



REPUBLIC OF KENYA



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Family Bank Limited v Segerger & 2 others (Environment and Land Appeal E003 of 2022) [2023] KEELC 20782 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E003 OF 2022
CG MBOGO, J
OCTOBER 19, 2023**

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

WILLIAM KIROKO ARAP SEGERGER 1ST RESPONDENT

CHESUBGAA ENTERPRISES 2ND RESPONDENT

DANIEL KIPLANGAT MARITIM 3RD RESPONDENT

(Being an appeal from the Judgment and orders of the Hon. G.N.Wakahu (Chief Magistrate) delivered on 11th day of April 2022 at Narok Chief Magistrates' Court in)

JUDGMENT

1. The appellant herein being dissatisfied with the judgment of the Hon G.N. Wakahu in Narok Chief Magistrates' Court ELC Case No. 143 of 2018 delivered on 11th April, 2022 has appealed to this court vide the memorandum of appeal dated 11th May, 2022 against the whole of the decision on the following grounds: -
 1. The learned magistrate erred in fact and in law in failing to consider and appreciated that the charge the subject of the suit was a third-party charge and in doing so the learned magistrate arrived at wrong conclusions.
 2. The learned magistrate erred in fact and in law in finding that the onus of proof shifted from the 1st respondent to the appellant on the issue of whether the 1st respondent applied for a loan in favour of the Appellant and not Kenya Commercial Bank in the absence of evidence to support such a finding.



3. By failing to appreciate the principles surrounding the nature of a third-party charge, the learned magistrate erred in fact and in law in finding that the loan application by the 1st respondent had not been sufficiently substantiated.
 4. The learned magistrate misdirected himself and erred in fact in finding that the 1st respondent herein had specifically pleaded the issue of obtaining the Land Control Board consent when the finding was not supported by the pleadings on record before the trial court.
 5. The learned magistrate misdirected himself and erred in fact and in law in allowing and considering evidence touching on the issue of whether the appellant herein had obtained the Land Control Board consent to change the suit property when the issue had not been pleaded.
 6. The learned magistrate erred in fact and in law in finding that the appellant had and failed to discharge the burden to prove that it obtained the Land Control Board consent prior to the creation of the charge when the burden of proof was unfounded and unsupported by the pleadings on record before the trial court.
 7. That the learned magistrate misguided himself and erred in fact and in law by considering matters which were not pleaded before the trial court and ought not to have considered, thus denying the appellant herein an opportunity to substantively defend and produce evidence in support of its defence.
 8. The learned magistrate misguided himself and erred in law and in fact by making a determination on matters not pleaded without giving the appellant herein an opportunity to substantively defend and produce evidence in support of its defence.
 9. The learned magistrate erred in law and in fact by failing to consider the written submissions and list and bundles of authorities filed by the appellant, and as a result, arrived at wrong conclusions.
 10. The learned magistrate misguided himself and erred in fact and in law in considering matters which she ought not to have considered and failing to consider relevant matters in arriving at his decision.
2. The appellant therefore prays for the orders that: -
- a. This appeal be allowed and the judgment delivered by the learned magistrate on the 11th day of April, 2022 together with all consequential orders be set aside.
 - b. The plaint dated the 26th day of September, 2018 be dismissed with costs to the appellant herein.
 - c. In the alternative to prayer (b) above, that the suit lodged by way of the plaint dated the 26th day of September, 2018 be referred to the trial court to be heard afresh on its merits.
 - d. The 1st respondent herein does pay to the appellant the costs of this appeal.
 - e. Any such further or other orders as it may deem fit and just.
3. The memorandum of appeal was canvassed by way of written submissions.
4. On 12th September, 2022, the appellant filed his written submissions dated 6th August, 2023 and raised four issues for determination as listed below: -



