



**Kimeria (Suing in her capacity as the administrator of the Estate of Harrison Charles Kimeriah (Deceased) v Housing Finance Company (K) Ltd (Commercial Case 250 of 2008) [2023] KEHC 26196 (KLR) (Commercial and Tax) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26196 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**COMMERCIAL CASE 250 OF 2008**  
**JWW MONG'ARE, J**  
**NOVEMBER 30, 2023**

**BETWEEN**

**FAITH WANJIRU KIMERIA (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF HARRISON CHARLES KIMERIAH (DECEASED) ..... PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY (K) LTD ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff has instituted this suit in her capacity as the Administrator of the estate of Harrison Charles Kimeriah (deceased) by a plaint dated 12<sup>th</sup> May, 2008 and amended on 16<sup>th</sup> January, 2017 seeking for judgment against the Defendant as follows: -
  - a. A declaration that the deceased had fully repaid the loan amount advanced by the Defendant and any amount being demanded by the Defendant from the Plaintiff is not due and or payable under the subject contract;
  - b. A declaration that the purported charge over the suit property is null and void;
  - c. General damages for breach of contract between themselves and the Defendant for illegally, irregular transfer of L.R. No. 7793/6 to a third party;
  - d. Kshs. 150,000,000/=(One Hundred and Fifty Million) as value of the suit property together with developments thereon; and
  - e. Costs of this suit plus interest.



2. On 1<sup>st</sup> July, 2008, the Defendant filed a defence to the suit denying the averments contained in the Plaintiff's plaint and seeking for an order dismissing this suit with costs to the Defendant. The matter proceeded to a full hearing and the Plaintiff called five (5) witnesses whereas the Defendant called two (2) witnesses to testify.

### **Plaintiff's Evidence**

3. Faith Wanjiru Kimeriah testified as PW1. She confirmed to have recorded a statement dated 20<sup>th</sup> July, 2018 which she adopted as her evidence in chief. She also relied on the agreed bundles of documents volume 1 & 2 dated 1<sup>st</sup> November, 2010 which she produced as evidence before the court. PW1 stated that she is the widow of the deceased who was the registered owner of L.R. No. 7793/6 (hereinafter referred to as the suit property) measuring 4.2 acres or thereabout situated at Langata within the Republic of Kenya. She further confirmed that pursuant to HCC No. 873 of 1993 she was declared by the court as 50% owner of the suit premises. She further stated that the deceased approached the Defendant for a loan whose terms were contained in the letter of offer dated 8<sup>th</sup> July, 1980 and confirmed that she, together with her late husband executed the charge instrument which offered the suit property for the loan of Kshs.500,000/= advanced to the deceased by the Defendant. It was her testimony that the loan was to be insured and that her late husband contributed Kshs.451.25/= to cover the insurance. The insurance company as per the loan agreement and the letter of offer produced were to be sourced by the Defendant and that the premium was deducted monthly and charged to the deceased as part of his loan repayment. Further, in the event of death, the loan balance would be fully redeemed by the insurance and the charged property discharged.
4. Mrs. Kimeriah testified that the Defendant varied the rate of interest contrary to the terms of the letter of offer hence increasing the monthly repayments. It was her testimony that the said variations were done arbitrarily and without notice to her deceased husband. She testified that despite her husband having paid the loan and interest at Kshs.1,115,181.45/= as at 1994, the Defendant still demanded to be paid Kshs.9,026,099.60/= this led to her late husband filing of Nairobi HCCC No. 693 of 1982 between the Defendant and her deceased husband challenging the same. She testified that her husband passed on in 2005 when the suit was still pending before the courts and her attempts to be enjoined to the said suit proved to be futile.
5. PW1 testified that after the passing of the deceased she visited the Defendant and gave her new postal address being Post Office Box No. 72331-00200 Nairobi to Mr. Geoffrey Kimaita, an employee of the Defendant, for purposes of all future communication. She received no communication from the Defendant but was forcefully evicted from the suit premises by hired goons in the company of policemen and MR. John Karungai Nyamu who claimed to be the registered owner of the premises. She was shocked to learn that the property had been sold by the Defendant by a private treaty for Kshs.10,000,000/= on 25<sup>th</sup> July, 2006.
6. She testified that even as at the time of the purported sale, the suit premises were not valued at Kshs.10,000,000/= but had a market valuation of Kshs.37,000,000/=. She contended that the sale of the suit property was unlawful since she was not served with the requisite statutory notices before the sale, and the one dated 26<sup>th</sup> January, 2006 sent to the estate of the late Harrison Charles Kimeriah was not received by her. The Plaintiff asserted that the current value of the suit property together with all the developments thereon is Kshs.150,000,000/=. She urged the court to declare that the loan at Kshs.500,000/= had been fully redeemed and that the purported sale was an illegality. She urged the court to award to her the sum of Kshs.150,000,000/= in damages and as compensation for the illegal sale of the suit property and the developments found thereon.



