Ndungu & another v Molyn Credit Limited & 3 others (Environment & Land Case 658 of 2016) [2023] KEELC 16338 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16338 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 658 OF 2016

AA OMOLLO, J

MARCH 16, 2023

BETWEEN

DANIEL KABIRU NDUNGU ..... 1ST PLAINTIFF

LUCY NYAMBURA LABIRU ..... 2ND PLAINTIFF

AND

MOLYN CREDIT LIMITED ..... 1ST DEFENDANT

WILSON KARIUKI T/A WISKAM AUCTIONEERS ..... 2ND DEFENDANT

LAND REGISTRAR ..... 3RD DEFENDANT

THE HON.ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. The plaintiffs instituted a suit against the defendants seeking for a permanent injunction restraining them from dealing with Ngong/Ngong/34016 herein after referred to as "the property", inter alia, a declaration that the title to the property was illegally transferred to the 1st defendant's name, an order directing the land registrar to cancel the title issued to the 1st defendant and issue a new title under the name of the 1st plaintiff. After conclusion of the hearing, the court determined that the title to the property was illegally transferred to the 1st defendant's name and ordered the same be cancelled and a new title be issued under the 1st plaintiff's name. The court also determined that the plaintiffs and the 1st defendant had entered into a loan agreement for a facility of Kshs 1,000,000 using the title to the property as security and entered judgement for the 1st defendant against the 1st plaintiff in the sum of Kshs 5,368,933/- together with interest at court rates from the date of judgement until payment in full.

1st Defendant's Application

2. The 1st defendant under order 37 rule 4 filed an originating summons dated June 27, 2022 supported by an affidavit sworn by Moses Anyangu on the same date seeking for the following orders;

    a) That the property known as title Ngong/Ngong/34016 charged by the chargor /respondent to the chargee /applicant under an informal charge dated March 12, 2015 be sold to recover outstanding loan balance of Kshs 5,368,933/- as at September 21, 2021 as per court judgement in HCCC at Nairobi ELC No 658 of 2016 together with interest at court rates from September 21, 2021 until payment in full.

    b) An order for vacant possession do issue over property known as title number Ngong/Ngong/34016 to enable the chargee/applicant to sell the suit property.

    c) Cost of this application be borne by respondents.

3. The summons was premised on the grounds inter alia;

    a) that the 1st plaintiff entered into a loan agreement dated March 12, 2015 with the 1st defendant/applicant for a loan facility in the sum of Kshs 1,000,000 secured by a charge over the property registered in his name and deposited the title with the applicant and

    b) the loan facility was to be repaid in 72 equal consecutive monthly installments of Kshs 46,975/- each, inclusive of interest at 4.5 per month, starting on May 20, 2015 and totaling 3,382,200/ if no default occurred.

    c) The applicant stated that the 1st plaintiff defaulted in paying the loan amount and as of when the judgement delivered in court on September 23, 2021 the outstanding amount was Kshs 5,368,933/- which continues to accrue interest.

    d) That the applicant is desirous of recovering the outstanding loan amount and to do so, he needs to exercise its statutory power of sale with leave of the court.

    e) That under section 79(9) of the *Land Act*, an informal charge may only take possession or sell the land subject of an informal charge by obtaining an order of the court.

4. In opposition to this application, the 1st plaintiff filed a replying affidavit sworn by Daniel Kabiru Ndungu on September 2, 2022 stating that an informal charge is only created where a chargee accepts a written document and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land with the repayment of monies obtained from the charge. In the instant case, there exist no charge between the 1st defendant and the applicant. The plaintiffs argued that the court held the property had been illegally transferred to the 1st defendant's/applicant's name hence the 1st defendant cannot purport to claim existence of a charge as at March 12, 2015.

5. The 1st plaintiff continued that there was no informal charge as alleged by the applicant because the consents under section 76(3) of the *Land Act* and section 6(1)of the *Land Control Act* were not obtained and that sometime on June 10, 2016, the 1st defendant/applicant through their agents, Wiskam Auctioneers had fraudulently attached his household goods which were undervalued and underquoted in attempt to illegally redeem the un-paid debt despite the plaintiffs servicing the loan by paying the due instalments for about four months.

