 [the property] and the right of Barclays Bank of Kenya, now Absa Bank Kenya Limited [the bank] to sell the property in exercise of the statutory power of sale.
3. In the plaint amended on March 26, 2018, Nyanza Fish Processors Limited [the plaintiff], sought judgment against the bank for declarations that the Charge dated June 15, 1995 purported to be in favour of the bank in respect of the property was illegal, unenforceable and/ or unlawful; that the sale and transfer of the property by the bank to Victoria Distributors Limited during the pendency of this suit was illegal and was founded on non-existent statutory power of sale; Damages against the bank equivalent to the current market value of the property; interest on the damages at court rates from December 22, 2009 until payment in full, costs of the suit of the suit and interest.
4. The plaintiff averred that the bank obtained and registered the charge over the property through misrepresentation given that it did no guarantee any facility the bank advanced to Afro Meat Company Limited [Afro Meat]. The plaintiff stated that there was material representation in clause 4(a) of the charge that it had covenanted to pay and discharge on a full indemnity basis and that the charge



- constituted security for all moneys advanced or paid by the bank to or to the account of or for its use as may become liable to pay under any guarantee or indemnity given.
5. The plaintiff pleaded that by letter dated February 23, 2004, the bank sought to regularize the securities by issuing a deed of variation converting the charge dated June 15, 1995 for Kshs 45,750,000.00 into a multi-currency facility and a further charge in respect to the property to secure further advances of USD 825,000, together with requisite accompanying documents. The documents were, however, not perfected and registered.
  6. The plaintiff averred that on November 4, 2004, the bank's Advocates issued a statutory notice of sale on the premise of a guarantee for a facility to Afro Meat Company Limited [Afro Meat]. The notice demanded Kshs 9,963,234.95 with interest at 21.75% and US Dollar 749,074.20 together with interest at 21.75%.
  7. The plaintiff stated that it filed this suit together with an application seeking injunction restraining the bank from selling the property. The application was however dismissed on April 17, 2009 by Kimaru J. [as he then was]. An appeal to the Court of Appeal, against that ruling being Nairobi Civil Appeal No 1 of 2011, was allowed and the application remitted to the High Court for fresh hearing before another judge.
  8. The plaintiff further stated that the bank sold the property to Victoria Distributors Limited who charged the same property to Bank of Baroda on December 22, 2009 before the application could be determined, thus extinguished its right to the property.
  9. The bank filed a defence amended on 3 November 1, 2018, denying the plaintiff's allegations. The bank averred that on June 30, 2015, the plaintiff's directors unanimously resolved to executed the legal charge dated June 15, 1995. The resolution approved giving of a guarantee to secure Kshs 30,000,000 that was to be advanced to Afro Meat, an associate company to the plaintiff. The facility was also to be supported by a legal charge over the suit property. The legal charge was dully registered over the property following the resolution by the plaintiff's directors dated June 30, 1995 and, therefore, the plaintiff was liable based in terms of the charge to pay the money plus interest and could only redeem the property upon payment of the outstanding loan amount plus interest.
  10. The bank asserted that the plaintiff's directors executed the charge and acknowledged to have understood the import of the provisions of section 74 of the repealed *Registered Land Act* [RLA]. The bank further asserted that on October 13, 1997 and March 19, 1998, the directors again resolved to guarantee Afro Meat further advances of Kshs 45,750,000 and USD 625,000. The bank maintained that the right to call on the statutory power of sale crystallised once there was default and the plaintiff was estopped from denying the charge and resolutions.

## Evidence

### Plaintiff's evidence

11. The plaintiff called two witnesses who testified on its behalf. Karim Mohammed Hassanali [Mr Karim], the plaintiff's director, testified as PW1. adopted his witness statement dated December 7, 2018 and produced the bundle of documents of the same date as P. Exh2. Mr Karim asserted that the plaintiff was the proprietor of the property and according to him, clause 8 of the special conditions of lease, the plaintiff could not charge its interest in the property without consent of the Commissioner of Lands.



