



Ndungu v Kenya Commercial Bank Limited (Environment & Land Case E353 of 2024) [2025] KEELC 1162 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E353 OF 2024**

**JA MOGENI, J
MARCH 13, 2025**

BETWEEN

JOHN NGATIA NDUNGU PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

JUDGMENT

1. This suit was commenced by way of Plaintiff dated 15/10/2021. In the said Plaintiff, the Plaintiff has sought the following orders against the Defendant :-
 - a. Orders that the Defendant do furnish the Plaintiff with full statements of the loan account.
 - b. Release of Plaintiff's Title Deeds over Sub-Division Number 5177 (Original No. 1873/1423) Mombasa Municipality Section II, Mainland North and Nairobi/Block 83/1122
 - c. A waiver of interest and penalties charged by the Defendant on its loan over Nairobi/Block 83/1122.
 - d. General Damages.
 - e. Exemplary damages.
 - f. Costs of this suit.
 - g. Interest.
2. The Plaintiff has in the Plaintiff pleaded that he had been an employee of the Defendant and following the acrimonious termination the Defendant was adjudged to pay the Plaintiff damages for illegal termination. That during employ the Plaintiff had under the employment scheme loans purchased two properties which are Sub-Division Number 5177 (Original No. 1873/1423) Mombasa Municipality



Section II, Mainland North and Nairobi/Block 83/1122 which acted as securities for the loans granted by the Defendant to the Plaintiff.

3. The Plaintiff avers to have fully paid for the loan of Sub-Division Number 5177 (Original No. 1873/1423) Mombasa Municipality Section II, Mainland North but the Defendant refused to release the Plaintiff's certificate of Title and infact in 2014 the Defendant issued an illegal notice of its intention to sell the said property.
4. That via another loan taken in 2010 by the Plaintiff of Kesh 1,500,000 to purchase Nairobi/Block 83/1122 which was to be charged to the Defendant for security. The Defendant's agents who were to transfer the property bungled the transaction neither transferred the property in favor of the Plaintiff nor a charge in favour of Defendant.
5. Infact in 2014 when the Plaintiff sought to dispose off the property NAIROBI/BLOCK 83/1122 to enable him pay the balance of his loan with the Defendant and obtain some funds he realized that the copy of title deed given to him by Defendant was a forgery since the property was in the name of the initial owner.
6. On 31st May, 2016 after six years processed a title deed registered in favour of the Plaintiff but without registering a charge. Yet despite the Plaintiff paying back the Defendant its money without a legal charge, the Defendant has refused to furnish the Plaintiff with statements of accounts and to release the Certificate of Lease registered in favour of the Plaintiff despite having professional undertaking by the Plaintiff's advocates that the Plaintiff will pay the balance of money if any owed to the Defendant in exchange with the said document.
7. At the same time the Plaintiff avers that the Defendant referred to him as a bad debtor to the Credit Reference Bureau making it difficult for the Plaintiff to get financial assistance from a financial institution.
8. The Defendant filed a Statement of Defence dated 15/12/2021 and denied all the averments in the Plaintiff.
9. The matter was set down for hearing on 25/06/2024 and both parties attend Court

The Plaintiff's claim and evidence

10. The Plaintiff was the only witness who testified in support of his claim against the Defendant. His main contention is:
 - a. That, he took several staff loans with the Plaintiff and charged two properties one in Mombasa for Kesh 700,000 and it was fully paid but the Defendant refused to return title deed. Infact there is no statement presented by the KCB, the Defendant to show that the Plaintiff owes any monies.
 - b. The other property in Nairobi he testified that he took a loan for Kesh 1,500,000 LR 83/1122 but the property was not charged despite having remitted the amount borrowed of Kesh 1,500,000 to the bank lawyer Mbaruk Advocate.
 - c. That despite paying the loan in 2014 he was served by auctioneers that the loan was in arrears. That Plaintiff sought to dispose the suit property but was not able to after conducting a search and it was realized that the title was still in the name of the original owner. When the bank was informed they managed to have the title registered in the Plaintiff's bae on 31/05/2016.



