



REPUBLIC OF KENYA



**Alinoor & another v Ismail (Environment & Land Case 1 of 2022)
[2023] KEELC 16784 (KLR) (12 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 1 OF 2022**

CA OCHIENG, J

APRIL 12, 2023

(FORMERLY MACHAKOS HCCC NO. 14 OF 2021 (OS))

**IN THE MATTER OF AN ORDER FOR SALE OF LAND
PARCEL TITLE NO. MAVOKO MUNICIPALITY BLOCK 7/266**

AND

IN THE MATTER OF SECTION 79 AND 90 OF THE LAND ACT NO. 6 OF 2012

BETWEEN

ABDINOOR MUHIADIN ALINOOR 1ST APPLICANT

ABDULLAHI DAHIR MOHAMED 2ND APPLICANT

AND

KHALIFAN KHAMIS ISMAIL RESPONDENT

JUDGMENT

1. What is before Court for determination is the Applicants' Originating Summons dated the 14th July, 2021 where they seek the following orders:
 1. That the Property known as Mavoko Municipality Block 7/266 charged by the Respondent to the Applicants under informal charge dated 25th February, 2021 be sold to recover Kenya shillings three million (Kshs. 3,000,000) together with agreed return of Kenya shillings one million eight hundred thousand (Kshs. 1,800,000) currently due and owing to the Applicant.
 2. That an order for vacant possession do issue over property known as Mavoko Municipality Block 7/266 to enable the Applicant to sell the property.
 3. That the Respondent to pay the cost of this suit.



2. The Respondent though duly served as evident in the Affidavits of Service sworn on 7th July, 2022 and 9th September, 2022 respectively, failed to enter appearance nor file a response to the Originating Summons which proceeded via viva voce evidence.

Evidence of the Applicants

3. The 1st Applicant as PW1 stated that the Applicants entered into a Memorandum of Understanding dated the 2nd October, 2020 with the Respondent in which they agreed to advance him Kshs. 3,000,000. He explained that, it was an agreed term within the said Memorandum of Understanding that the Respondent was to pay back a total of Kshs. 4, 800,000 within three months from the date of the agreement which amount includes an agreed return of investment of Kshs. 1, 800,000. It was his testimony that in honouring their part of the Agreement, they paid the Respondent a total sum of Kshs. 3,000,000. Further, that they agreed that the Respondent was to execute an informal Charge which they consequently executed on 25th February, 2021 with respect to Title Number Mavoko Municipality Block 7/266 that was solely owned by the Respondent. He testified that the Respondent had agreed to give them the original Certificate of Lease of his property known as Mavoko Municipality Block 7/266 as security for the investment sum advanced to him. He confirms that through their Advocates, they served the borrower with a demand notice for the outstanding amount of Kshs. 4, 800,000 due and owing as at 2nd January, 2021 which demand the Respondent failed to respond to and further refused to pay. Further, through their advocates, they issued the Respondent with a notice of default on 29th March, 2021 and demanded for payment of the entire outstanding sum. It was his further testimony that the principal sum together with the agreed amount of the return of investment is still outstanding and despite demand including reminders, the Respondent has failed to pay the amount due. The Applicants produced the following documents as exhibits: Memorandum of Understanding dated 2nd October, 2020; Letter of Authority dated 14th July, 2021; Informal Charge dated 25th February, 2021; Copy of Certificate of Lease for Land Title Number Mavoko Municipality Block 7/266; Demand Letters dated the 5th January, 2021 and Notice of Default of Payment of Investment Sum and Returns dated the 29th March, 2021.

Submissions

4. The Applicants filed their submissions where reiterated their evidence as presented and contended that the Informal Charge created between the Respondent and themselves in respect to land title number Mavoko Municipality Block 7/266 vide the Memorandum of Understanding dated the 2nd October, 2020 for the sum of Kshs. 3,000,000 including Kshs. 1,800,000 return on investment, is valid. They contended that since the Respondent had received the monies and deposited the Certificate of Title for the aforementioned parcel of land, a Charge/Chargor relationship had been created. Further, since he failed to repay the monies advanced to him including return on investment, they are entitled to exercise their statutory power of sale over the said subject property. To support their arguments, they relied on Section 79(6) and (7) of the Land Act as well as the case of Jamii Bora Bank Limited v Wapak Developers (2018) eKLR.
5. The Respondent never tendered any evidence nor filed submissions.

Analysis and Determination

6. Upon consideration of the Originating Summons dated the 14th July, 2021 including the Supporting Affidavit, annexures and submissions, the following are the issues for determination: Whether a valid Informal Charge exists between the Applicants and the Respondent in respect to Land Title Number



Mavoko Municipality Block 7/266. Whether the Applicants are entitled to the Orders as sought in the Originating Summons.