The Plaintiffs' Application

6. The plaintiffs filed a notice of motion dated July 20, 2022 seeking for the following orders;

    1. Spent

    2. That *vide* a consent dated July 20, 2022 leave be granted to the firm of Kabene & Co Advocates to come on record and act for the applicant/plaintiffs herein in the place of the firm of Karanu Kanai Advocates.

    3. Spent

    4. That the honourable court be pleased to review/vary and or set aside its judgment entered on September 23, 2021 and the orders/decree thereof.

    5. That costs of this application be provided.

7. The grounds of the motion relied on were outlined in the supporting affidavit sworn by Daniel Kabiru Ndungu on July 20, 2022 *inter alia*, that he had retained the firm of Karanu Kanai & Co Advocates to represent the plaintiffs in this suit and a judgment was entered and a decree issued on November 16, 2021 and now wish the firm of Kabane & Co Advocates to take up the matter.

8. The applicant stated that the plaintiffs took a facility of one million secured by a charge over land reference number Ngong/Ngong/34016 in his name from the 1st defendant in the year 2015 and which loan attracted a 4.5 % interest on reducing balance basis. That he was served with a notice of entry of judgement where the 1st defendant intends to attach the suit property to satisfy the decree issued on November 16, 2021 for a sum of Kshs 5,368,933 which amount escalated as a result of interest accrued and the said attachment is illegal as no statutory notice has been served upon them.

9. The applicant contended that he 1st defendant has applied punitive penalties and there is an apparent error on the face of the record thus necessitating an application for review/setting aside the courts judgement entered on September 23, 2021 and the ensuing orders/decree. It is further averred by the 1st plaintiff that it was imperative that the court consider the in duplum rule to protect the plaintiffs as borrower from interest accumulating to astronomic figures as in the instant case, thus safeguarding their equity of redemption as they have been servicing the loan for a period of time.

10. The applicant also stated that no current valuation report had been served upon him by the 1st defendant and he had conducted a valuation of the property which valuation posted a value of Kshs 7,900,000. The plaintiffs stated that they had not been accorded an opportunity to redeem the property, having not been served with the 90 days' statutory notice, 40 days' notice to sell and 45 days of redemption notice and that if the 1st defendant is allowed to attach the property, they will suffer irreparable loss and damage.

11. The 1st defendant fervently opposed the application vide the replying affidavit sworn by Moses Namayi Anyangu on September 30, 2022 stating that it has not commenced any realization of the debt by attachment of the applicant's property and that they have only served the plaintiffs with a notice of entry of judgment.

12. The 1st defendant stated that it endeavors to initiate the process to procedurally have the property realized as security which precipitated the filing of its application dated June 27, 2022 and that the debt continues accruing with the 1st plaintiff not making any efforts to settle the outstanding sum since November 2015.

13. The 1st defendant avers that the applicant's application for review orders or setting aside of judgement entered on September 23, 2021 is frivolous as the same was not done timeously and it is an afterthought as both parties advanced their arguments before the court which considered them before delivering the judgement. Consequently, raising the the in-duplum rule which does not apply in this case is intended to waste the court's time and to frustrate the 1st defendant from recovering the loan.

14. The 1st defendant stated that following the service of notice of entry of judgement upon the plaintiffs, the plaintiffs wrote a letter dated February 24, 2022 asking to be given 60 days to pay the decretal amount yet eight months later they have not made any payment. That they have admitted that the situation is beyond salvage and are filing frivolous applications with no evidence to circumvent due process by attaching the property while the 1st defendant continues to suffer immensely due to the failure of the 1st plaintiff to clear the loan that is in arrears for the last over seven years.

Submissions.