12. Mr Karim further asserted that under the plaintiff's memorandum and articles of association, a resolution had to be passed before it could enter into any financial commitment with regard to its assets. Mr Karim maintained that the plaintiff never passed a resolution to borrow money from Absa or guarantee financial facilities advanced to any other company, including Afro Meat. Mr Karim took the position that the plaintiff did not guarantee any financial facility from the bank to Afro Meat. That notwithstanding, on June 15, 1995, the bank unlawfully, irregularly and through misrepresentation, registered a charge against the property, thus the charge was incapable of conferring an interest in favour of the bank.
13. Mr Karim denied signing the resolution, minutes or any guarantee for any money given to anyone. He also pointed out that the letterhead on which the minutes were written was not the same as the one with the resolution and did not have a postal address. Mr Karim asserted that a notice was served through the bank's Advocates purporting to be a statutory notice which, however, contained misrepresentation on the facility given to Afro Meat.
14. When cross examined, Mr Karim admitted that he and his late father executed the charge; that they gave the title documents for the property to secure the loan; that both were also shareholders and directors of Afro Meat which also owed money to the bank as evidenced by statements; that his late father was the only one handling financial matters of the company; that he did not have Evidence that his late father had sought return of the title documents; that he was aware of HCCC No 140 of 2006 where the bank had sued the plaintiff, Afro Meat, himself and his father because of the money Afro Meat owed the bank and that the plaintiff's postal address was Box 42969 Nairobi which also appeared on the demand letter of November 4, 2004 which he received.
15. Mr Karim also stated that he could not recall whether the resolution formed part of the documents in HCCC No 140 of 2006 even though he admitted that he been served with the suit documents. Mr Karim further stated that his father must have asked for the return of the title deed, but he did not have evidence for this.
16. The bank again called Pius Isaiah Khaoya [Mr Khaoya], a valuer practising in the name of Chrisca Real Estate. Mr Khaoya stated that he visited the property and conducted a valuation exercise on April 10, 2018. He valued the property at Kshs 500 million and produced a valuation report dated April 19, 2018. There had been substantial refurbishment on the property which was used for fish export. He only valued the land and building but not the machinery. He asserted that although a valuer can ascribe value to the land and building separately, he was not instructed to do so.

### **The Bank's Evidence**

17. The bank called Lucas Gikungu (Mr Gikungu), its corporate recoveries manager as DW1. Mr Gikungu adopted his witness statement filed in court on January 25, 2018 and produced the Bundle of documents filed by the bank as exhibits. Mr Gikungu asserted that on June 30, 1995, the plaintiff's directors resolved to charge the suit property to secure a financial facility the bank was to extend to Afro Meat and also to give a guarantee for that purpose. The directors executed the charge dated June 15, 1995 which was dully registered on June 29, 1995. Thereafter, the bank disbursed money to Afro Meat. On October 13, 1997 and March 19, 1998 the plaintiff's directors again resolved to guarantee further advances of Kshs 45,750,000 and USD 625,000 respectively to Afro Meat. Afro Meat defaulted in loan repayment and as at November 3, 2005, Kshs 17,905,873.37 and USD 736,258.48 was outstanding. Demand was made and statutory notice was served before the bank exercised its statutory power of sale over the property.



18. When cross examined, Mr Gikungu stated that the bank did not advance any money to the plaintiff and that the legal charge and other documents were executed by the plaintiff's directors; that there was no guarantee; that he did not witness execution of the charge documents by Mr Karim; that all account statements produced were in relation to Afro Meat and that the statutory notice referred to the charge dated June 15, 1995 and money advanced to Afro Meat. He admitted that the statutory notice was not copied to Afro Meats; that the charge was dated before the resolution; and that the bank did not produce the CR12, Memorandum and Articles of association for the two companies.
19. The bank again called Samuel Mwangi Munyao (Mr Munyao), a valuer working with Knight Frank Ltd as DW2. Mr Munyao produced a valuation report dated March 18, 2020, [the bank's report], in respect of the property as an exhibit. The report was prepared by Marvin Odhiambo and countersigned by Stephen Makau, a director of Knight Frank. The report put market value of the property at Kshs 246,200,000.
20. According to Mr Munyao, their report differed from the plaintiff's report because the methodology adopted in preparing was depreciation valuation cost method which took into account the condition of the building, professional fees and the existing use of the plant. On the other hand, the plaintiff's report indicated that the buildings were in good condition as at 2018 while the bank's report noted that the plant was non-operational and had been vandalized and run down.
21. When cross-examined, Mr Munyao confirmed that he did not prepare the report and that the report was prepared on February 12, 2020 on instruction by Mr Gikungu after he [Mr Gikungu] had completed his testimony in court.