7. Mr. Moses Kago an accountant by profession testified as PW2. He testified that he had been hired by the Plaintiff and her deceased husband to recalculate the loan repayment. He confirmed that from the records availed to him the loan would be repaid in lump sum and that the same had been repaid by 1995. He testified that he noted that the interest rate was varied several times and not maintained at 10.5% as indicated in the letter of offer letter and the charge instrument indicated the rate at 12% per annum. His recalculation revealed that the interest applied was as high as 26%. He could not confirm if notices of variation of the interest were ever served on the deceased or at all as agreed in the charge instrument.
8. Ms. Eunice Nyawira Kimeriah the Plaintiff's daughter and a banker by profession testified as PW3. She largely corroborated PW1's testimony and stated that there was no contest over the validity of the charge instrument. She further confirmed that as per the Charge instrument the statutory notice dated 26<sup>th</sup> January, 2006, were never received at both addresses. She confirmed that she accompanied the mother to the defendant's offices to provide the postal address and confirm the status of the loan after the demise of her father.
9. Ms. Jane Miriti a Valuer at Capital Valuers testified as PW4. She stated that in October, 2007 the market value of the suit property together with the developments thereon was Kshs.37,000,000/= and in 2010 it had risen to Kshs.69,000,000/=. She produced her valuation report as evidence before court.
10. Mr. Paul Kaguamba A Valuer at Assets & Mortgages Valuers testified as PW5. He testified that in 2007 the market value of the suit property was Kshs.60,000,000/= and in 2019 it had risen to Kshs.200,000,000/=. He further testified that looking at the Defendant's valuation of the suit property in 2007 the suit property was grossly undervalued. He produced his valuation report as evidence in court.

### **Defendant's Evidence**

11. DW1 was Mr. Samuel Odiembo a valuer. He stated that as per his valuation report dated 2<sup>nd</sup> May 2006 the market value of the suit property was Kshs.10,000,000/=. In doing his valuation, he relied on a sale on L.R. No. 7793/9 measuring approximately 10 acres which was not far from the suit property and was sold at Kshs.18,000,000/= in 2004 with one acre retailing at Kshs.1,800,000/=. In cross examination he stated that PW5's valuation was based on values at Karen area whereas the suit property is situated in Langata, a neighbouring area to Karen.
12. Mr. Simon Osok an officer of the Defendant testified as DW2. He testified that a loan of Kshs.500,000/= was advanced to the deceased and the said loan was fully insured but the insurance would only cover the sums upon death of the debtor only if the loan account was not in arrears. He confirmed that based on the statements, the life insurance was indeed debited by the Defendant but no policy was ever taken by the Defendant to secure the loan. He stated that the deceased started defaulting in his loan repayments in October, 1980, and that notices on variation of interest were issued to the deceased.
13. Mr. Osok deposed that a statutory notice was sent to the Plaintiff before the suit property was sold and there was a certificate of posting which showed the addresses used. Mr. Osok confirmed that the deceased through a consent proposed to pay the outstanding sums by way of monthly instalments whereas the Plaintiff committed to pay Kshs.9,000,000/= in 2001. In cross examination, he confirmed that the charge instrument required the Defendant to charge the deceased interest annually but the Defendant started to compute interest monthly.