15. The plaintiffs filed submissions dated November 2, 2022 with regard to both applications setting out the issues or determination to include;

    i) whether the plaintiffs have established grounds to warrant review/setting aside of the court's judgement made on September 23, 2021,

    ii) whether the 1st defendant has redeemed himself by attaching the plaintiff's movable goods and whether the said attachment was legal and procedural and

    iii) whether the was any informal charge between the plaintiff and the 1st defendant and if yes, whether the said contract can be cautioned as a result of exorbitant interest rates under the in-duplum rule.

16. The plaintiffs submitted that they have demonstrated an apparent error on the face of the judgement and discovery of new evidence as follows;

    a) The court in rendering its judgement at paragraph 1, of its conclusion found that the property was illegally and fraudulently transferred to the 1st defendant, who at all material times at the hearing of the suit held the title (security) in his name. As such, the plaintiff could not be expected to service and pay interest on a loan, which security (title) was not in his name as it had already been illegally transferred.

    b) The court in awarding a judgement award of Kshs 5,368,933 to the 1st defendant against the plaintiff, failed to take cognizance of the principle loan amount, the in-duplum rule and the fact that the plaintiff had partly serviced the loan.

    c) The court in awarding a judgement award of Kshs 5,368,933 to the 1st defendant against the plaintiff, there is discovery of new material and non-disclosure by the 1st defendant to the extent that the 1st defendant had attached the plaintiff's movable properties.

17. The plaintiffs cited the case of *Leposo Ole Koila & another v Isaac Kireu* [2018]eklr where the court held that an interest rate of 25% per month is by all means oppressive unreasonable and fraudulent, submitting that the court can interfere even where parties have agreed on a rate of interest if it is shown that to be illegal unconscionable or fraudulent. That the 1st defendant being a registered microfinance

cannot claim that the institution is not subject to the in duplum rule as was the case in *Mwambeja Ranching Company Limited and another v Kenya National Capital Corporation* [2019]eKLR.

18. The plaintiffs further submitted that the 1st defendant had engaged in an illegality of transferring the plaintiffs title in his name and un-procedurally attached his movable property hence should not be allowed to continue freezing the plaintiff.

19. The 1st defendant filed two sets of submissions both dated December 5, 2022, one for the application dated June 27, 2022 and the other for application dated July 20, 2022.I will start with the submissions for application dated June 27, 2022.

20. The 1st defendant outlined the background of the matter and outlined the orders given in the judgement delivered on September 23, 2021. The 1st defendant submitted that the security created was in the nature of a charge and that following the delivery of the judgement, the 1st defendant served a notice of entry of the judgement upon the plaintiffs and also sought payment of the outstanding loan balance. The plaintiffs through their advocates then, Karanu Kanai & Co Advocates, wrote a letter dated February 24, 2022 to the 1st defendant's advocates asking to be given 60 days to pay the decretal amount but they are yet to make any payment.

21. The 1st defendant submitted on the issue of whether this court should grant the orders allowing the sale of the property in view of the informal charge created between the 1st defendant/applicant and the 1st respondent/plaintiff to recover the outstanding debt due and the cost of the suit. The 1st defendant argued that the terms and conditions agreed between the parties in the loan agreement stipulated the event of actions to be undertaken upon default. Therefore, they should be allowed to realize its security by way of an informal charge, in exercise of statutory power of sale. In support of their argument, the 1st defendant cited the case of *Jamii Bora Bank Limited v Wapak Developers* [2018] eKLR where the court pronounced itself on what entails an informal charge as per section 79(6) and section 2 of the *Land Act* and also the legality of such agreements as spelt out in section 79 of the *Land Act*.

22. The 1st defendant also relied on the case of *Tassia Coffee Estate Limited and another v Milele Ventures Lirnited* [2014] eKLR in which the court stated that by depositing the title deed with the plaintiff, the defendant created an informal charge in favour of the plaintiff over the suit property as security for payment of the balance of purchase price and other parcels of land, therefore the plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.

23. In respect to the plaintiffs' application dated July 20, 2022, the 1st defendant submitted that the plaintiffs/applicants did not provide any evidence to support the allegations that the 1st defendant had commenced the attachments of property illegally. That their seeking for review of the delivered judgement on the grounds that the court erred in failing to appreciate the provisions of section 44 of the *Banking Act* did not form the issue for determination before the court thus casting doubt on the question of whether an order of review lies therein.