#### **Plaintiff's Submissions**

22. The plaintiff filed and relied on written submissions dated October 22, 2020 and supplementary submissions dated January 8, 2021. The plaintiff argued that the bank had no right to sell the property because the charge was illegal and invalid. It was the plaintiff's case, that there was no consideration as required under the law of contract as the plaintiff did not receive money from the bank and further the plaintiff did not guarantee financial facilities advanced to Afro Meat.
23. The plaintiff relied on *Kaniki Karisa Kaniki v Commercial Bank Ltd & 2 others* Mombasa HCCC Number 177 of 2006); *National Bank of Kenya Limited v Kwanza House Limited* [1998] eKLR and *Josiah Kariu Kamau v Standard Chartered Bank of Kenya Limited*, [Nairobi HCCC No 733 of 2003 eKLR] to support its case.
24. The plaintiff asserted that the bank did not demonstrate that the charge met the contractual threshold for purposes of its enforcement. Reliance was placed on *David Muyodi v Robert Wambogo Ombayo* [Eldoret HCCA Number 130 of 2014]. The plaintiff took the view, that Mr Gikungu (DW1) had confirmed that he did not deal with the matter and could only rely on the documents before the court. The plaintiff relied on *Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and another* [2007] eKLR for the position that the court should not consider evidence that would contradict, vary and conflict with the terms and conditions of the charge.
25. The plaintiff, again relying on *Rajdip Housing Development Limited v Wacira Wambugu t/a Wambugu & Company Advocates* [Nairobi CA Number 4 of 1991], argued that since the charge was drafted in favour of the bank, it must be read against the it. The plaintiff maintained that the bank failed to prove that there was a valid legal charge given that there were no supporting documents such as a loan application letter, the companies' memorandum and articles of association, CR12, letter of offer, consent to charge from the Commissioner of Lands as required under the special conditions of



- the lease and that the certificate of registration of mortgage showing that the charge had been registered to secure an unspecified amount.
26. The plaintiff was of the view, that the bank failed to satisfactorily explain the irregularities in the post-dated resolution to charge and the minutes thus making the impugned charge invalid as it was made before the resolution to charge was signed.
  27. Although the plaintiff conceded that once a charge is registered, the formal requirements for its creation are deemed to have been met, the plaintiff argued that this case is distinguishable from the authorities cited on that point as it was not the borrower and it did not benefit from the registration of the impugned charge.
  28. The plaintiff asserted that the impugned charge cannot be construed as a third party charge as it did not execute a guarantee. According to the plaintiff, the bank had failed to prove existence of a contract of guarantee as provided under *Law of Contract Act*. The plaintiff maintained that to be considered valid, a guarantee must be produced in court and supported by consideration. [*Delphis Bank Limited (Under Statutory Management) v Shield Hire Purchase Limited & Four (4) others* [2007] eKLR], made in the interest of the company [*Rolled Steel Products (Holdings) Ltd v British Steel Corp and others* [1986] Ch. 246], and provided some commercial benefit to the guarantor [*Juja Coffee Exporters Limited & 3 others v Bank of Africa Limited & another* [2016] eKLR].
  29. Regarding sale of the property, the plaintiff faulted the bank for selling the property during active court proceedings. The plaintiff also challenged the legality and validity of the statutory notice of sale dated 4<sup>th</sup> November 2004 in that it was prepared by Walker Kontos Advocates, the same advocates acting in the matter; the statutory notice referred to Afro Meat as the borrower but was not copied to that company; the notice sought to convert the charge into a third-party charge; and demanded money both in Kenya Shillings and US Dollars when impugned charge did not make reference to any US Dollar lending and/or facility.
  30. The plaintiff relied on *Romanus Okeno v Bank of Baroda* [Kisumu Civil Appeal No 18 of 2006] for the argument that the statutory notice dated November 4, 2004 was illegal and *Sharok Kher Mohamed Ali & another v Southern Credit Banking Corporation Limited* [Nairobi HCCC No 659 of 2007] that if a charge is invalid for any reason, then a statutory notice issued pursuant to such a charge is invalid.
  31. The plaintiff further challenged the letter of offer dated 23<sup>rd</sup> February 2004, further charge and deed of variation of charge, as an attempt to regularize the charge after it had raised its grievances. The plaintiff took the view, that court should not come to the aid of a creditor who has been negligent in conducting its business. Reliance was placed on *National Bank of Kenya Limited v Isaac Ogettah*, Nairobi [HCCC No 205 of 1995].
  32. Regarding HCCC No 140 of 2006-*Barclays Bank of Kenya Limited v Afro Meat Company Limited & 3 others*, the plaintiff argued that the suit was dismissed for want of prosecution and the witness statement by Mr Gikunga (DW1) referred to the claim as filed in HCCC No 40 of 2005 only.
  33. The plaintiff maintained that the valuation report by Knight Frank was unreliable because it was a desktop report with numerous inaccuracies made on instructions of Mr Gikunga [DW1] after he had concluded his evidence and cross-examined.
  34. The plaintiff urged the Court to rely on its valuation report dated April 19, 2018; allow the suit, and award damages of Kshs 650,00,000.00, taking into account loss of the plant and machinery that were on the property, costs and interest.



