



**HFC Limited v Ombwera (Environment & Land Case 2 of 2022)
[2023] KEELC 18746 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 2 OF 2022**

M SILA, J

JULY 13, 2023

BETWEEN

HFC LIMITED APPLICANT

AND

JOSHUA MAIGO OMBWERA DEFENDANT

JUDGMENT

(Suit by plaintiff seeking a declaration of creation of an informal charge; defendant having deposited his title as security for some financial accommodation; informal charge thus created; plaintiff given liberty to dispose of the security as defendant is in default).

1. This judgment is in respect of an Originating Summons that was filed on 10 June 2022 by the applicant, HFC Limited, whom I will henceforth refer to as ‘the plaintiff’ and the respondent as ‘the defendant.’ The summons seeks orders on two issues being :-
 - i. Whether a declaration should be issued directing that an informal charge was created by Joshua Maigo Ombwera by depositing with the plaintiff the Certificate of Title to land reference No. Nyaribari Chache/Nyanturago/466 as security for the sum of Kshs. 500,000/= overdraft facility advanced to the defendant pursuant to the letter of offer dated 19 July 2016.
 - ii. Whether leave should be granted to HFC Limited, as the chargee to exercise its statutory power of sale over land reference No. Nyaribari Chache/Nyanturago/466 by issuing statutory notices to the defendant pursuant to section 90 of the Land Act, 2012, to recover the outstanding sum of Kshs. 751,871.68.
2. The application is based on various grounds and is supported by the affidavit of Christine Wahome, the Legal Manager of the plaintiff. She avers that the defendant is the registered proprietor of the land parcel Nyaribari Chache/Nyanturago/466 (the suit land) and that by a letter of offer dated 19 July 2016, the plaintiff agreed to advance to the defendant an overdraft facility of Kshs. 500,000/= to be



used as working capital. The overdraft was advanced on conditions that the defendant would open a current account with the plaintiff and have a direct debit/standing order for repayment of the loan, and secondly, a deposit of the title document to the suit land and that the rental income and business proceeds will be banked with the plaintiff for the life of the overdraft facility. The amount drawn on the overdraft facility was repayable strictly on demand, and provided there was no default, the facility was available until 5 July 2017. It is deposed that the respondent did deposit the certificate of title to the suit land as security but defaulted in repayment of the facility so that at the time of filing suit the facility was in arrears of Kshs. 751,871.68/=. Despite writing letters to the defendant to regularize his account, this had not been done. She has deposed that the plaintiff has now come to court pursuant to section 79 of the Land Act, 2012, so as to be allowed to exercise the statutory power of sale over the suit property.

3. The defendant appointed counsel but no reply was filed to the Originating Summons. I directed that the matter be canvassed by way of affidavit evidence and submissions. However, only counsel for the applicant filed submissions. I have taken these into account before arriving at my decision.
4. The creation of charges is governed by section 79 of the Land Act, 2012, which is drawn as follows :-

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;
5. From the above, it will be discerned that charges can be created in two ways. The first, is the formal way of creating a charge, which is done by registering the instrument of the charge. The second way of creating a charge is the informal way, which, as noted in sub-section 6, is by depositing the document of title of the land subject to there being documentation that the deposit is meant to have the title charged to secure the financial accommodation provided to the owner of the subject land. It will further be observed, that unlike a formal charge where the charge instrument will inevitably contain the chargees’ remedies, including the power of sale, and it is not necessary for the chargee to come to court to enforce these remedies, in an informal charge, the chargee can only take possession and sell the land upon obtaining an order of court.
6. I find that this suit is therefore properly before court as the plaintiff needs to first obtain an order of court before proceeding to exercise the chargee’s statutory power of sale.
7. Having gone through the documents filed, I am persuaded that an informal charge was created. I have seen the letter of offer dated 19 July 2016 vide which the defendant was offered an overdraft facility. One of the conditions for the grant of the facility was deposit of the title document to the suit land. I have seen that the defendant accepted the letter of offer, and the terms therein, by signing the said letter, and the title document was subsequently deposited with the plaintiff. I have seen that the plaintiff has written to the defendant seeking regularization of his account but the account still remains unpaid. I find that the only way that the plaintiff can be paid is by her proceeding to sell the suit land.
8. I find merit in this suit and is hereby allowed.
9. For the avoidance of doubt, it is the holding of this court that an informal charge was created by the defendant over the land parcel Nyaribari Chache/Nyanturago/466. An order is hereby issued permitting the plaintiff to take possession of the said land and the plaintiff is at liberty to sell the land to recover the monies advanced together with accrued interest. The plaintiff to follow the procedures outlined in law in the exercise of the chargee’s statutory power of sale. The plaintiff will have the costs of this suit payable by the defendant.
10. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 13 DAY OF JULY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