- d. By 31/05/2016 the Plaintiff testified that he had paid the bank Kesh 1,103,000 and that the loan account used to disburse the money to the Plaintiff is MG 1035600341 and not MG1220500254 as stated by the Defendant.
- e. He further testified that whereas the Defendant indicated that the Plaintiff was given money on 23/07/2012 totaling Kesh 1,677,463, it was his testimony that he never applied for a loan in 2012.
- f. That the back statement shows nil balances meaning the loan is fully serviced. Further that he never charged any property in 2019 but in 2010 and that at page 73 it shows that the Plaintiff appeared before Joel Kyatha Mbaluka but the date on the document was changed to show 29 instead of 20 and 2020. Infact, that the Power of Attorney for the Lender is for 20/01/2019.
- g. On cross-examination he confirmed that he took other loans such as Kesh 215,000 for furniture and also another facility of Kesh 265,000 where the security is the suit property in Mombasa. The Mombasa property secured a loan of Kesh 215,000 in May 2004, Kesh 145,000 in April 2006, another for Kesh 100,000 and Ksh 165,000 in July. He contends that the loan of Mombasa property was cleared in 2010.
- h. He contends that he had cleared all loans in 2010 and that if he was owing then could not have received another loan if he had not paid the previous loan.
- i. With this the Plaintiff closed her case.
- j. guarantor he was entitled to be told by the Defendant of the default of the Principal Debtor (borrower) to pay the debt so that he can take action to ensure the debt is repaid;

Defendant's case

11. The Defendant called one witness, one Evelyn Chepkoech. Her testimony is already recorded by this Court in extenso. She adopted her statements and the documents filed in support of the Defendant's case. In a nutshell, Evelyn told the Court that she has worked for Defendant as manager in charge of staff loans based at KCB Moi Avenue Branch.
12. It was her testimony that the bank can issue additional loans is promised on servicing of existing loans and that one cannot get another loan if the earlier one is not being serviced.
13. She testified that she did not have a statement of each of the loans. She stated that as at 23/07/2012 there was an outstanding amount of Kesh 1,677,463/- as a staff loan. The Plaintiff's services were terminated on 6/09/2011. That the Plaintiff was given a loan of Kesh 1,500,000/- on 02/12/2010 and that it was to be disbursed based on full compliance but that she had no document to show it was disbursed.
14. She testified that there was a delay in registration of the charge and security. She stated that she was not aware that the charged title was fake and also that the property as is, is not charged. She further testified that she had a statement opening showing 23/07/2014 and it goes all the way to 19/11/2014 which time the Plaintiff was not in employ of the Defendant. The balance of the statement shows that it is a Nil balance and that the loan facility was written off because the client/customer was not in a position to service the loan and so it had to be cleared to balance off the books and the Plaintiff was not a bank employee.
15. That the statement in Court show that the Plaintiff does not owe any money to the bank.
16. Upon re-examination she informed the Court that the bank wrote off the loan by the time the Plaintiff left the bank so as to avoid a non-performing loan accruing more interest. She stated that when a loan is



written off the applicant still has to pay the loan. She at the same time testified that as per the statement the loan was written off on 19/12/2014 as stated in the supplementary affidavit pages 2-4

17. She testified that the bank does not deduct final dues without permission. It was her testimony that the statement in Court start at 23/07/2012 because the loans were combined into one loan account since it was amalgamated for ease of recovery and administration. That loans A-G were secured and unsecured loans and F&G are secured as shown at page 42. That whereas the loans were amalgamated the accounts statement are still there but offer letter at clause 11 speaks of combining of the accounts.
18. With this the Defendant closed their case.

Analysis and Determination

19. I have considered all the pleadings filed, the issues raised by the parties, the evidence tendered as well as the arguments by counsels. I decipher therefrom that the ultimate issues that I must determine are:-

i. Whether statements of account were provided to the Plaintiff and the status of those statements.