## Bank's submissions

35. The bank relied on its written submissions dated 8<sup>th</sup> January 2021 to argue that it had a right to sell the property. The bank relied on *Coast Brick & Tile Works Ltd & Others v Premchand Raichand & another* [1964] EA 187 to assert that since the charge was duly registered, it must be taken that the formal requirements for its creation were met.
36. It was the bank's case that the plaintiff did not deny executing the charge; Mr Karim [PW1] was present at a meeting held in 1998 when Afro Meat resolved to take further advances which were to be secured by the suit property; Mr Karim did not contest the extent of the facilities that were advanced to Afro Meat or the extent of default by Afro Meat as shown in the statements of account. The bank relied on *Mrao Ltd v First American Bank* [2003] KLR 125 to argue that unexplained delays in raising questions about the validity of securities impaired such claims as it showed that there was no intention of repaying the money.
37. In the bank's view, although the charge was created in 1995, the plaintiff only raised the issue in 2005 after Afro Meat had defaulted in loan repayment. The bank took issue with Mr Karim's evidence that he did not tell the court when he discovered that there were issues with the securities. The bank further pointed out that Mr Karim had admitted in cross-examination that Afro Meat was in default and that it never repaid the loan.
38. The bank asserted that the plaintiff and Afro Meats were associate companies with common shareholders and directors and that the plaintiff and Karim were guarantors of Afro Meat, as the court (Warsame J.) (as he then was) found in the ruling dated June 12, 2008 in HCCC 140 of 2006-Absa Bank of Kenya Limited v Afro Meat Company Limited & 3 others when that suit was consolidated with this suit.
39. The bank argued, therefore, that the plaintiff is estopped from claiming that the impugned charge did not secure the money advanced to Afro Meat given that its directors signed the resolution to charge the property as security for the facility advanced. In this respect, Absa relied on *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR for the proposition that the doctrine of equity is applicable in Kenya.
40. The bank maintained that the plaintiff agreed to guarantee financial advances to Afro Meat, an associate company, as evidenced by the charge and the resolutions. The bank posited that clause 4 (a) of the charge registered over the property clearly contemplated that it would secure obligations of the plaintiff, as chargor and the chargor would be liable to pay the bank under any guarantee or indemnity either as principal or surety.
41. With regard to the authenticity of the resolution, the bank argued that the plaintiff did not challenge the resolutions through any civil or criminal proceedings against it concerning those resolutions. The bank asserted that despite Mr Karim's presence in the 1998 meeting when Afro Meat's directors passed the resolution to take further financial facility Mr Karim did not object. According to the bank, the effort to update financial facilities and improve their format could not take away its statutory right to sell the suit property.
42. The bank urged the court to disregard the plaintiff's valuation report as it did not show the methodology used, economic downturns and comparable data on sales of similar properties, and urged the court to dismiss the suit with costs.