- i. Whether the learned magistrate erred in fact and in law in considering and making a determination on matters that had not been specifically pleaded by the parties.
 - ii. Whether the learned magistrate erred in fact and law in failing to understand the nature of the transaction.
 - iii. Whether the learned magistrate erred in fact and in law in considering matters that should not have been considered and in disregarding matters that should have been considered.
 - iv. Who should bear the costs for this appeal.
5. On the first issue, the appellant challenges the finding of the court on the issue of whether a charge over parcel no. Cis/Mara/Ilmotiok/4417 in its favour was registered in accordance with the law and submitted that the findings of the court were without basis given the pleadings on record. The appellant submitted that parties are bound by their pleadings which pleadings form the basis for adducing evidence by a party and granting of reliefs sought therein by a court. The appellants relied on the cases of *Isaiah Ondiba Bitange & 3 Others versus Institute of Engineers of Kenya & Another* [2017] eKLR and *Vijay Morarjia versus Nansingh Madhusingh Darbar & Another* [2000] eKLR and further submitted that Order 2 Rule 4 of the *Civil Procedure Rules* mandates parties to specifically plead the particulars of certain allegations, including fraud.
6. The appellant further submitted that on the sole basis of the particulars set out on the face of the pleadings, the trial magistrate misguided and misdirected himself in law and in fact in making a finding that the obtaining of the Land Control Board consent was specifically pleaded by the plaintiff but the 1st defendant could not prove that it obtained the same and a perusal of the plaint will reveal that the 1st respondent never made a claim with respect to the Land Control Board consent or failure to obtain the same. Further, that the 1st respondent tried to remedy this error in its submissions by dubiously referring the trial court to paragraph 16 (b) of the plaint and on this basis, the trial court erroneously admitted evidence touching on the purported failure by the appellant to obtain Land Control Board consent.
7. The appellant further submitted that the case before the trial court did not fit the exceptional circumstances to warrant determination on matters not pleaded and it was not open for the trial court to base its decision on issues surrounding the Land Control Board consent which particulars of fraud had not been specifically pleaded. The appellant relied on the case of *Charles C. Sande versus Kenya Cooperative Creameries Limited*, Civil Appeal No. 154 of 1992 (unreported) and submitted that much like a claim for special damages, a claim of fraud must be specifically pleaded and proved and it follows that a court cannot base its decision on fraud that have not been explicitly pleaded. The appellant further relied on the Court of Appeal decision in *John Mbogua Getao versus Simon Parkoyiet Mokare & 4 Others* [2017] eKLR.
8. On the second issue, the appellant submitted that in arriving at the finding by the trial court that the loan application by the plaintiff in favour of the 1st defendant has not been sufficiently substantiated, the court failed to understand the nature of the transaction between the appellant and the 1st respondent herein was a third-party charge and in doing so, sought to introduce into the charge requirements that were not stipulated therein as basis for invalidating the charge. To buttress this submission, the appellant relied on the case of *Twiga Chemicals Industries Limited versus Allan Stephen Reynolds* Civil Appeal No. 300 of 2006 [2014] eKLR.
9. On the third and fourth issue, the appellant submitted that the court considered issues it ought not to have considered in making its determination more so with respect to the Land Control Board consent



by failing to consider whether the 3rd respondent herein a taken a loan facility with the appellant under which the 1st respondent's suit property was charged, whether the charge over the suit property was registered in accordance with the law and the burden of proof of allegations of fraud on the part of the appellant. In conclusion, the appellant urged this court to be guided by the principles that costs follow events.

