



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL SUIT NO. 4 OF 2019

(FORMERLY ELC NO. 170 OF 2018)

JAMII BORA LIMITED.....PLAINTIFF

VERSUS

ERNEST KAMAU NDUATI.....1ST DEFENDANT

URBAN PROPERTIES CONSULTANTS, DEVELOPERS LIMITED2ND DEFENDANT

JUDGMENT

1. Jamii Bora Bank Ltd, the chargee (**herein after referred to as plaintiff**) has filed this suit through Originating summons against Ernest Kamau Nduati, the chargor and Urban Properties Consultants and Debentures Ltd, the borrower (**herein referred to as 1st and 2nd defendants respectively**), for a declaration that an informal charge created over **parcel No. Kajiado /Kitengela /27058** for Kenya shillings one million six hundred thousand (Kshs. 1,600,000) is recoverable.

2. The originating summons is supported by an affidavit by Christine Wahome, the Legal Manager of the applicant sworn on 20th October, 2018 and filed together with the originating summons.

3. According to the deponent, on 17th July, 2017, the plaintiff agreed to advance for the 2nd respondent Kshs. 1,600,000, loan term facility on terms specified in a letter of offer of the same day. The loan was disbursed on 3rd November, 2017 on the basis of an informal charge dated 25th September, 2017 created over **Parcel No. Kajiado/Kitengela/22058**. The facility was to be repaid by 12 monthly installments of Kshs 143,659,39.

4. It is the plaintiff's case that the defendants failed to repay the amount thus fell into arrears which have continued to remain unpaid. The applicant states that as at 21st September,2018, the outstanding loan was Kshs. 2,002,395.28. The plaintiff further states that as a holder of an informal charge by simple deposit of the informal charge dated 25th September, 2017 duly executed by the 1st defendant and duly registered on 16th September, 2018, it intends to recover the outstanding amount by exercising its statutory power of sale over the property. This, it states, can only be done with leave of the court. It therefore seeks the court's declaration to that effect and leave of court to exercise its statutory power of sale over the property.

5. Although originating summons was served on the defendants, they neither filed a response to the originating summons nor attended court for the hearing even after being served with a hearing notice. The matter proceeded undefended.

6. During the hearing, Mr. Murgor, learned counsel for the plaintiff, urged the court to allow the originating summons. He reiterated the contents of the originating summons and facts deposed to in the supporting affidavit. Counsel submitted that there is default and the applicant's right to exercise its statutory power of sale has accrued. He prayed for a declaration that the informal charge was valid and grant leave to the applicant to exercise the statutory power of sale in terms of Section 79 (7) (a) of the Land Act. Counsel argued that although the defendants were duly served with the originating summons and were aware of the hearing date, they did not respond to the originating summons had not attended during the hearing.

Determination

7. I have considered the originating summons, depositions in the supporting affidavit and annexures thereto. I have also considered submissions by the plaintiff's counsel. The respondents were served and were represented in court by counsel. On 4th March, 2019, the court gave directions in the presence of Mr. Gachuhi who was holding brief for Mr. Mwaniki for the defendants, after Mr. Gachuhi requested for

time to file a response. The court directed the defendants to file responses within 14 days and set the matter for hearing on 8th April, 2019.

8. On that day, Mr. Rutto was present and held brief for Mr. Mwaniki. He informed the court that they had a ready buyer and requested for time to resolve the matter out of court. The matter was adjourned due to Mr. Mwaniki's absence and a hearing set for 15th July, 2017.

9. Come 15th July 2019, Mr. Isoye held brief for Mr. Mwaniki for the defendants, and although the matter was set for hearing, Mr. Isoye informed the court that his instructions were that the matter was for directions which was not true given that the date had been taken by consent.

10. After hearing objections from Mr. Murgor for the applicant, the court granted a last adjournment to the respondents. The defendants were ordered to pay Kshs. 1,000 Court adjournment fees and that day's costs to the applicant's advocates of Kshs, 10,000/- before the next hearing date. The court set the matter for hearing on 4th November, 2019.

11. On that day the defendant's counsel was absent and so were the defendants themselves. They had also neither paid court adjournment fees nor the advocate costs as ordered. The defendants' counsel had been dully served with a Hearing notice. The court ruled that the matter do proceed to hearing, hence this judgment.

12. Having considered the originating summons the depositions and submissions by counsel for the plaintiff, there is no doubt that the 2nd defendant's request for a financial facility from the plaintiff, was granted and guaranteed by the 1st defendant who executed a charge over his property known as **Kajiado/Kitengela/27058**. The 1st defendant deposited title documents for that property to secure the loan amount. The plaintiff disbursed the money to the 2nd defendant and it was to be repaid by 12 monthly installments of Kshs 143659. The 2nd defendant defaulted payment and as a result, the loan fell into arrears.

13. The defendants did not dispute the plaintiff's averments and dispositions. They did not even allege that they are paying the loan or that they did not deposit the security and title documents or execute the charge in favour of the plaintiff.

14. Section 79 (6) of the Land Act allows creation of informal charges and subsection (9) allows a chargee to exercise its statutory power of sale subject to leave of court. Section 79 provides:

“(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 fulfilment 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 charger 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 prescribed 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;

(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 the an order of the Court." (emphasis)

15. From the materials placed before court, I am satisfied that the plaintiff has established on a balance of probability, that there was an agreement between it and the respondents; that it disbursed money based on that agreement and that the money was secured by a charge executed by the 1st defendant. For that reason, I find that the plaintiff has proved its case to the required standard.

16. Consequently, and for the above reasons, the originating summons dated 30th October 2018 is allowed as follows:

a. A declaration be and is hereby issued that an informal charge was created by Ernest Kamau Nduati and Urban Properties Consultants and Developers Limited by depositing the certificate of Title to Parcel No. Kajiado/ Kitengela/22058 with the charge to secure a term loan facility of Kenya Shillings One Million Six Hundred Thousand (Kshs. 1,600,000) advanced to Urban Properties Consultants and Developers Limited.

b. A declaration is hereby issued that an informal charge was created by Ernest Kamau Nduati and Urban Properties Consultants and Developers Limited by the execution of the informal charge over Parcel No. Kajiado/ Kitengela/22058 with the charge to secure a term loan facility of Kenya Shillings One Million Six Hundred Thousand (Kshs. 1,600,000) advanced to Urban Properties Consultants and Developers Limited.

c. A declaration is hereby issued that the subsequent registration of the informal charge over Parcel No. Kajiado/ Kitengela/ 22058 at the Kajiado Land Registry amounted to a proper registration as anticipated under the Land Act.

d. A declaration is hereby issued that the charge is entitled to leave and leave is hereby granted to the charge/ plaintiff to exercise its statutory power of sale over Parcel No. Kajiado/ Kitengela/ 22058 to recover the outstanding loan arrears in the sum of Kenya Shillings Two Million and Two Thousand Three Hundred and Ninety-Five Twenty-Eight Cents (Kshs. 2,002,395.28) as at 21st September 2018.

e. Costs to the plaintiff.

Dated, Signed and delivered at Kajiado this 13th day of March 2020

E.C. MWITA

JUDGE