



REPUBLIC OF KENYA



**Ayugi v HFC Limited & another (Commercial Case 120 of 2019)
[2022] KEHC 384 (KLR) (Commercial and Tax) (25 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 384 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 120 OF 2019
DAS MAJANJA, J
APRIL 25, 2022**

BETWEEN

ISAAC ONYANGO AYUGI PLAINTIFF

AND

HFC LIMITED 1ST DEFENDANT

ROSE ADHIAMBO OKINDA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff and 2nd Defendant are husband and wife. Their relationship has been strained and they are now separated. The Plaintiff currently resides in the United States of America ("the US"). He is also registered as the proprietor of the property known as Nairobi/Block-32/1011 ("the suit property"). Sometime in early 2014, the 2nd Defendant approached the 1st Defendant ("HFC"), a duly licensed bank, for a loan facility. HFC granted the facility by the Letter of Offer dated 7th March 2014 wherein it agreed to advance the Plaintiff and the 2nd Defendant KES 5,000,000.00 to be secured by way of a Charge dated 3rd April 2014 over the suit property. Consequently, a mortgage loan account no. 600-*****3 was also opened.
2. In due course, the loan account fell into arrears which prompted HFC to issue letters of demand requiring the Plaintiff and 2nd Defendant to settle the arrears. It also issued statutory notices threatening to sell the suit property. When the Plaintiff learnt that HFC was about to sell the property, he made remittances to HFC between April 2016 and February 2017. He thereafter filed this suit by way of a Plaint dated 3rd October 2017 claiming that he never approached HFC seeking a financial facility together with the 2nd Defendant as alleged and neither did he participate in the preparation and/or execution of the facility documents, that is, the loan application form, the Letter of Offer and the



- Charge Document .The Plaintiff further states that he was not involved in the opening of the mortgage account and that he did not benefit from the loan advanced to the 2nd Defendant.
3. In sum, the Plaintiff alleges that the suit property has been illegally charged to HFC and that the entire transaction is mired in fraud perpetuated by the 2nd Defendant in cahoots with HFC's employees and/or agents and thus seeks the following reliefs against the Defendants jointly and severally:
 - a. A permanent injunction restraining the Defendants whether by themselves, agents, servants or anyone acting at their behest or otherwise howsoever from in any way, disposing, selling, alienating, transferring or otherwise dealing in any manner with the suit property known as Title no. Nairobi/Block 32/1011 situate in Nairobi and registered in the name of the Plaintiff
 - b. A permanent injunction restraining the 1st Defendant whether by itself, its agents, servants or anyone acting at its behest or otherwise howsoever from advertising and/or initiating any public auction or offering for sale by private treaty or in any other manner the suit property known as Title no. Nairobi/Block 32/1011 situate in Nairobi
 - c. A Declaration that the purported Charge registered in favour of the 1st Defendant to secure advances to the 2nd Defendant and all acts and dealings by the Defendants relating to the suit property are null and void
 - d. An Order compelling the 1st Defendant to discharge the suit property and unconditionally release the original Title to the Suit Property to the Plaintiff
 - e. An order compelling the 1st Defendant to remove the Plaintiff's name from the fraudulent mortgage loan account no. 600-*****3 or in the alternative, close it all-together and have the Plaintiff's name removed from the defaulter's list at the relevant Credit Reference Bureau.
 - f. An order compelling the 1st Defendant to refund, with interest, the total sum of USD 6,200/= paid by the Plaintiff towards the mortgage loan account no. 600-*****3
 - g. Costs of the suit.
 4. HFC responded to the suit by filing a Statement of Defence dated 1st November 2017 where it states that the Plaintiff and the 2nd Defendant accepted the Letter of Offer and contents of the Charge by signing the same in the presence of advocates. It states that at the time of obtaining the loan from HFC, the Plaintiff and the 2nd Defendant had an existing banking facility with Consolidated Bank of Kenya Limited with an outstanding balance of KES. 2,921,911.79 which was secured by the suit property and part of the loan was disbursed to Consolidated Bank of Kenya Limited to clear the balance outstanding in order to secure release of the suit property title.
 5. HFC contends that the Plaintiff signed the loan application form, Letter of Offer and Charge documents and that he has been aware of the status of the loan account and that he made payments after receiving demands and the statutory notices. HFC further states that the suit property was legally charged and that the loan account is still in arrears even after the Plaintiff made attempts to reduce the arrears.
 6. HFC denies the allegations of fraud and collusion with the 2nd Defendant as alleged by the Plaintiff and states that this suit is intended to shield the Plaintiff from fulfilling his contractual obligations and it does not disclose any cause of action against HFC. HFC thus urges the court to dismiss the suit against it with costs.
 7. In her Statement of Defence dated 11th September 2019, the 2nd Defendant prays that the suit against her be dismissed. She avers that even though the Plaintiff may not have had actual knowledge of the full



particulars of the loan advanced between herself and HFC, the nature of the underlying transaction was fully disclosed to the Plaintiff in various correspondences and the Plaintiff was thus deemed to know of the nature of the underlying transactions.