24. The 1st defendant contended that they had entered into a loan agreement for a loan facility of Kshs 1,000,000 which was secured by deposit of the title to the property. The terms spelt out in the loan facility agreement was that the facility was to be repaid in 72 equal consecutive monthly installments of Kshs 46,975/- each, inclusive of interest at 4.5% per month, starting on May 20, 2015, and totaling 3,382,200/= if no default occurred. That following the judgement delivered on September 23, 2021, the 1st defendant served notice of entry of judgement upon the plaintiffs seeking for payment of the outstanding loan balance but the same is yet to be settled.

25. The 1st defendant submitted that review lies on a mistake or error not matters of law as the 1st plaintiff/ applicants seeks. That, if the applicant wanted to raise questions on the issues of law then an appeal

would have sufficed at the appropriate time. Additionally, that the applicant have not presented/ demonstrated to this court the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time of trial or when decree was made.

26. The 1st defendant also submitted that parties are bound to the terms of their contract therefore courts cannot vary the terms of the contract or restructure the facilities by restraining them from exercising its legal remedies as this would amount to rewriting the parties' bargain as is held in the case of *Kenlink Global Limited & 2 others v Paramount Universal Bank Limited* [2021] eKLR where the court echoed the position in the case of *Muigai Enterprises Limited v Kenya Commercial Bank Limited* [2016] eKLR and *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited & another* ML civil case No E240 of 2020 [2020]eKLR.

Analysis

27. I have looked and considered the two applications filed, responses thereto and submissions rendered. Consequently, I frame these issues condensed for determination of both.

    a) Whether the court should review/vary and set aside its judgment entered on September 23, 2021 and orders/decree thereof

    b) Whether the 1st defendant should be granted liberty to exercise statutory power sale of the suit property to recover the outstanding loan balance of Kshs 5,368,933/-

    c) Cost

28. In answering the question of whether the court should to review/vary and set aside its judgment entered onSeptember 23, 2021 and orders/decree thereof, I will look at the grounds set in law upon which an order for review can be granted and in particular, grounds pleaded by the 1st plaintiff in their application. The 1st plaintiff pleaded that there was an apparent error on the face of the judgement because the learned judge failed to consider the in duplum rule while arriving at his decision. The plaintiffs also relied on the ground of discovery of new evidence as was outlined in their submissions.

29. Order 45 rule 1 of the *Civil Procedure Rules, 2010* sets the grounds upon which a court can allow review. It states as follows: -

    " 45 rule 1 (1) Any person considering himself aggrieved-

    (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

    (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

30. For a review of the ruling to be granted, the mistake or error on the judgement should be self -evident and should not require an elaborate argument to establish it. The 1st plaintiff has submitted that there

was discovery of new and important matter or evidence, outlining the deductions from the court's determination delivered on the filed suit. The determination made by court cannot be interpreted to be new evidence as the same was arrived at after an evaluation of the evidence presented by both parties to the court.

31. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & others*, 9 Supreme Court cases 596 at page 608 had this to say:-

> "the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

32. The meaning of that phrase "sufficient cause" was considered in the case *FWNM v SMM* [2019] eKLR as follows: -

> "I again repeat the question what does the phrase "sufficient cause" mean. The Supreme Court of India in the case of *Parimalv Veena*observed that: -
>
> sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. .....the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously'".

33. The court made a determination that indeed there was a loan agreement between the 1st plaintiff and the 1st defendant which is credit company for a facility of Kshs 1,000,000 using the title to the property as security and went ahead to make an order that the 1st plaintiff make a payment of Kshs 5,368,933/- being the amount loaned and the interest that had accrued. The amount awarded to the 1st defendant was pleaded in the counter-claim hence the plaintiff was aware of this sum before the case was heard and determined on merits. The plaintiffs did file a reply to the defence and counter-claim dated July 10, 2018 and nowhere in that replying pleading did they invoke the in duplum principle. The same principle was also not pleaded in the original plaint nor submitted on at the close of the hearing.

