



**Matere v Family Bank (K) Ltd & another (Civil Suit 10 of 2018)
[2023] KEHC 19359 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19359 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 10 OF 2018**

**DK KEMEL, J
JUNE 30, 2023**

BETWEEN

ROSE KHAINJA MATERE PLAINTIFF

AND

FAMILY BANK (K) LTD 1ST DEFENDANT

PAVEMENT AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. Vide her plaint dated October 9, 2017, the plaintiff sought an order of permanent injunction restraining the defendants, their agents, servants and or other persons acting on their behalf whatsoever from selling the plaintiff's parcel of land No E Bukusu/S Kanduyi/14591 as well as costs of the suit.
2. The plaintiff pleaded that sometimes in the year 2010, she guaranteed one Linus Huduli Messo (the borrower) a loan from the 1st defendant in the sum of Kshs 650,000/- which was to be repaid through salary check-off from the borrower's payslip. The plaintiff charged her property known as E Bukusu/ S Kanduyi/14591 (the suit property).
3. That subsequently, the borrower lost his job and was thus unable to repay the loan and on October 5, 2017, the plaintiff was served by the 2nd defendant with a proclamation of their intention to sell the suit property. She avers that the failure to repay the loan was unintentional as the borrower lost his job.
4. The defendants filed their statement of defence stating that the borrower was indeed advanced the sum of Kshs 3,950,000/- and secured by a charge over the suit property ceding to the 1st defendant the rights over the suit property unless the plaintiff performs her part of the obligations under the charge and that the plaintiff having defaulted, the 1st defendant is entitled to sell the property after it served the requisite notices.



5. PW-1, Rose Khainja Mattere stated that she was approached by the borrower to guarantee him a staff loan of kshs 3,950,000/- with the 1st defendant where he was working as a credit manager. She accepted and handed over the title to the suit property which initially belonged to her late father.
6. She stated that she did not sign any document with the bank however she read the terms of the loan for instance that in case of retirement, the borrower's benefits would be used to offset the outstanding loan.
7. She testified that on August 24, 2017, she was served with a notification of sale yet she had not been notified by the bank of the borrower's default or the fact that the borrower had retired due to sickness. She checked with the bank and realized that there was an outstanding balance of Kshs 1, 472, 695/-. That the bank declined to allow her pay the balance though the interest was high. She managed to pay into the borrower's account the sum of kshs 180,000/- which was withdrawn by the borrower.
8. She beseeched the court to allow her liquidate the sum in monthly installments of Kshs 50,00/- every month.
9. On cross examination, she conceded that she indeed guaranteed the borrower for the sums advanced and that the documents including the identification documents and the postal address are hers. That the documents were brought to her by the borrower. That the bank informed her that the borrower had received his benefits and was aware of the borrower's default. That she had not made any other payment since December 30, 2016 to date.
10. In relation to the notification of February 17, 2017 and the demand letter, she confirmed that the postal address had closed but that it is the one she had supplied to the bank.
11. The plaintiff's case was later closed after she failed to call her witnesses and the 1st defendant tendered its evidence.
12. DW-1 Elizabeth Khaemba, the 1st defendant's senior relationships officer stated that the borrower was advanced the sum of kshs 3,950,000/- by the 1st defendant and secured a charge over the suit property and guaranteed by the plaintiff. The borrower defaulted and the bank issued a statutory notice on February 17, 2017. On June 20, 2017, a notice of intention to sell was issued and instructed Acumen valuers to undertake valuation of the property and on August 11, 2017, the 2nd defendant was instructed to sell the property. The 2nd defendant then issued notification of sale and upon the lapse of the period, the sale was advertised.
13. She stated that therefore, the 1st defendant was entitled to sell the property to recover its loan.
14. The parties were directed to file and serve their written submissions but only the 1st defendant complied. In their submissions, the following issues are identified;
 - a. Whether the plaintiff has fully discharged her obligations under the charge instruments dated October 8, 2011 and July 23, 2012.
 - b. Whether the 1st defendant issued the requisite notices to enable it exercise its statutory power of sale over the property.
 - c. Whether the 2nd defendant followed the statutory procedure in arranging the sale of the subject property to recover the outstanding balance.
15. On the first issue, it is argued that in terms of the letters of offer dated April 24, 2012 and July 11, 2012, the charged property cannot be discharged or redeemed unless monies due and owing are paid by the plaintiff or the borrower in accordance with the charge documents. Reliance is placed on the



authorities in National bank of kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & another (2001) eKLR, John Karanja Kihagi & another Vs Jamii Bora Bank & 2 others (2020) eKLR and Cieni Plains Company Limited & 2 others V Ecobank Kenya Limited (2017) eKLR, Nyanza fish procesors ltd vs Barclays bank of kenya ltd (2009) eKLR.