## Determination

43. The court has considered the evidence, exhibits and submissions on record. The issue before the court is whether the charge dated June 15, 1995 and registered over the property was valid and, depending on the answer to the issue, whether the bank had the right to sale the property.
44. This suit arose from the action taken by the bank to sell the suit property by public auction in exercise of the statutory power of sale due to default in loan repayment. The plaintiff's case is that the charge purportedly created over the property was invalid and could not confer a statutory power to sale the property. The plaintiff took the view, that there were irregularities with regard to the charge which vitiated its validity thus the purported sale was unlawful and invalid. The plaintiff further argued that there was no resolution authorising charging of the property, no money was advanced to it, and the statutory notice issued for purposes of selling the property was invalid as it was issued by the same advocates on record acting for the bank.
45. On its part, the bank argued that a valid charge was created and registered, the plaintiff passed a resolution to authorise the charge to secure money advanced to Afro Meat, a sister company to the plaintiff, money was advanced to Afro Meat, Afro Meat fell into default and a statutory right crystallised once there was default. The bank maintained that the charge having been duly executed and registered, the plaintiff could not challenge its validity only after action had been taken to exercise the statutory power of sale.
46. The evidence shows that the plaintiff executed a charge dated June 15, 1995 over the property in favour of the bank to secure money that was to be advanced. That charge was registered on June 29, 1995. There is no denial that money was advanced to Afro Meat, a company associated with the plaintiff with same directors and shareholders.
47. The bank showed that there were further resolutions dated on October 13, 1997 and March 19, 1998 respectively, to guarantee further advances of Kshs 45,750,000 and USD 625,000 to Afro Meat. There is no denial that Afro Meat defaulted and that as at 3<sup>rd</sup> November 2005, Kshs 17,905,873.37 and USD 736,258.48 was outstanding. The plaintiff did not also deny that demand was made and notices duly served which was why this suit was filed before the property was sold in exercise of the statutory power of sale.
48. The argument by the plaintiff was that the charge was invalid for the reason that there was no resolution and that the resolution relied on was made after the charge had been created, executed and registered, thus rendering that charge invalid.
49. There is no dispute that the charge was executed on June 15, 1995 and was and registered on June 29, 1995 This fact was admitted by the plaintiff's director Mr Karim who testified as PW1. There was also no allegation that the charge was not executed by the plaintiff's directors. In fact, Mr Karim admitted that both he and his father executed the charge; gave the title documents for the property as security for the loan; both were also shareholders and directors of Afro Meat and that Afro Meat still owed the money. This evidence showed that the charge was indeed executed on behalf of the plaintiff to secure a loan.
50. Mr Karim asserted that the charge was to secure money that was to be advanced to the plaintiff but was not and accused the bank of misrepresentation. No evidence was, however, adduced to show that the plaintiff had applied for a loan and when such an application was made. The witness further took issue with the address in one of the documents, arguing that it did not belong to the plaintiff. He



however admitted when cross examined that the address [P.O Box 42969 Nairobi] indeed belonged to the plaintiff.