10. The 1st respondent's written submissions dated 18th August, 2023 were filed in court on 17th August, 2023. The submissions raised two issues for determination as follows: -
 - a. Whether or not the trial magistrate erred in fact and in law in finding that the charge registered against the title deed to land parcel no. Cis-Mara/Ilmotiok/4417 in favour of the appellant was illegal, null and void.
 - b. Who bears the costs.
11. On the first issue, the 1st respondent submitted that in determining the validity of the charge registered against the title deed to parcel no. Cis-Mara/Ilmotiok/4417, the trial court held that the charge was created illegally owing to the fact that the appellant did not comply with all the statutory requirements for creation of a valid charge under Section 79 (3) of the Land Act and also observed that it was undisputed that the suit land was agricultural land and it logically follows that Section 6 of the Land Control Act applied. The 1st respondent relied on the cases of Joseph Mathenge Kamitu versus Joseph Wainaina Karanja & Another [2015] eKLR and David Sironga Ole Tukai versus Francis Arap Muge & 2 Others [2014] eKLR.
12. The 1st respondent further submitted that he pleaded that the charge created was illegal null and void and invited the appellant to justify and prove the manner in which the charge was created including whether or not a Land Control Board consent was obtained. Further, that the question as to whether the Land Control Board consent was obtained by the appellant prior to the creation of the charge is crucial and naturally arose in the course of trial which question was put to DW1 who testified on behalf of the appellant during cross examination. And as such, the appellant had an opportunity to respond to the said issue and did not suffer prejudice. Further, that if the appellant suffered any prejudice, the same ought to have been raised during cross examination and if need be, make an application to introduce the consent as evidence if at all it existed. The 1st respondent relied on the case of G.K Macharia & Another versus Lucy N. Mungai [1995] eKLR.
13. The 1st respondent further submitted that the appellant, in its submissions in paragraph 41 and 48 which was captured in the judgment addressed the issue of the consent prior to the registration of a charge. As to whether the trial court failed to appreciate that the charge was a third-party charge, the 1st respondent submitted that the status does not in any way serve to justify the violation of the provisions of the Land Control Act by the appellant in registering the charge in question.
14. As to the prayer for retrial, the 1st respondent submitted that the same can only be ordered in extreme circumstances where the conduct of the trial court amounts to a miscarriage of justice as it was observed in the case of Chandaria versus Njeri [1982] eKLR.
15. The 1st respondent submitted that the conclusion arrived at by the trial court was fair, legally sound and took into consideration the merits and peculiar set of facts of the case.
16. On the second issue, the 1st respondent submitted that given the determination of the issues submitted, the 1st respondent is inevitably entitled to costs.



17. I have considered the grounds of appeal and the written submissions filed by the appellant and the 1st respondent and I am of the considered view that the issue for determination is whether the memorandum of appeal merits grant of the orders sought by this court.
18. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd* 1982 – 88 I KAR 278.
19. The 1st respondent filed a plaint dated 26th September, 2018 seeking judgment against the defendants for: -
 - a. That the charge of the plaintiff's property known as Cis-Mara/Ilmotiok/4417 in favour of Family Bank limited created on the 10th July 2015 be declared illegal null and void.
 - b. That the charge created and registered on 10th July, 2015 against the title to land parcel no. Cis-Mara/Ilmotiok/4417 in favour of Family Bank limited be cancelled.
 - c. That the original title deed be unconditionally released into the plaintiff's custody.
 - d. General damages.
 - e. Costs of this suit and interest.
20. In the plaint, the 1st respondent stated that he was the registered owner of property known as Cis-Mara/Ilmotiok/4417 and that sometime in the year 2015, the 3rd respondent who as at the time was an employee of Kenya Commercial Bank advised him that it was possible to secure a loan of Kshs. 1,400,000 using his title deed which he did. The 1st respondent further stated that the 3rd respondent was later informed that his loan application was approved and the money would be disbursed to his account but the same never took place. The 1st respondent stated that he was surprised that on 18th October, 2017, he was served with a 45-day redemption notice that he had defaulted on a loan facility with the appellant and, that if he did not pay it within 45 days, the suit property would be sold to recover the debt. Later upon enquiry, the 1st respondent learnt that on or about 10th July, 2015, the title deed to his property was used by the 2nd and 3rd respondents to secure a loan of Kshs. 600,000 in favour of the appellant which money was deposited in an account held by the 2nd respondent yet he had no interest or relationship with the 2nd respondent.
21. The 1st respondent pleaded particulars of fraud on the appellant contained in paragraph 16 of the plaint to wit; failing to conduct due diligence on the authenticity of the documents presented by the 2nd and 3rd respondents, failing to engage the registered proprietor prior to registering the charge, failing to obtain spousal consent and colluding with the 2nd and 3rd respondent to register an illegal charge.
22. The appellant filed its statement of defence dated 28th May, 2019. In its defence, the appellant admitted the 45 days redemption notice by the auctioneer and stated that the 1st respondent was aware of the existence of the financial facility of Kshs. 600,000/- advanced to the 3rd respondent since he had executed a charge instrument in favour of the appellant over the suit property to secure the sum aforesaid. Further, that the appellant, by virtue of the legal charge executed by the 1st respondent, it has acquired a valid legal interest over the suit property and that the 3rd respondent defaulted in servicing his financial obligations under the agreement and as a result, the appellant was entitled to exercise its statutory power of sale. The appellant denied the particulars of fraud and stated that it conducted due