8. The 2nd Defendant states that the sum advanced was used to make renovations on the suit property which the 2nd Plaintiff claims also belongs to her by virtue of their marriage. She states that these improvements were necessitated due to neglect of the Plaintiff and the 2nd Defendant was able to get a tenant for the suit property and the said tenant made payment to the loan account to offset the same, which financial arrangement, the 2nd Defendant insists, was entered into with the full knowledge of the Plaintiff. She also denies any claim of fraud on her part and avers that she cannot be held to account for the alleged fraud on the part of HFC.
9. The matter was set down for hearing. The Plaintiff testified as PW 1. HFC called one witness, Steve Ogelo (DW 1), a recoveries officer in its Debt Management Department, while the 2nd Defendant testified as DW 2. At the conclusion of the hearing, the parties were directed to file written submissions which are now on record.

The Plaintiff's Case

10. The Plaintiff contests the validity of the Charge dated 3rd April 2014 registered in favour of HFC on the ground that he never executed it, was not aware of the facility being advanced to the 2nd Defendant and only came to know of these documents and the facility once HFC purported to exercise its statutory power of sale whereupon he filed this suit.
11. PW 1 testified that he was not in the country during this period when the Charge was allegedly executed by him. He insisted that the Charge was fraudulently executed by the 2nd Defendant and that HFC was aware that he was not in the country at the time as he had been living in the US for 20 years since 2001. He stated that he only came to the country in 2010 for three weeks and in 2017 when he came to find out about the case. PW 1 further stated that when facility was advanced by HFC, neither the 2nd Defendant nor HFC ever contacted him about it and that none of the facility documents were ever sent to him either by post or mail.
12. PW 1 recalled that he only became aware of the facility in 2016 through his son when HFC threatened to sell the suit property and the 2nd Defendant sought help from their son to pay off the loan. PW 1 confirmed that since he could not immediately come to the country to dispute the Charge, he opted to pay HFC USD 6,200.00. He denied receiving any demand letters and statutory notices as these were addressed to his postal address in Nairobi and not US where he was resident.
13. PW 1 recalled that when he got in touch with the 2nd Defendant after learning of the facility and threatened to go to court, the 2nd Defendant wrote him a letter dated 11th November 2017 apologizing for taking the loan without his knowledge and that she had already even taken another loan with Consolidated Bank which he also never knew about. PW 1 testified that he since he did not execute the documents, he reported the forgery to the police. He admitted that he never followed up the outcome of the police investigation or even with the Law Society of Kenya regarding the advocate who claimed to have witnessed him execute the facility documents.
14. PW 1 recalled when he went to the US, he left the original title to the suit property with the 2nd Defendant. He admitted that he received the statutory notices from HFC after complaining and this was after he started making the repayments in a bit to prevent the suit property from being auctioned.
15. PW 1 testified that the 2nd Defendant was living on the suit property before she moved out and rented it. That the 2nd Defendant was initially collecting rent but he took over collection. He denied that he



took over collection of rent to deny HFC its dues insisting that it was his property and the loan was not valid. PW 1 denied that he made the arrears worse as the 2nd Defendant was still not repaying the loan even when she was collecting rent from the suit property.

16. In cross-examination, PW 1 denied that the signature in the loan application form is similar to the signature in his witness statement. He stated that he has no evidence from an expert that the two signatures were signed by different people. PW 1 insisted that he never appeared before any advocate to sign the facility documents and that at the date when it was executed he was not present in Kenya.