51. Mr Karim again admitted that money was advanced to Afro Meat but could not remember the terms of the facility. He also admitted that he was aware of HCCC No 140 of 2006 in which the bank had sued the plaintiff, Afro Meat and directors of the two companies but he could not remember whether the resolution was one of the documents filed in that case. Despite being one of the directors of Afro Meat, Mr Karim did not tell the court how the financial facility advance to Afro Meat was secured, to justify the claim that the charge was not to secure that loan facility.
52. The plaintiff's real issue with the charge was that it was executed before the resolution and further that Mr Karim did not sign the resolution. There was no allegation, however, that the other director did not sign the resolution.
53. A careful perusal of the resolution dated June 30, 1995, which the plaintiff argued was made after the charge had been executed and registered, shows that it is an extract from the plaintiff's minute book for the plaintiff's board of directors meeting held on June 6, 1995. That meeting was attended by Mohammed Hassanali and Karim Hassanali. The extract is certified as "a true copy of the extracts from the company's minute book" and was signed by a director. The plaintiff did not produce the plaintiff's minutes book to show that there was no board meeting on 6<sup>th</sup> June 1995 and that Mr Karim Hassanali did not attend that meeting or sign the resolution.
54. The bank again produced a copy of charge and certificate of registration and Resolutions dated October 13, 1997 and March 19, 1998. These documents were duly signed and the charge was executed by the plaintiff's to secured up to Kshs 30,000,000. Clause 4(a) of the charge stated that the charge covered the money advanced to the chargor or on which the chargor may become liable to pay under any guarantee.
55. The minutes dated October 13, 1997 show that the same directors, namely; Mohammed Hassanali and Karim Mohammed Hassanali were present. The minutes were signed by the chairman. Minutes of a board meeting of directors of Afro Meat held on March 19, 1998 show that the meeting was again attended by Mohammed Hassanali and Karim Hassanali and were signed by a director and secretary. The directors resolved that Afro Meat was to borrow USD 625,000 to be guaranteed by Nyanza Fish by way of legal charge over the property. The demand letter dated November 4, 2004 to the plaintiff showed the outstanding amount was Kshs 9,963,234.99 and USD 749,074. It cannot, therefore, be true that the charge dated 15<sup>th</sup> June 1995 was executed and registered on June 29, 1995 before a resolution by the plaintiff to charge the property.
56. The bundle of documents the plaintiff produced as exhibits, contained undated and unexecuted documents such as debenture over the assets of Afro Meat, both for Kenya Shillings and USD, undated and unexecuted charge over the property, undated and unexecuted further charge over the property, undated and unexecuted letter of guarantee and indemnity, undated and unexecuted letter of guarantee for USD 1,450,000 and unsigned director's resolution. The undated charge was drawn by K. Mwaura & Company Advocates in 2002, yet the charge in contention was dated June 15, 1995. The plaintiff's documents were different and the plaintiff's witness could not possibly have had the same document in mind when he said the charge was improperly registered. Similarly, the unsigned resolution produced by the plaintiff has no names of directors present, has no date but shows the year as 2004.
57. If, for any reason, the resolution was made post execution and registration of the charge, that would only have been a mere irregularity, deficiency or shortcoming that could not invalidate the charge. Moreover, the irregularity, if any, would have been regularised when the plaintiff's directors passed the resolution whose extract was dated June 30, 1995 authorising use of the property as security.



58. In *Giro Commercial Bank Ltd v Econ Construction & Engineering Ltd & another* [2014] eKLR, the Court of Appeal cited Steward Kyd's *Treatise on the Law of Corporations*, Vol 1, Butterworths, London, 1793 where the author stated that:

A corporation aggregate, being considered as an indivisible body, cannot manifest its intentions by personal act or oral discourse...the law therefore has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. That is by affixing the common seal.

59. The court of Appeal then held [in *Giro Commercial Bank Ltd v Econ Construction & Engineering Ltd & another, supra*] thus:

In a case where a transaction has been entered into; money has been disbursed; the instrument in question is sealed with the seal of the company; that seal is authenticated by two directors; there is a certificate by an advocate confirming that the company is fully aware of the effect of execution of the instrument; and the company does not contend that it did not sign the instrument or that it did not know the effect of signing, it would, in our view, be a monumental injustice to hold that the instrument is invalid. It is the kind of injustice that a court, conscious of the principles that underpin the administration of justice under Article 159 of the *Constitution*, cannot countenance.

60. It follows that the documents, namely; the charge and resolutions were executed and signed by and on behalf of the plaintiff. The charge was sealed and witnessed by two officials. The resolutions were passed by directors and Mr Karim was one of them. Mr Karim [one director], could not turn around and argue that the documents were not signed or that he did not sign them himself. Mr Karim also admitted that his father, also a director of both the plaintiff and Afro Meat, was the one in charge of financial matters in the two companies. This would mean Mr Karim had little to do with financial affairs of the companies and may not have known much regarding the charge and other documents other than signing them.

61. In civil proceedings, the plaintiff bears the burden of proof. In that respect, section 109 of the *Evidence Act* provides that burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by a law that the proof of the fact lies on particular person.

62. The Court of Appeal also stated in *Mbutia Macharia v Annah Mutua & another* [2017] eKLR that:

(16)The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.

63. The burden was on the plaintiff to prove that the charge, the subject of this suit was invalid in law, a fact it was not able to prove. The bank on its part produced documentary evidence to show that resolution was passed before the charge was executed and registered, which rebutted the plaintiff's contention that the charge was invalid. The argument that the charge was registered without consent from the Commissioner of Lands could not, on its own, invalidate the charge. There is an endorsement that the Chief Land Registrar had authorised registration of the charge to secure the money. It would have been the Chief Land Registrar to decline to register the charge if any conditions had not been complied with.