34. It is an established principle of law that parties are bound by their pleadings and there is a reason for it to provide a level playing field where parties in a suit know what case to prepare for. Similarly, courts are bound to determine issues raised before it or that come up for the determination of the court during the trial. In the prayers contained in the plaint, none sought the court to make a declaration that the sum claimed by the 1st defendant was in contravention of in duplum rule. Neither did the plaintiffs seek an order for taking of accounts. It behoves logic for the plaintiff to now bring an application for

review on the ground of error/mistake on the face of the record premised on an issue that was neither pleaded nor raised in evidence.

35. In the event that indeed the in duplum principle was a matter that came for determination before judgement was rendered and in the plaintiffs view the judge failed to take it into consideration then such failure is a point which can only be challenged by way of appeal and not under the remedy of review. I have concurrent jurisdiction with the judge whose finding is being questioned and I am least qualified to re-evaluate his judgement to reach a different conclusion as is being urged.

36. It is my considered opinion and i so hold that the plaintiffs application does not meet the threshold for review. The same is dismissed for want of merit with costs to the 1st defendant respondent.

37. The court now proceeds to determine whether the 1st defendant should exercise statutory power sale of the property to recover outstanding loan balance of Kshs 5,368,933/- as prayed for in their application. There is no dispute that the 1st defendant has a judgement in their favour for the claimed sum. It is also not disputed that the judgement directed that the suit title be deposited with the 1st defendant on the terms of their initial transaction with the 1st plaintiff. In support of their motion the 1st defendant relied on the provisions of section 79 of the *Land Act*.

38. Section 79 (6) provides thus;

> (6) an informal charge may be created where:
>
> (a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee plus interest as agreed by the chargor and the charge;
>
> (b) the chargor deposits any of the following—
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> (i) a certificate of title to the land;
>
> (ii) a document of lease of land;
>
> (iii) any other document which it is agreed evidences ownership of land or a right to interest in land.
>
> (9) A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court.

39. The plaintiffs argued that the orders cannot be granted because the issue of an informal charge cannot be raised at this stage, the court having rendered itself on the dispute between the parties. Justice Okongo held in paragraph 2 of the orders made thus; the land registrar, Ngong and or Kajiado shall issue a new title deed for the suit property in the name of the 1st plaintiff but the same shall be handed over to the 1st defendant who shall hold the same in the terms on which the same was handed over to it by the 1st plaintiff.

40. In essence, the judge allowed the 1st defendant to hold the suit title on the terms before filing of the suit. Those terms in their view created an informal charge between it and the 1st plaintiff and as stated in section 79 quoted above, an informal charge is not entered in the register of the suit title. Although the plaintiff denied the creation of an informal charge, the judge found that the 1st defendant had given the 1st plaintiff a loan (as per the loan agreement executed and produced in evidence) on the basis of which he deposited title of the suit property with the 1st defendant to hold as security. The plaintiffs argue that the 1st defendant had not served them with a statutory notice. However, they did not refer

this court to the relevant section of the law that provided for service of notice. It is my considered view that the filing of this application is in itself a notice on the plaintiffs to either pay the debt or the suit property be sold by the 1st defendant to recover the debt.

41. Lastly, the 1st defendant holds a decree and is permitted under order 22 of the *Civil Procedure Rules* to apply for leave to sell the immovable property of the judgement debtor (1st plaintiff) in realisation of the decree. Thus, whether the 1st defendant is applying for leave of the court to sell the suit title under the terms of an informal charge or in execution of the decree, the outcome remains the same.

42. In conclusion, I find that the 1st defendant's application dated June 27, 2022 is merited and is allowed as presented. However, the plaintiffs application dated July 20, 2022 did not meet the threshold for review. The same is dismissed for want of merit with costs to the 1st defendant respondent

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2023

A. OMOLLO

JUDGE

In the presence of

Mr Beyo Advocate for the 1st Defendant

N/A for Kabene for the Plaintiffs