## Submissions

14. Upon close of the Plaintiff's and the Defendant's case, the Court directed parties to file written submissions. I shall not regurgitate the contents of the said submissions but I have carefully considered them at length and will refer to them in my determination as necessary.

## Analysis And Determination

15. I have carefully considered and analyzed the evidence above in line with the pleadings filed, together with the written submissions by Counsel for parties, and note that the issues that arise for determination are –
- i. Whether this Court has jurisdiction to hear and determine the dispute between the parties herein;
  - ii. Whether there was a valid Life Insurance cover in place equivalent to the loan advanced to the deceased;
  - iii. Whether the Defendant served the Plaintiff with all the requisite statutory notices before selling the suit property by private treaty;
  - iv. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

### **Whether this Court has jurisdiction to hear and determine the dispute between the parties herein.**

16. It is trite that a Court's jurisdiction flows from either the Constitution or legislation or both thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. This was the holding by the Supreme Court in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
17. The Defendant submitted that the dispute between the parties herein falls under the category of a dispute relating to public, private and community land, contracts and/or any other instrument granting any enforceable interests in land. Therefore, it ought to be determined by the Environment and Land Court.
18. This was contested by the Plaintiff who argued that the dispute herein arose as a result of a financial facility advanced to the deceased by the Defendant which facility was secured by a charge registered over the suit property in favour of the Defendant. The Defendant alleges that the deceased defaulted in his repayment of the facility thus it exercised its statutory power of sale over the suit property. In light of the foregoing, the question that comes to mind is whether a charge and the exercise of a bank's statutory power of sale amounts to land use for purposes of Article 162(2)(b) of the Constitution of Kenya, 2010 which established the Environment and Land Court to deal with issues relating to the use, occupation of, and title to land as set out under Section 13 Environment and Land Court Act. The Court of Appeal in the case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR dealt with this issue and held that –

“By definition, a charge is an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the Land Act). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth. The rights so acquired are limited to the realization of the security so advanced (see Section 80 of the Land Act). The creation of that relationship therefore, has nothing to do with use of the land (as defined above). Indeed, that relationship



is simply limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor...

...the assertion that a charge constitutes use of land within the meaning of Article 162 of the *Constitution* fails.”

19. The dispute between the parties herein just as in the aforementioned case touches on settlement of the sums owed to the Defendant by the Plaintiff on account of a contractual relationship, and the exercise of the Defendant’s statutory power of sale as a result of breach of the said contractual relationship. As a result, this Court finds that it has the requisite jurisdiction to determine this dispute as opposed to the Environment and Land Court.