64. The plaintiff did not explain why the title documents for the property were released the bank if there was no intention to charge it. The plaintiff did not also explain why the property had been charged for nearly ten years in favour of the bank, had transacted with the bank for all those years and even wanted further charge created over the property, if the undated documents it produced were to be believed, but never raised any questions, only to raise an issue after the bank moved to realise the security. This would only imply that the plaintiff was not being candid.
65. Regarding letters of Guarantee and indemnity, it is the view of the court that these would be important where directors were sued which is not the case here. It would appear that the plaintiff was selective on which documents to produce given that most of the documents the plaintiff produced were undated and did not relate to the period in issue. The court is unable to agree with the plaintiff that the charge dated 15<sup>th</sup> June 1995 was invalid given that the charge was properly executed and registered as required by law.
66. We now turn to whether the bank could exercise the statutory power of sale. The plaintiff argued that there was no valid charge and, therefore, a statutory power of sale could not arise. The plaintiff also argued that the demand was served by the same firm of advocates on record for the bank, hence there was no valid statutory notice. The plaintiff further took issue with the fact that the property was sold when the suit was pending.
67. The plaintiff did not dispute the fact that the statutory notice was served at least that is not an issue here. The argument is on the procedural validity of that notice. The court has determined that the charge was validly executed and registered. The law is settled that a lender must serve a statutory notice before exercising the statutory power of sale. Where there is default, the debt is admitted and the notice is served, the court will not interfere if the lender is exercising its statutory power of sale.
68. In *Giro Commercial Bank Limited v Halid Hamad Mutesi* [2002] eKLR, the Court of Appeal stated that a mortgagee cannot be restrained from exercising his power of sale even if the amount due is in dispute. Where the debt is admitted as due and the loan is not being serviced, the court should not grant an injunction.
69. The charge conferred on the bank the right to sell the property in case of default. The plaintiff admitted that Afro Meat still owed money, that demand was made and the notice was served. The notice(s) was handed over to the advocates to deal, hence this case. The argument that the advocates who issued and served the notice were also on record did not have any weight. The plaintiff did not give any legal justification for this argument. In this respect, the court does not agree with the plaintiff that there would be justification to hold that the notice was invalid or that the statutory power of sale had not crystallised and the bank could not sell the property.
70. There was also the argument that the sale was invalidated because the property was sold during the pendency of the suit and application. On this, the plaintiff did not prove that there was a valid court order restraining the bank from selling the property. Although it would have been improper to sale the property while parties were actively litigating in court, the sale would not be illegal in the absence of a restraining order.
71. Finally, there was the issue of HCCC No 140 of 2006. The bank argued that the suit was consolidated with this suit and, therefore, the court should make a determination of the two suits. The plaintiff on the other hand argued that the suit was dismissed for want of prosecution and, for that reason, the court could not make a decision on it.
72. It is true that this suit was consolidated with HCC No 140 of 2006 By Warsame J [as he then was] on June 12, 2008. The plaintiff did not, however, produce evidence to show that the suit had been



dismissed. This assertion was only made from the bar. Similarly, when asked by the court whether that file [HCC No 140 of 2006] had been placed before the judge during the hearing of this suit, counsel for the defendant admitted that it was not. In the circumstances, that suit [HCCC No 140 of 2006] having not been heard together with this suit, this court cannot make a determination of the issues raised therein as they were not addressed during the hearing of this suit and there is no evidence on record to assist this court make a determination one way or the other.

### **Conclusion**

73. Having considered and evaluated the evidence on record and exhibits produced, the conclusion the court comes to is that the plaintiff did not prove the case on a balance of probability. There was no proof that the charge was illegal. On the contrary, the charge was executed and registered. There was a resolution dully signed by the plaintiff's directors authorising charging of the property. There was evidence that money was advanced to Afro Meat, as shown in the statements produced and there was default. It was admitted that demand was made and statutory notice served. This being a civil suit, the plaintiff did not discharge the burden of proof.
74. Consequently, and for the above reasons, this suit is dismissed with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2023**

**E C MWITA**

**JUDGE**