20. From the evidence of the Defendant I note that the Plaintiff is the registered owner of the suit properties. This is not in dispute. Similarly, it is not in dispute that the suit properties were mortgaged in favour of the Defendant who extended a loan to the Plaintiff. However despite the averments by the Plaintiff that he has paid off the loans and he is deserving of his registration documents of the suit property to be released to him, the Defendant has withheld them claiming that the Plaintiff has not settled his loans.
21. In fact, from the evidence adduced before Court there has been no communication to the Plaintiff about the outstanding loan through sharing of statement of loan account to show what has and what has not been paid.
22. Both parties made copious submissions on the issues at hand. There is a dichotomy here; on the one hand, the Defendant argued that the Plaintiff owed the bank loan money advanced when he was in its employment. Yet the Plaintiff left the bank upon termination on 6/09/2011 and upon being ordered by the Industrial Court to pay the Plaintiff his dues. The Defendant wants us to believe that the bank was so gracious that it paid the Plaintiff all the monies ordered by Court without deducting the loan balance. That is laughable unless the said bank is not Kenya Commercial Bank based in Kenya!
23. And if by chance such a thing happened then I am convinced that it would have been the Defendant in Court seeking to recover “erroneously” paid out monies owed to the bank. This line argument from the bank is infact hilarious. The Defendant’s witness infact told the Court that she did not have a copy of the cheque before Court to show how much money the Plaintiff was paid but that she knows the bank did not deduct its dues. How convenient again it is the submission of the Defendant that Section 107 of the *Evidence Act* quoting the decision of the Court in *Anne Wambui Ndirit vs. Joseph Kiprono Ropkoi & Another* [2005]1 EA 334 submitted that the existence of any legal right or liability to prove facts must be presented by the person alleging. In this case the Defendant failed their own test.
24. The bank statement presented conveniently starts from 2013 which time the Plaintiff had left the employment of the Defendant. What happened to the statements of the years the Plaintiff served until 6/09/2011? Especially due to the fact the Plaintiff took a second loan in 2010?
25. In the same breath however the Plaintiff asserted that he fully paid the loan secured by Sub-Division Number 5177 (Original No. 1873/1423) Mombasa Municipality Section II, Mainland North which was not disputed by the Defendant through presentation of a loan statement to show any outstanding amounts. At the same time the loan for Nairobi/Block 83/1122 which the Plaintiff claims to have paid



- despite discovering that there was no charge in existence. Vide a letter dated 29/12/2010 the Counsel for the Defendant confirmed having registered a charge but the search dated 11/06/2014 show that the proprietor is one Noah Mahinda Gathumbi. Yet all along the Plaintiff was paying the bank the loan under the belief that he owned the property.
26. The bank has refused and or completely failed to furnish the Plaintiff with the loan statement to show the repayment and infact vide the letter dated 12/06/2017 the Counsel for the Plaintiff sought for the securities in exchange for settlement of an outstanding balance of Kshs 393,124.20/- and gave a professional undertaking to pay what is owed but the Defendants kept mum.
 27. The arguments in the submissions are quite robust and useful, but one matter stands out and is agreed by both parties: That the Plaintiff's securities are withheld by the Defendant who is claiming not to have been paid off the loan taken by the Plaintiff. Yet the Defendant has refused and or failed to provide the loan statement to attest to what is owed if at all. Further the Defendant did not present the legal charge between the Plaintiff and the Defendant of Nairobi/Block 83/1122 following the borrowing of Ksh 1,500,000/-. The Charge instrument 28/01/2019 according to the Plaintiff was not signed by him.
 28. The Plaintiff testified the document at page 73 of the Defendant's bundle show his signature but the document is a forgery and that the date on the document was altered. This averment was not contested by the Defendant and that the Power of Attorney for the Lender is dated 20/01/2019 yet the loan the Plaintiff took was for 2010. The Defendant did not explain the alteration of dates on the charge document and therefore the averment of the Plaintiff is unchallenged.
 29. The only document that the Defendant can hang on is the charge instrument whose authenticity has been challenged. Infact is unconceivable that the instrument is dated 2019 while the loan was taken in 2010. I am therefore unable to hold that there is any contract between the Plaintiff and Defendant as the contract in a charge instrument only becomes effectual on registration. But even assuming that the charge instrument though unregistered was a contract, which I certainly do not hold, such contract (assuming it existed as at 2010, when the lawyers for the Defendant may have forwarded it for registration) it will have been caught up by limitation of time by 2021 when this suit was filed or even by 2019 when the said instrument is shown to have been registered. A charge instrument cannot remain unregistered for 6 years, the duration of the limitation of time for contracts.
 30. The fact of the matter in our instance is that the charge instrument displayed is time-barred and the loan claimed to be owing is actually not owing since the statement dated 19/12/2014 show that the balance is nil meaning the loan is fully serviced. I again add that the suit property Nairobi/Block 83/1122 was charged in 2010 but there was no charge until 2019. This being the case and due to the limitation of time there is no charge in existence, that is the only import, then there is nothing to register and hence no reason to keep holding onto the Plaintiff's Certificates of Title. If there exists a charge instrument that is capable of registration, then we must ask ourselves whether the Defendant is still entitled to hold on to the Certificate of Title of the Plaintiff nine or so years after the charge instrument was apparently executed by the Plaintiff.
 31. I have pondered whether there is any limitation of time given within which one must register a charge instrument. I have not seen any. My position is that a charge instrument needs to be registered within a reasonable time and if not so registered within such reasonable time, the registration must be abandoned and the title documents must be returned to the property owner.
 32. The Plaintiff has of course made clear his intentions to be no longer interested in the tribulations caused him by the Defendant, if I may call them so, of Mr. Ndungu. Given this intention, is the Defendant still entitled to hold onto the Plaintiff's titles? My answer to this is No! And this answer is informed by



- the fact that there is no law that permits the Defendant to continue holding the Plaintiff's certificate of title.
33. From the foregoing I find no reasonable basis which would have entitled the Defendant to hold onto the Plaintiff's title documents for a duration of almost 9 years to the time this suit was filed. According to me the bank acted irrationally and in total disregard to the interests of the Plaintiff who was never even indebted to the bank.
 34. I do not hesitate to order the bank to return the title documents to the suit properties to the Plaintiff forthwith.
 35. The Plaintiff has also made a claim for general and exemplary damages. I have already held that the bank acted unreasonably by holding onto the title documents of the Plaintiff. It should have been obvious to the bank that their actions are causing loss and damage to the Plaintiff. It cannot be said that the bank was not alive to the fact that for one to access capital security is required. That indeed is their business. The bank cannot claim to have been ignorant to the fact that without the title documents being released to the Plaintiff, the Plaintiff could not do much with the suit properties.
 36. Holding of the title documents for a period of 11 years before this suit was filed was a long time already. No overtures were made by the Defendant to return the title deeds even after this suit was filed. I may never know whether the Defendant's lackadaisical attitude was due to lack of legal advice, insensitivity or sheer stubbornness. The Plaintiff has been denied meaningful use of his land for a period of about 14 years now. It is a long time. It was unfair and insensitive for the Defendant to continue holding the Plaintiff's title documents for all this time. The Plaintiff must have suffered loss because of the actions of the Defendant. I think the Plaintiff is perfectly entitled to some compensation in form of general damages.
 37. Let me conclude by saying that the decision by the bank to keep the Plaintiff's securities and the inability to present before this Court a statement of loan payment is an act comparable to illegal foreclosure; it defeated all prudence and reasonableness. The bank kept a dark ominous cloud hovering upon the Plaintiff knowing too well that there was no charge. Infact the bank illegally received interest charged on non-existent charge knowing it was oppressing an innocent Kenyan. The action by the bank was not only a source of anxiety and uncertainty as to when the property will be redeemed but is contrived, malicious, stealth and oppressive; a complete negation of the law and equity of redemption.
 38. I would have gone on and on but I have said enough about the despicable behavior of the Defendant in treating the Plaintiff with disdain and seeming to say "nitakuonyesha" by using the lending power it has against an employee they already sacked. They seem to want to punish him for being granted an award by the Industrial Court. Yet they already deducted their due. Shylock already got his pound of flesh so what else does Shylock want yet he is only entitled to his pound of flesh? That conduct is loathed by law. I grant relief to the Plaintiff as follows:-
 - a. I order that the Defendant do furnish the Plaintiff with full statements of the loan account within 7 days of this Judgment.
 - b. I direct that the Defendant forthwith within 7 days from the date hereof release the Plaintiff's Title Deeds over Sub-Division Number 5177 (Original No. 1873/1423) Mombasa Municipality Section II, Mainland North and Nairobi/Block 83/1122.
 - c. I direct that there be a waiver of interest and penalties charged by the Defendant on it's loan over Nairobi/Block 83/1122



- d. The Court awards the Plaintiff General Damages of Kesh 300,000/- with interest at Court rates until payment in full.
- e. Costs of this suit are awarded to the Plaintiff.

39. Those are the Orders of the Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

Judgment read in virtual Court in the presence of:

..... for the Plaintiff

..... for the Defendant

Melita Court Assistant.

.....

MOGENI J

JUDGE

