



**Kingdom Bank Limited v Okotsi (Civil Suit E004 of 2021)
[2022] KEHC 12771 (KLR) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL SUIT E004 OF 2021
PJO OTIENO, J
AUGUST 30, 2022**

BETWEEN

KINGDOM BANK LIMITED PLAINTIFF

AND

ALFAYO MAGOMA OKOTSI DEFENDANT

Prerequisites for the creation of informal charges.

Reported by John Ribia

***Land Law** – charges – informal charges - creation of an informal charge - where a loan that had been secured by property gets defaulted - whether a loan secured via a parcel of land created an intention to create an informal charge - whether a dispute as to calculation of interest was a ground to deny a chargor of the right to realise the security offered - whether the circumstances of the suit entitled the plaintiff to realise the security hence the need to grant leave - Land Act (Cap 280) section 79.*

Brief facts

The plaintiff (bank) sought to be granted leave to exercise its right of sale of a property (suit property). The plaintiff contended that the suit property had been pledged to it by way of an informal charge under section 79(6)(b) of the Land Act. The respondent objected to the application on grounds that the instant court lacked jurisdiction to determine the matter and that whereas the suit title was deposited with the plaintiff to secure the payment of the loan advanced and the respondent been paying the loan but the plaintiff negligently managed the account by debiting the account with illegal non-contractual and unconscionable charges. The respondent also denied being served with statutory notices.

The plaintiff took the position that the title having been deposited on the understanding that it would secure the debt, it was the duty of the court to enforce that covenant not to diminish or rewrite it and that the offer of it as security equated the property to a commodity to be sold upon default.

Issues

- i. Whether a loan secured via a parcel of land created an intention to create an informal charge.



- ii. Whether a dispute as to calculation of interest was a ground to deny a chargor of the right to realise the security offered.
- iii. Whether the circumstances of the suit entitled the plaintiff to realise the security hence the need to grant leave.

Relevant provisions of the Law

Land Act (Cap 280)

Section 79 - Informal charges

(1) An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.

(2) The power conferred by subsection (1) shall include the power to create second and subsequent charges.

(3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

(4) The power conferred by this section shall be exercisable subject to—

(a) any prohibition or limitation imposed by this Act or any written law; and

(b) any restriction contained in an instrument creating or affecting the interest in land that is to be the subject of a charge.

(5) A formal charge shall take effect only when it is registered in a land register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.

(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 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 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;

Held

1. Section 79 of the Land Act created prerequisites for the creation of both formal and informal charges. For informal charges what was required was writing to disclose clear intent to offer the title out laid or an interest in land to secure the payment of a debt whether existing, contingent or future, which instrument was then accepted by the chargee as a written commitment and the deposit of any document agreed to evidence the ownership of the land by the chargor.
2. The only document exhibited to demonstrate the agreement between the parties was the letter of offer. To establish if the parties intended to create an informal charge one had to peruse that document and establish if the requirements of section 79 (6), (7), (8), and (9) of the Land Act had been established.
3. The intention had to be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt. While there had not been exhibited any document to



show what document of title was pledged or deposited, there was a demonstration in the letter of offer to show the intention to charge the property, informally, to secure the payment of any amount that would be availed to the defendant in the form and nature of a temporary overdraft facility.

4. It was proved within a balance of preponderance that there was created an informal charge. A case was made out for the court to grant the leave sought. It was the default to pay that founded the right for leave to sell or possess. Leave was granted to the plaintiff to take possession, and if need be, sell the property whose title and interest were charged to the bank pursuant to section 79(9) of the Land Act.
5. Once the informal charge was determined to have been created, the duties and obligations of a chargee including the obligation to protect and secure the equity of redemption and trusteeship to the chargee were called into play and the statutory notices, including notices of default and notice of intention to sell, was to issue, if not yet issued in strict compliance with the Act.
6. Section 79 of the *Land Act* appeared to be incorrectly headed. While its head note was clearly on informal charges, subsections 1 to 4 had to be read and understood to regard formal charges while subsections 6 to 9 strictly applied to informal charges. The heading could be relooked at in law reform.