- diligence and complied with all the requisite provisions of the law in creation and registration of the legal charge over the suit property.
23. The matter proceeded for hearing before the trial court where the 1st respondent and his wife gave their testimony as well as the Relationship Manager of the appellant herein. Judgment in this matter was delivered on 11th April, 2022. In the judgment, the trial court framed three issues for determination as follows: -
1. Whether evidence by DW-1 is admissible in court.
 2. Whether the plaintiff applied for a loan facility from the 1st defendant.
 3. Whether the charge over land parcel no. Cis-Mara/Ilmotiok/4417 in favour of the 1st defendant was registered in accordance with the law.
24. On the first issue, the trial court made a finding that the 1st respondent had not adduced evidence to contradict the authenticity of the evidence produced by DW1 and found the evidence admissible.
25. On the second issue, the trial court found that the onus of proof shifted from the 1st respondent to the appellant to prove that indeed he applied for a loan in its favour and not Kenya Commercial Bank and it ought to have produced some sought of an agreement to ascertain the fact that the 1st respondent sought of applied for a loan and actually got a loan from the appellant and, that the mere fact that the 1st respondent failed to provide evidence towards his claim of applying the loan in favour of Kenya Commercial Bank did not automatically prove that the 1st respondent did so in its favour. Further, that from the record, there is no evidence of the agreement between the appellant and the 1st respondent and in its opinion, a loan application by the 1st respondent in favour of the appellant had not been sufficiently substantiated.
26. On the third issue, the trial court was of the view that the it was the appellant's onus to prove that it obtained the Land Control Board consent prior to the creation of a charge. Also, that the obtaining of the Land Control Board consent was specifically pleaded by the 1st respondent but the appellant could not prove that it obtained the same and with that, the trial court found that the charge over the suit property was not registered in accordance with the law.
27. The appellant in its submissions argued that the issue of the Land Control Board consent to charge the property was not specifically pleaded and the trial court was misguided and went on to make findings on issues that had not been pleaded. The plaintiff in paragraph 16 of his plaint pleaded that the creation of the charge was highly irregular, illegal and marred with fraud. The 1st respondent particularized claims of fraud on the appellant and, the 2nd and 3rd respondents. I agree with the appellant on this issue for the reason that in the plaint, the 1st respondent did not specifically mention the lack of a Land Control Board consent in this transaction. However, this issue came up during trial and the appellant had an opportunity to clarify this by presenting evidence to that effect.
28. DW1 in his evidence testified that: -
- “I am not the one who holds all the documents. The records are not kept by me. I never participated in the making of any of these documents. I never saw them being made. I confirm that there is no LSB application or LCB consent. The funds were advanced to the 2nd defendant/3rd defendant.”
29. Section 6 of the [Land Control Board Act](#) states: -



- (1) Each of the following transactions that is to say-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;

Is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.

30. The appellant also argued that the trial court failed to understand the nature of the transaction between the appellant and the 1st respondent herein who was a third-party charge and in doing so, sought to introduce into the charge requirements that were not stipulated therein as basis for invalidating the charge. I have looked at the application for a banking facility of Kshs. 600,000/- addressed to the 3rd respondent dated 5th June, 2015, clause 9.4 required the 3rd respondent to obtain at his cost, all consents required under the Land Act that are pre-requisite to the registration of the appellant's interest as charge.
31. In my view, the appellant ought to have obtained the requisite consent as part of the requirements for the reason that the suit property was agricultural land and which Section 6 of the Land Control Board Act applied to. The trial court was thus fair in its finding and I have no reason whatsoever to interfere with the same.
32. Arising from the above, the memorandum of appeal dated 11th May, 2022 lacks merit and it is hereby dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 19TH DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

19/10/2023

In the presence of:

CA: Mr Julius Lotkomoi