16. On the second issue, the bank issued a three month's statutory notice on February 17, 2017 and served upon the plaintiff as provided for under Section 90 of the Land Act by way of registered post to the address provided at the time of creating the charge.
17. On the statutory notice to sell, it is submitted that the same is dated June 20, 2017 and was served upon the plaintiff by way of registered post to the address provided.
18. That in the circumstances, the plaintiff having failed to comply with the terms of the notices, the bank is entitled to exercise its power of sale so as to realize the security.
19. In this limb, the following authorities have been cited; John Karanja Kihagi (supra), Nancy Wacici Vs Kenya Women Microfinance Bank Ltd (2017) eKLR, Showind Industries Vs Guardian Bank Limited & another (2002) 1 KLR 284 and Ambient Construction Vs National Bank of Kenya Limited (2019) eKLR.
20. On the third issue, it is contended that the 1st defendant issued a letter of instructions to Acumen Valuers to conduct a valuation of the property, the 2nd defendant was instructed as is required by the Auctioneers (Practice) Rules, 2009, a notification of sale was issued under Rule 15 of the Auctioneers (Practice) Rules 2009 and finally an advertisement was placed on the newspapers on September 5, 2018.

Analysis

21. From the evidence on record, there is no dispute that the plaintiff guaranteed the borrower in a loan which he took from the 1st defendant. The loan is now in default as according to the loan statement filed by the defendant showing that the default was in the sum of KShs 6,333,433.16 as at December 31, 2021. Even though the plaintiff in examination in chief disputed signing the documents relating to the charge, she conceded on cross examination that she indeed signed the document and gave her postal address which has since been closed.
22. It is also not in dispute that the borrower has since left the bank's employment without clearing the loan.
23. Given the admission by the plaintiff that she indeed guaranteed the loan and charged her property in favour of the bank, the issue then, is whether the bank followed the procedure up to the time it served the proclamation and caused the advertisement of the suit property.
24. In such a matter, the provisions of the Land Act come into operation. Section 90(1) and (2) provide;
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 - (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

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- (2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters –
- a) the nature and extent of the default by the chargor;
 - b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
 - d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies

25. In relation to this case, the defendants state that upon default, they issued a three-month's statutory notice dated February 17, 2017 produced as Dexh 6 and contained in page 71 of the defendant's bundle of documents. According to the notice, the amount required to be paid by the plaintiff to rectify the breach is Kshs 113,249.22. There is no evidence that the amount was paid. In the said notice, the letter is sent to the plaintiff of Po Box 1025-50200 Bungoma and that the same was served by way of registered post which certificate is contained in page 73 thereof.
26. Commenting on the issue, Oundo J in *East Africa Vantor Co Ltd v Agricultural Finance Co-op Ltd & another* [2017] eKLR held;

As read together with section 90(3), section 90(2) of the *Land Act* obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the chargor is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargee would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.

27. The defence that the notice was not served was articulated by the court in *First Choice Mega Store Limited v Ecobank Kenya Limited* [2017]eKLR held;

[37] ...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property



to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notification of such action and an opportunity to redeem his property.

28. In the instant case, the plaintiff alleged that the postal address had been closed. There is no evidence tendered showing the same. The postal address having been given by the plaintiff, there was no way the bank could have known that much.
29. In the circumstances, I find that the bank complied with the terms of Section 90 of the *Land Act* in relation to issuing statutory notices.
30. From the evidence tendered by the defendant, having issued the statutory notice and there being no compliance on the plaintiff's part, it instructed the valuers to carry out valuation of the property before instructing the 2nd defendant to proceed with realization of the security.
31. A valuation was then conducted and the report was tabled in this court as Dexh 9 and the instructions to the 2nd defendant culminating in the notification of sale and the advertisement.
32. My analysis of the evidence shows that the defendants complied with the law as required of them before finally putting up the advertisement. The 1st defendant is entitled to realize the security out of the property charged as the essence of the charge was to secure the payment of the amount so advanced. In the words of Lord Bingham of Cornhill, in *Royal Bank of Scotland Plc v Etridge* [2002] 2 AC 733, that;

“the law must afford both parties a measure of protection”. The lender who thus also feels able to advance money on security, including non-possessory security, like land, in reasonable confidence reasonable confidence that it may at an appropriate time enforce the security is also protected”.
33. The fact of default not being contested by the plaintiff, I find the plaintiff's case as not having been proved to the required standard of proof. The plaintiff's claim that the borrower was expected to use his terminal benefits to offset the loan does not help her case since she is the one who offered her property as security for the loan taken by the borrower and that she knew that the said property would be sold in the event of default. She only made one payment on December 30, 2016 and did not make any other payment until the property was advertised for sale. She has not even sought from the 1st defendant to be allowed to liquidate the same by instalments. Clearly, the conduct of the plaintiff is one of a don't care attitude and that her conduct is not deserving of an equitable remedy. The 1st defendant should be allowed to realize the security in pursuit of the monies advanced to the borrower. The plaintiff has failed to exercise her right of equity of redemption as she has not offered a proposal to the 1st defendant.
34. In the end, I find no merit in the plaintiff's case which is hereby dismissed with costs. The interim order in force barring the sale of the suit property is hereby vacated.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023

D.Kemei

Judge

In the presence of :

No appearance Rose Khainja Matere Plaintiff



Miss Lidoro for 1st Defendant

No appearance for 2nd Defendant

Kizito Court Assistant