**Whether there was a valid Life Insurance cover in place equivalent to the loan advanced to the deceased.**

20. The Plaintiff referred to Clause 6 & 15 of the Defendant’s loan conditions and submitted that it was the responsibility of the Defendant to ensure that the deceased was insured. The Defendant on the other hand submitted that though the loan was insured as per the charge instrument, the insurer could not repay the loan upon the demise of the deceased due to unpaid dues as at the time of the death of the deceased.
21. From the foregoing, it is evident that the Defendant was tasked with the duty of ensuring that the life of the deceased was insured for a sum equivalent to the loan advanced to him upon payment of the premiums by the deceased. Mr. Osok (DW2) upon cross examination confirmed that the entire loan amount being Kshs.500,000/= was insured hence if the borrower died before the loan was fully repaid, the balance was supposed to be paid by the insurance.
22. It is however noteworthy that the Defendant never produced a copy of the insurance policy that was taken over the life of the deceased thus the averments contained at paragraph 7(b) of the Defendant’s defence that the insurance would only cover the sums upon the death of a party if the account was not in arrears and the borrower paid the same are of no probative value. This Court also notes that the Defendant did not demonstrate how the insurance premiums deducted from the deceased’s account were utilized and to which insurance company they were paid. Further, Upon the passing of the deceased, the Defendant did not demonstrate that it made a claim for payment of the balance of the loan amount and the insurance company declined to make payments on grounds that there were unpaid dues as at the time of the death of the deceased or any other reason whatsoever.
23. In the circumstances, this Court forms the conclusion that there was no valid Life Insurance cover in place equivalent to the loan advanced to the deceased at the time of death of the Plaintiff’s husband, despite the Defendant having diligently collected the premium thereto. The said premium was deducted and not passed on to the insurer in terms of the loan conditions between the parties.

**Whether the Defendant served the Plaintiff with all the requisite statutory notices before selling the suit property by private treaty.**

24. The Plaintiff submitted that the Defendant did not serve her with any statutory notices as provided for under Section 74 of the *Registered Land Act*, the notice that was purportedly sent to her by the Defendant via her registered post was sent to the wrong postal address hence she did not receive it. The Defendant submitted that the Plaintiff was served with a statutory notice dated 26<sup>th</sup> January, 2006, via her postal addresses being Post Office Box Nos. 14797 & 72331. Despite her living on the suit premises prior to the sale, there was nothing brought to the property by the Defendant to indicate that there was an ongoing sale or the intention to sale the property or at all. The Plaintiff she only learned that



the property had been sold when she was evicted by the 2<sup>nd</sup> Defendant and hired goons in the company of the Police.

25. In support of the averments that the statutory notice dated 26<sup>th</sup> January, 2006 was indeed served upon the Plaintiff the Defendant produced a certificate of posting. The Plaintiff argued that the certificate of posting was not enough to demonstrate service as the letter might have been returned to sender after some time. I am therefore satisfied and do believe the plaintiff when she affirms that no statutory notices were served upon her before the sale of the property.

**Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.**

26. From the evidence adduced in this court, it is not contested that the loan amount advanced to the deceased was Kshs.500,000/=. It is also not disputed that over a period of time the same was repaid in excess of Kshs.1,000,000/=. The Plaintiff confirmed that indeed she made an attempt to inform the Defendant about the death of her late husband who was the principal borrower and that indeed it was her expectation that the life insurance they had been levied on the loan repayments would fully discharge the loan. The charge instrument provided for a life insurance policy over the life of the borrower, the Defendant did not contest the same but failed to produce a policy nor an explanation as to how come the loan remained outstanding despite the death of the borrower. The Defendant only produced a certificate of posting as evidence of service of the statutory notices and made no attempt to visit the suit premises prior to the sale.
27. In light of the foregoing, I am persuaded that the Plaintiff has proved her case against the Defendant on a balance of probability thus she is entitled to the reliefs sought in the plaint. The upshot is that the Plaintiff's suit against the Defendant has merit. In addition, costs follow the event, the Plaintiff being the successful party is hereby awarded costs of the suit.
28. In the end, I enter Judgment in favour of the Plaintiff against the Defendant in the following terms –
- i. A declaration is hereby issued that the deceased had fully repaid the loan amount advanced by the Defendant;
  - ii. The Defendant do pay to the Plaintiff the sum of Kshs.150,000,000/= being the current market value of the suit property together with developments thereon.
  - iii. Costs of this suit;
  - iv. Interest on (ii) &(iii) above from the date of this judgment until payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**J. W. W. MONG'ARE**  
**JUDGE**

**In the Presence of:-**

- 1. Mr. Mirie holding brief for Mr. King'ara for the Plaintiff.**
- 2. Ms. Wanjiku holding brief for Ms. Jan Mohammed for the Defendant.**
- 3. Amos - Court Assistant**

