



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL CASE NO. E003 OF 2020

KINGDOM BANK LTD

(FORMERLY KNOWN AS JAMII BORA BANK LTD)APPLICANT

VERSUS

GEORGE OWUOR OPANY.....RESPONDENT

RULING

1. The applicant came to court by way of originating summons dated 14th December, 2020. It was brought under section 79 (7) of the Land Act, 2012, sections 3 & 3A of the Civil Procedure Act, CAP. 21 Laws of Kenya and under Order 37 Rules 6 & 8 of the Civil Procedure Rules, 2010. The applicant is seeking the following orders:

- a. That the honorable court be pleased to allow the applicant to exercise its statutory power of sale to recover the outstanding balances on account of the respondent.
- b. That the applicant be entitled to vacant possession of title numbers Kanyada/Kanyango/Kalanya/5447 and Kanyada/Kanyango/Kalanya/6050 to facilitate the exercise of its statutory power of sale.
- c. that the respondent by himself, tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession of title number Kanyada/Kanyango/Kalanya/5447 and Kanyada/Kanyango/Kalanya/6050 to the applicant and/or the appointed agent to enable sale.
- d. That the respondent, his servants, agents of any other occupants be forcefully evicted from the subject premises should they fail to deliver vacant possession within fourteen (14) days from the date of the order of this honorable court.
- e. The respondent do bear the costs of this application.

2. The application was premised on the following grounds:

- a. The applicant via letter of offer dated 23rd October, 2014 accorded the respondent a loan facility of Kenya shillings Six Million (6,000,000) to be secured by creation of a legal charge.
- b. It was a term of the said letters of offer that a legal charge was to be created over title numbers Kanyada/Kanyango/Kalanya/6050 (hereinafter referred to as “the properties”) all registered in the name of the respondent.
- c. A charge was only created over title number Kanyada/Kanyango/Kalanya/4883 pursuant to the said letter of offer.
- d. Further, by way of a simple deposit of the title deeds of title numbers Kanyada/Kanyango/Kalanya/5447 and Kanyada/Kanyango/Kalanya/6050 by the respondent to the applicant, an informal charge was created in terms of the letter of offer aforementioned.
- e. The respondent defaulted and fell into arrears in repayment of the facility accorded to him and further that as at the 30th day of October, 2020 the said facility was in arrears to a tune of Kenya shillings thirteen million, thirty three thousand, four hundred and nine and ninety six (Kshs.13, 033,496.00) that continues to attract interest (hereinafter referred to as “the outstanding debt”).
- f. The applicant is desirous of disposing the properties by exercising its statutory power of sale to recover the outstanding debt and therefore urgently requires the properties delivered up to it in vacant possession.

g. No sale can be successfully finalized with any prospective purchaser as long as there is no free and unlimited access for the inspection of the properties neither a guaranteed right of immediate occupation upon purchase.

h. The outstanding debt by the respondent is quite substantial and the applicant will suffer great prejudice if its statutory power of sale is not exercised immediately.

i. It is in the interest of justice that this application be heard and order granted.

3. The respondent opposed the application on the following grounds:

a. That the respondent did not consent to the creation of charge in respect of title numbers Kanyada/Kanyango/Kalanya/5447 and Kanyada/Kanyango/Kalanya/6050.

b. That the informal charge is void and unenforceable for contravening section 6 of the Land Control Act.

c. Section 79(6) of the Land Act provides as follows:

(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.

In the instant case, the respondent deposited certificates in respect of land parcels number Kanyada/Kanyango/Kalanya/5447 and Kanyada/Kanyango/Kalanya/6050 with the applicant. An informal charge was therefore created.

5. It was contended for the respondent that the informal charge is incapable of being enforced for section 6 (1) (a) of the Land Control Act was breached. The section provides:

1. Each of the following transactions that is to say—

a. the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

6. This section was the subject of interpretation in the case of **Jamii Bora Bank Limited vs. Wapak Developers[2018] eKLR** where R. Nyakundi J held:

I also note that in the formal charge, section 6(2) of the Land Control Act comes into operation, the instrument must be registered and it goes through the normal transfer and have that particular undertaking registered as an encumbrance which shows that the Bank has rights which has been conveyed by virtue of the registered formal charge. On the other hand, that is not the case in informal charges due to the lack of registration. Herein the parties enter into an agreement which sets out the terms of the law that is to govern the covenant which they have agreed to be bound with in all its terms and conditions. For instance, the chargor deposited title documents with the Chargee which will be held by the Chargee as a lien for security. That in case there is a default in the repayment of the loan amounts, the Chargor may move to section 90 of the Land Act with the consent of the court. It is trite that a contract that the parties have agreed to perform, the court will not interfere unless that contract is tainted with illegalities, fraud, is against public policy, misrepresentation etcetera. In that respect, the parties are expected by the court to be able to perform their part of the bargain.

I agree with the learned judge that section 6 (1) (a) of the Land Control Act is in applicable in informal charges.

7. Earlier in the case of **Ibrahim Seikei T/A Masco Enterprises vs. Delphis Bank 2004 eKLR** the court held:

we must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the bank and had an obligation to repay the monies under the terms agreed. Banks do not give monies as gratuity or love for human kind. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute.

8. From the foregoing, I find that the application succeeds. The chargor is entitled to move and exercise its statutory power of sale in accordance with the law. In the interest of justice, the suit property should be subjected to valuation by a qualified valuer to obtain the true value before exercising of the statutory power of sale. The right of redemption available to the respondent shall apply in the circumstances of

this case.

9. Costs of the application to be borne by the respondent.

DELIVERED and SIGNED at HOMA BAY this 27th Day of July, 2021

KIARIE WAWERU KIARIE

JUDGE.