Application allowed.

Orders

- i. *The originating summons dated August 17, 2021 was allowed.*
- ii. *Leave was granted to the plaintiff to sell its security in the informal charge subject to compliance of the law on realisation of securities.*
- iii. *Costs of the suit were awarded to the plaintiff.*

Citations

Cases

Kenya

1. *Ibrahim Seikei t/a Masco Enterprises v Delphis Bank* Civil Appeal 160 of 2003; [2004] KEHC 89 (KLR) - (Applied)
2. *Jamii Bora Bank Limited v Wapak Developers* Civil Suit 22 of 2018; [2018] KEHC 9599 (KLR) - (Applied)
3. *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* Civil Appeal 95 of 1999; [2001] KECA 362 (KLR) - (Applied)
4. *Njeru, Jim Kennedy Kiriro v Equity Bank (K) Limited* Civil Suit 47 of 2019; [2019] KEHC 9788 (KLR) - (Applied)

Statutes

Kenya

1. Land Act (cap 280) sections 79(6-9); 90; 96 - (Interpreted)
2. Land Control Act (cap 302) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The bank took out an originating summons dated August 17, 2021, and sought an order that it be granted leave to exercise its right of sale of title No Kakamega/Chagenda/459 pledged to it by way of an informal charge under section 79(6)(b) of the *Land Act* No 3 of 2012. It also prayed that it be granted the costs of the suits.



2. The grounds advanced to premise the summons were that the plaintiff advanced to the defendant the sum of Kshs 1,000,000/= secured by an informal charge over the suit property and that there was a default to service and repay the loan culminating in the loan remaining outstanding in the sum of Kshs 1,131,731.76 as at May 5, 2021. Following the default the plaintiff served notices pursuant to section 90 and 96 of the [Land Act](#) but the defendant persisted on his default leaving the plaintiff with no alternative but to seek the leave of the court to realise its security in the informal charge pursuant to 79(8) of the [Act](#).
3. The summons was resisted by both replying affidavit of the defendant and a notice of preliminary objection both filed in court on the October 15, 2021. The notice of preliminary objection contends that the matter ought to have been filed before the Magistrate's Court with the requisite jurisdiction and that the summons is fatally defective for failure to seek the consequential orders after leave.
4. On the other hand, the gist of the replying affidavit is that indeed the suit title was deposited with the plaintiff to secure the payment of the loan advanced and that he had been paying the loan but the plaintiff negligently managed the account by debiting the account with illegal non-contractual and unconscionable charges thereby increasing the defendant's indebtedness hence the payments made were not sufficient to reduce the indebtedness by the defendant. He exhibited to court the three deposit slips for Kshs 70,000/=, 40,000/= and 20,000/= dated September 9, 2021, September 22, 2021 and September 27, 2021. The defendant denied having been served with the statutory notices and on a without prejudice basis asserted that the land is subject to the [Land Control Act](#) but no consent to charge was ever sought nor obtained.
5. When the matter came before court on the July 20, 2022, only the plaintiff's counsel attended court without the counsel for the defendant and requested the court for directions on the originating summons as he had filed written submissions but the defendant had not filed.
6. In his submissions, the plaintiff takes the position that the title having been deposited on the understanding that it would secure the debt, it was the duty of the court to enforce that covenant not to diminish or rewrite it and that the offer of it as security equated the property to a commodity to be sold upon default.
7. It was added that a dispute as to calculation of interest is not a ground to deny a charge his right to realise the security offered. The plaintiff cited to curtail the decisions in [Jamii Bora Bank Ltd v Wapak Developers](#) [2018] eKLR, [National Bank of Kenya Limited v Pipeplastic Samkolit](#) [2001] eKLR, [Ibrahim Seikei t/a Masco Enterprises v Delphis Bank](#) [2004] eKLR and [Jim Kennedy Kiriro Njeru v Equity Bank \(K\) Ltd](#) [2019] eKLR on creation of an informal charge, the need to respect the intentions of the contracting parties and that the interests of the bank on its security needs to be protected and not obstructed by the court.
8. I have anxiously considered the originating summons, the affidavits filed by both sides and the submissions then applied the same to the law. I have in that endeavour discerned that there are only two issues for determination. The issues are whether there was an intention to create an informal charge and if circumstances have arisen to entitle the bank to realise the security hence the need to grant leave.
9. Section 79 of the [Land Act, 2012](#) upon which the suit is guided is worded in the following fashion:-

“(1) An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.



- (2) The power conferred by sub section (1) shall include the power to create second and subsequent charges.
- (3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.
- (4) The power conferred by this section shall be exercisable subject to—
 - (a) Any prohibition or limitation imposed by this Act or any written law; and
 - (b) Any restriction contained in an instrument creating or affecting the interest in land that is to be the subject of a charge.
- (5) A formal charge shall take effect only when it is registered in a land register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.
- (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 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 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.”

10. I discern and consider the provision to create prerequisites for the creation of both formal and informal charges. For informal charges what is required is writing to disclose clear intent to offer the title out laid or an interest in land to secure the payment of a debt whether existing, contingent or future, which instrument is then accepted by the chargee as a written commitment and the deposit of any document agreed to evidence the ownership of the land by the chargor.



11. In this matter, the only document exhibited to demonstrate the agreement between the parties is the letter of offer dated November 13, 2018 and duly signed and witnessed by the advocate on the November 30, 2018. To establish if the parties did intend to create an informal charge one must peruse that document and establish if the requirements of section 79 (6 – 9) *Land Act* have been established.
12. The intention must be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt. While there has not been exhibited any document to show what document of title was pledged or deposited, the letter of offer at the clause headed “principal covenants” show that the facility would not be availed until and unless all security documentation would have been finalized and pledged in favour of the bank. In addition, the respondent has unequivocal and on oath sworn of paragraph 3 of the replying affidavit that he ‘deposited his title deed with the plaintiff bank to serve (sic) the repayment of a loan borrowed from it’. I do find, on the documents filed, that there was a demonstration in the letter of offer to clearly show the intention to charge the property, informally, to secure the payment of any amount that would be availed to the defendant in the form and nature of a temporary overdraft facility.
13. That being the case, I find it satisfactorily proved, within a balance of preponderance, that there was created an informal charge. That being the finding of the court and it being shown by the bank statement exhibited, and agreed between the parties in the clause headed, “evidence of debt” in the letter of offer to be evidence of indebtedness, i do find that a case is made out for the court to grant the leave sought. it is the default to pay that founds the right for leave to sell or possess
14. Accordingly, leave is granted to the plaintiff to take possession, and if need be, sell the property whose title and interest were charged to the bank pursuant to section 79(9) of the *Act*. For clarity purposes, once the informal charge is determined to have been created, the duties and obligations of a chargee including the obligation to protect and secure the equity of redemption and trusteeship to the chargee are called into play and accordingly, the statutory notices, including notices of default and notice of intention to sell, shall issue, if not yet issued in strict compliance with the act.
15. Before the court concludes and pens off, section 79 appear to be incorrectly headed. while its head note is clearly on informal charges, subsections 1 – 4 must be read and understood to regard formal charges while subsections 6 -9 strictly apply to informal charges. maybe when time comes for law reform that heading could be relooked at.
16. In conclusion, the originating summons dated August 17, 2021 is allowed as prayed, leave granted to the plaintiff to sell its security in the informal charge subject to compliance of the law on realisation of securities.
17. The plaintiff having succeeded, the costs of the suit are awarded to it.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA, THIS 30TH DAY OF AUGUST 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant: Kulubi