HFC's case

17. DW 1 reiterated that the facility documents were validly executed by the Plaintiff and the 2nd Defendant before an advocate and that as far as HFC is concerned, no complaint has ever been raised about the execution of those documents whether with the Law Society of Kenya or the police and that there is no such evidence. He recalled that in 2016 when HFC sent statutory notices, the Plaintiff himself contacted HFC and requested for loan account details where he could pay the loan amount. That the account details were duly provided to him and at no point did he ever raise any issues with HFC with regard to the execution of the documents until he filed the suit.
18. DW 1 testified that HFC prepares the offer letters, hands them to the borrower who executes the same in the presence his or her advocate. He however admitted that there is no one from HFC who witnesses the execution of the documents as the borrower's advocate. DW 1 also admitted that from the Plaintiff's passports, the Plaintiff was only in the country in 2010 and 2017 whereas the facility documents were executed in 2014. DW 1 further admitted that ideally, the Plaintiff and the 2nd Defendant should have appeared before HFC's advocate to sign the Charge document and that from the Charge document, it is not HFC's advocate who witnessed the execution of the Charge and that the said advocate was not instructed by HFC to draw the Charge.
19. DW 1 also admitted the notices were issued to the Plaintiff through his Nairobi address and sent to his email on 29th June 2016 but that from the passports, he was not in Kenya at the time and could not possibly have received them. DW 1 further testified that the three months' notice dated 27th March 2017 was set to the Plaintiff's American address and that this change of address was informed by their correspondences where the Plaintiff requested to be sent to the said address. DW 1 also confirmed that the Plaintiff, through his advocates, challenged the validity of the charge and the facility in the letter dated 5th April 2017 and that the Plaintiff challenged the same through his letter dated 30th March 2017. DW 1 stated that this challenge was mounted after the statutory notice dated 27th March 2017 was sent to the Plaintiff.
20. DW 1 also stated that HFC never called any of the said advocates indicated as to have attested to the Plaintiff's signatures in the facility documents to confirm whether the Plaintiff executed the same. DW 1 further testified that the payments made towards liquidating the facility were made by both the Plaintiff and the 2nd Defendant and that the Plaintiff only made payments totalling USD 3,000.00.

The 2nd Defendant's case

21. The 2nd Defendant (DW 2) testified that she and the Plaintiff agreed to obtain the loan since they were in good terms when they married in 1989. She stated that she approached HFC, signed the facility documents, was granted the loan which she began servicing. She reiterated that she used the first loan amount to develop the suit property which they purchased in 1980. She then rented it out for KES. 90,000.00 which was being paid directly to HFC. She alleges that the Plaintiff came and kicked her out of the suit property, began collecting rent and refused to pay the loan.



22. DW 2 recalled that she was the one who collected the facility documents from HFC and executed the same in presence of an advocate, John Mugo Mithike. DW 2 stated that she signed her part but left the Plaintiff's part unsigned as the Plaintiff was not in the country at the time. DW 2 also stated that she signed her part of the offer letter but left the Plaintiff's part unsigned where one 'Joseph' of HFC told her he was going to organize the signing of the Plaintiff's part as HFC was aware the Plaintiff was not in the country.
23. DW 2 also admitted that before taking the current loan, she had taken a facility with Consolidated Bank but that the Plaintiff never executed the facility documents with Consolidated Bank. DW 2 stated that she was able to present the requisite documents required by HFC such as the Plaintiff's National ID copy as she was in possession of his ID. She further reiterated that she told the Plaintiff that she was using his documents to obtain the loan but that she did not have any written consent for her to use the suit property title and Plaintiff's ID and PIN certificate to obtain the loan from HFC. She further confirmed that the Plaintiff never gave her permission to use the suit property title.
24. DW 2 confirmed that at the time she was taking the loan from HFC, the Plaintiff was in the US and that it was not possible for him to have executed the facility documents and Charge. She also confirmed that she wrote the email dated November 11, 2017 where she sought forgiveness from the Plaintiff for taking out a loan without informing him. She stated that although she requested the Plaintiff to take the loan, the Plaintiff did not respond. DW 2 also testified that she executed the facility documents in the presence of an advocate instructed by HFC. DW 2 insisted that she does not know who executed the Plaintiff's part in the facility documents as she only executed her part and left the documents with HFC.

Analysis and Determination

25. From the pleadings, evidence and submissions, the main issue for determination is narrow and straightforward and it is whether the Plaintiff executed the facility documents for the loan advanced to the 2nd Defendant by HFC and whether the Charge is valid.
26. I find that the evidence on record is overwhelming and undisputed that the Plaintiff was not in the country at the material time in 2014 when the facility documents were being executed. The Plaintiff's testimony on his absence from Kenya is corroborated by the entries in his passport. Likewise, the 2nd Defendant confirmed that he was in the US at the material time. Even though HFC urged the court to find that there could have been another passport the Plaintiff might have used to get into the country, it did not produce such a passport. Since the Plaintiff was not in the country at the time HFC granted the facility to the 2nd Defendant, he could not have been involved in the negotiations between the 2nd Defendant and HFC. In light of the evidence produced by the Plaintiff, the burden to rebut the entirety of the Plaintiff's evidence rested on HFC.
27. It is also not possible that the Plaintiff ever appeared before any of the advocates indicated in the facility documents to execute the same. Once the Plaintiff denied that he ever appeared before any of them and established that fact, it was incumbent upon HFC to demonstrate otherwise. The 2nd Defendant's email of November 11, 2017 is the *coup de grace* that puts to bed the issue of whether the Plaintiff executed the facility documents or not. The 2nd Defendant owns up to her actions that she took out the loan without the Plaintiff's consent and expressly sought forgiveness from him.
28. Even without the evidence of an expert witness such as a document examiner, the available evidence is emphatic that the Plaintiff never executed the facility documents including the Loan Application Forms, Letter of Offer, Charge documents and Mortgage Account opening forms or any such



document in respect of the facility advanced by HFC to the 2nd Defendant. I am satisfied that on a balance of probabilities, the Plaintiff never executed the said facility documents including the Charge.

29. Where does that leave the Charge? In resolving this issue, I am guided by section 3 of the Law of Contract Act (Chapter 23 of the *Laws of Kenya*) which provides as follows:

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) the contract on which the suit is founded –
 - (i) is in writing,
 - (ii) is signed by all parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.

30. Under section 6 of the Law of Contract Act, an “‘interest in land” means any estate in or charge over land ...” hence it is mandatory that a charge is not only required to be writing, it must be signed by all parties thereto and the signature of each party signing attested by a witness who is present when the contract is signed. The collective import section 3(3) aforesaid is that a contract for disposition of an interest in land that does not comply with those provisions is null and void.

31. I have found as a fact that the Charge was not executed by the Plaintiff, as chargor and neither was it attested by a witness. It was in fact fraudulently executed by someone other than the Plaintiff. The Charge is therefore invalid in law. It does not create any enforceable rights or obligations in respect to the suit property notwithstanding its registration or advancement of the loan facility to the 2nd Defendant.

32. HFC urges the court to find that the Plaintiff was aware of the facility as he made payments when the HFC intimated that it would sell the suit property. I hold that the fact that the Plaintiff made payments towards the loan did not rectify or validate the otherwise invalid Charge. What the Plaintiff did is what any reasonable person would have done to save his property from sale. One cannot fault the Plaintiff for first seeking to save the property from being sold by HFC and thereafter dealing with the issue of how it came to be charged when he was never in the country and never executed any facility documents. Since the charge is null and void and there is no underlying agreement between the Plaintiff and HFC to pay any debt, it follows that the HFC must refund the amount paid to it by the Plaintiff.

33. From the evidence, it is clear that 2nd Defendant is the person who directly benefitted from the facility. However, the Bank did not file a counterclaim to seek relief against the Plaintiff or the suit property or file a claim against the 2nd Defendant to seek indemnity or other relief against her. In the circumstances, I am unable to make any finding or grant any relief in favour of HFC against the Plaintiff or the 2nd Defendant.

34. On the issue of costs, I am aware of the general principle for attribution of costs in section 27 of the Civil Procedure Act (Chapter 21 of the *Laws of Kenya*) that costs follow the event. The facts emerging in this case show that the 2nd Defendant is the person who dealt with the suit property to the detriment of the Plaintiff. The 2nd Defendant knew that the Plaintiff was not in the country when she procured



the execution of the security documents. In this case therefore, she must shoulder the burden of costs. She shall pay the Plaintiff and 1st Defendant costs.

Conclusion and Disposition

35. Having concluded that the Plaintiff did not execute the charge, I now turn to considering the reliefs sought in the Plaintiff. My findings above lead to a conclusion that the Plaintiff's suit is merited. I therefore grant the following reliefs:
- a. A Declaration be and is hereby issued that the Charge dated 3rd April 2014 in respect of Title no. Nairobi/Block 32/1011 situate in Nairobi registered in favour of the 1st Defendant to secure advances to the 2nd Defendant and all acts and dealings by the Defendants in relation to the charge are null and void.
 - b. An Order be and is hereby issued compelling the 1st Defendant to discharge the suit property and unconditionally release the original Title to the Suit Property to the Plaintiff within twenty-one (21) days from the date of service of the decree herein.
 - c. The 1st Defendant shall refund to the Plaintiff USD 6,200.00 paid by the Plaintiff towards the mortgage loan account no. 600-*****.
 - d. The 2nd Defendant shall pay the costs of the suit to the Plaintiff and the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Kiiru instructed by Omusolo Mungai and Company Advocates for the Plaintiff.

Mr Kimani instructed by Walker Kontos Advocates for the 1st Defendant.

Ms Maloba instructed by Anne Were Maloba and Company Advocates for the 2nd Defendant.