7. As to whether a valid Informal Charge exists between the Applicants and the Respondent in respect to Land Title Number Mavoko Municipality Block 7/266.
8. The Applicants claimed to have entered into a Memorandum of Understanding (MOU) dated the 2nd October, 2020 with the Respondent in which they agreed to advance him Kshs. 3,000,000. They contended that as per the terms of the said MOU, the Respondent was expected to pay Kshs. 3,000,000 plus another Kshs. 1, 800,000 within three months from the date of signing the said MOU. Further, that the total amount the Respondent was meant to repay was Kshs. 4,800,000. PW1 confirmed in his testimony that in honouring their part of the agreement, they paid the Respondent a total sum of Kshs. 3,000,000 and they agreed that the Respondent was to execute an Informal Charge which they consequently did on 25th February, 2021 with respect to Title Number Mavoko Municipality Block 7/266 that was solely owned by the Respondent. He testified that the Respondent had agreed to give them the original Certificate of Lease of his property known as Mavoko Municipality Block 7/266 as security for the investment sum advanced to him.
9. The Respondent though duly served never filed a reply to controvert these averments.
10. On Informal Charges Section 79(6) of the Land Act stipulates that:

“79(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; (b) the chargor deposits any of the following-

- 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.

(7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.

(8) An arrangement contemplated in subsection (6) (a) may be referred to as an “informal charge” and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a “lien by deposit of documents.”

(9) A chargee shall not possess or sell land whose title document have been deposited with the chargor under an informal charge without an order of the Court.”

11. While Section 2 of the Land Act further defines a charge as follows:

“Charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –



- a. an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor's land with the repayment of money or money's worth obtained from the chargee.... ”
12. In this instance, it emerged in evidence that the Applicants and Respondent entered into an MOU culminating in the Applicants giving the Respondent Kshs. 3 Million. It was further agreed that the Respondent was to pay an additional Kshs. 1.8 million. I note as per Clause 5 of the said MOU, the Respondent agreed to deposit his Certificate of Lease as security. Further, as per Clause 7 of the MOU, the parties agreed that in the event of default, the Debtor was to be given twenty one (21) days' Notice to remedy the debt or else the investors could exercise their power to transfer or dispose of the security. At Clause 8 of the MOU, the Debtor accepted to execute an Informal Charge (Form LRA 54) that would allow the investors to transfer or dispose of the security. I note the Respondent proceeded to surrender his title to the Applicants and executed an Instrument of Informal Charge which was registered at the Lands Office.
13. In the case of *Jamii Bora Bank Limited v Wapak Developers* [2018] eKLR, it was held that:
- “In light of the above, it is evident from the applicable provisions of law that informal charges must be by way of an interest and it must be reduced into writing, and the Chargee must enter into further charges or agreements in the event that they want security provided for any other monies that maybe found to be owed by the Chargor. In casu, it is clear from the terms of the agreement that the parties herein created an informal charge under the loan facility and I have taken note of the fact that the letter of offer dated 19th December, 2014, Supplemental letter of offer dated 27th April, 2015 and an informal charge instrument dated 18th June, 2015.....was duly executed by the Defendant. Thus the parties herein duly executed a lien by the deposit of title with the Plaintiff by the Defendant, written and witnessed undertaking as between them. In casu, it is clear from the terms of the agreement that the parties herein created an informal charge under the loan facility and I have taken note of the fact that the letter of offer dated 19th December, 2014, Supplemental letter of offer dated 27th April, 2015 and an informal charge instrument dated 18th June, 2015 was duly executed by the Defendant. Thus the parties herein duly executed a lien by the deposit of titles with the Plaintiff by the Defendant.”
14. See also the decision in *Tassia Coffee Estate Limited & Anor v Milele Ventures Limited* (2014) eKLR.
15. Based on the facts as presented while relying on the legal provisions I have cited above as well as associating myself with the cited decisions, I opine that since there was a duly executed Memorandum of Agreement dated the 2nd October, 2020 between the parties herein culminating in the disbursement of Kshs. 3 million to the Respondent who then deposited his Certificate of Title with the Applicants as well as executed an Instrument of Informal Charge dated the 25th February, 2021, I find that the said Informal Charge created between them in respect to land title number Mavoko Municipality Block 7/266 for the sum of Kshs. 3,000,000 including Kshs. 1,800,000 return on investment, is indeed valid.
16. As to whether the Applicants are entitled to the Orders as sought in the Originating Summons.
17. The Applicants sought for a declaration that there was an Informal Charge and for an order for vacant possession to issue over property known as Mavoko Municipality Block 7/266 to enable them sell it.
18. I note I have already made a finding above that the Informal Charge created between the Applicants and Respondent is valid. Further, from the evidence tendered by the Applicants, it emerged that through



their Advocates, they served the Respondent with a demand notice for the outstanding amount of Kshs. 4, 800,000 due and owing as at 2nd January, 2021 which demand he failed to respond to and further refused to pay. Further, through their Advocates, they also issued the Respondent with a notice of default on 29th March, 2021 and demanded for payment of the entire outstanding sum. I have perused the respective notices and it indeed confirms that Respondent was issued with requisite notices as required by law. In the foregoing, I find that the Applicants are entitled to the orders as sought in the instant Originating Summons.

19. In the circumstances, I find that the Applicants have proved their case on a balance of probability and will allow it. I will proceed to make the following final orders:
- a. That the Property known as Mavoko Municipality Block 7/266 charged by the Respondent to the Applicants under informal charge dated 25th February, 2021 be sold to recover Kenya shillings three million (Kshs. 3,000,000) together with agreed return of Kenya shillings one million eight hundred thousand (Kshs. 1,800,000) currently due and owing to the Applicant.
 - b. That an order for vacant possession do and is hereby issued over property known as Mavoko Municipality Block 7/266 to enable the Applicants to sell it.
 - c. That the Respondent be and is hereby ordered to pay the cost of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE

