



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA No. E5 OF 2020

NATIONAL HOUSING CORPORATION APPELLANT

VERSUS

CHARLES LUTTA KASAMANI.....1ST RESPONDENT

KEYSIAN AUCTIONEERS2ND RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. T. A Odera, Senior Principal Magistrate) delivered on 23rd September 2020 in Mumias SPM ELC No. 164 of 2018 Charles Lutta Kasamani v National Housing Corporation & Keysian Auctioneers)

JUDGMENT

1. This appeal traces its roots to a plaint filed in the subordinate court on 30th July 2018 by Charles Lutta Kasamani, hereinafter 'Kasamani' against National Housing Corporation, hereinafter 'Housing' and Keysian Auctioneers, hereinafter 'Keysian'. Kasamani averred that that he obtained a loan facility of KShs 1,500,000 from Housing which loan was secured by a charge over the parcel of land known as N/Wanga/Mayoni/1733. That Housing purported to give him notice through Keysian that it intended to sell the suit property. Kasamani contended that the statutory power of sale under the charge had not arisen and that valid statutory had not been served upon him.

2. Kasamani therefore prayed for judgment against Housing and Keysian as follows:

(a) The Defendants be restrained whether by themselves, their servants and or agents from selling, advertising/readvertising disposing of, offering for sale or alienating in any manner whatsoever or interfering with the Plaintiffs use and possession of the property known as L.R NO. N/WANGA/MAYONI/1733

(b) The 1st Defendant be directed to render and deliver to the Plaintiff true and correct accounts and the entire statements of accounts in respect of the loan advanced and charged secured.

(c) An order cancelling the registration of the Charge over the property known as LR NO. N/WANGA/MAYONI/1733

(d) Costs of this suit together with interest thereon for such period and at such rates this honorable Court may deem appropriate

(e) Any such other or further relief as this honorable Court may deem appropriate to grant.

3. Housing filed a defence and counterclaim in which it averred inter alia that it duly served Kasamani with statutory notices and prayed that his case be dismissed. It added that Kasamani defaulted and fell into arrears which he did not settle despite issuance of statutory notices. That as at 8th November 2018, the arrears stood at KShs 5,512,761 plus interest at 13% per annum. It therefore prayed for judgment against Kasamani as follows:

a) For Judgment for the entire loan balance of KShs. 5,512,761/= as at 8.11.2018 plus interest thereon at the contractual rate of 13% p.a. from 8.11.2018 until payment in full.

b) A Declaration that the Plaintiff is in default and breach of the terms of the Charge and the Loan Agreement entered into between the 1st Defendant and the Plaintiff herein and that, consequently, the 1st defendant is entitled to and is at liberty to forthwith sell the suit so as to recover the entire loan balance of KShs. 5,512,761/= plus interest thereon at the contractual rate of 13% p.a. from 8.11.2018 until payment in full, together with all costs, fees and charges consequential upon such sale.

c) Costs of this Counter-Claim.

d) Interest on the amounts payable at a) and c), above, at the contractual or the Honourable Court's rate herein until payment in full.

e) Such other and further relief or remedy that the Honourable Court in its discretion may be pleased to grant.

4. The matter proceeded to trial before Hon. T. A Odera, Senior Principal Magistrate who ultimately delivered judgment on 23rd September 2020. The learned magistrate found that Kasamani had partially proven his case and that Housing had also partially proven its counterclaim. The learned magistrate declared that Kasamani owed Housing KShs 3,000,000; that the charge could not be cancelled as Kasamani still owed KShs 3,000,000; entered judgment for Housing against Kasamani for KShs 3,000,000; declared the prayer for accounts spent since accounts were produced in evidence; restrained Housing and Keysian as well as their servants and agents from selling, advertising, readvertising, disposing off, offering for sale, alienating or interfering with Kasamani's use and possession of the suit property for an amount of debt greater than KShs 3,000,000. Each party was ordered to bear own costs of the suit.

5. Being dissatisfied with the judgment, Housing filed this appeal and listed the following grounds on the face of the Memorandum of Appeal:

1. THAT the Honourable Magistrate erred in law and in fact by considering exterior reasons and allegedly basing her decision on an ambiguous fact to the effect that 'the 1st Defendant (the Appellant herein) performs banking services of lending money to clients among others and so its transactions are regulated by the Banking Act' when in fact it (the Appellant) is regulated by the Housing Act, Chapter 117 of the Laws of Kenya which specifically gives powers to the Appellant to grant loans to any Company, Society or individual person for the purposes of enabling such Company, Society or individual person to acquire land and construct thereon.

2. THAT the Honourable Magistrate erred in law and in fact by arriving at the conclusion that the Appellant is governed by the provisions of the Banking Act when in fact, the Appellant is governed by the provisions of the Housing Act, Chapter 117 of the Laws of Kenya.

3. THAT the Honourable Magistrate erred in fact by arriving at the decision that the 1st Respondent herein was not served with the requisite Statutory Notices when in fact the Court rejected and disallowed the Appellant's documentary evidence showing that it (the Appellant) had indeed served the Plaintiff with the Statutory notices, thereby demonstrating open bias against the Appellant as shall be demonstrated from the proceedings before it.

4. THAT in any event, the Honourable Magistrate erred in law and fact by arriving at the impugned decision contrary to the law, facts, circumstances and principles applicable to the case when analysed in their entirety.

6. Based on those grounds, Housing urged this court to grant the following orders:

a. This Appeal be allowed.

b. The Judgment of the Honourable trial Court against the Appellant and all the consequential Orders and/or Decree made therefrom be set aside.

c. Judgment be entered in favour of the 1st Defendant/Appellant in terms of prayers a, b, c, d and e of the Counter-Claim filed in the trial Court on 12th February, 2019.

d. The Appellant be granted the costs of this Appeal and in the trial Court.

e. The Court be pleased to make any other suitable order as the circumstances of the case may require.

7. Keysian did not participate in both the proceedings in the subordinate court and in this court.

8. The appeal was canvassed through written submissions. In its submissions, Housing focused on two issues; whether Housing is regulated by the **Banking Act** including **Section 44A** of the **Banking Act** and whether statutory notices were properly issued and served.

9. On the first issue, was it argued that the learned magistrate failed to take into account Housing's unique nature and the legal framework within which it operates under the **Housing Act**. That Housing was established as a tool for social re-engineering with a view to mobilizing resources to finance and support construction and ownership of affordable houses for all Kenyans at affordable interest rates. Citing **Sections 3, 7, 17 and 18** of the **Housing Act**, it was further argued that it could never have been contemplated that at Housing's minimal interest rate compared to bank rates, a borrower could secure credit from it and hold on to it to infinity while enjoying the immunity and amnesty offered by the *In Duplum* rule.

10. As to whether statutory notices were properly issued and served, it was argued on behalf of Housing that Kasamani was served with the requisite notices. Referring the court to Defence exhibits 15-28, 34 and 45, it was submitted that **Sections 91 and 96** of the **Land Act** were duly complied with. In conclusion, Housing prayed that this appeal be allowed, the decision of subordinate court be set aside, and that Kasamani's suit be dismissed with costs.

11. For Kasamani it was argued that Housing did not extract the decree in terms of **Order 21 Rules 7, 8, and 20** of the **Civil Procedure Rules** and that the record of appeal herein is defective for not containing a certified copy of the decree in terms of **Order 42 Rule 2** of the **Civil Procedure Rules**. Reliance was placed on the case of **South Nyanza Sugar Co. Ltd v Elijah Ntabo Omoro [2011] eKLR**.

12. While addressing grounds 1 and 2 of the appeal, it was argued that the **Housing Act** does not exempt Housing from the **Banking Act** and that the trial court cannot be faulted for finding that the interest rate charged could not exceed the principal amount owing at the time the loan became non-performing. In support of that contention, reliance was placed on the case of **National Housing Corporation v Osii Owade Ayoma [2008] eKLR**.

13. Regarding ground 3 of the appeal, it was argued on behalf of Kasamani while referring to pages 234-236 of the record that at trial Kasamani successfully objected to Housing introducing statutory and auctioneers' notices, certificates of postage, statements and Kasamani's letters which were then struck out. That no appeal or other challenge was mounted against the decision of the trial court striking out the documents and that Housing proceeded to close its case. That in the circumstances Housing cannot fault the trial court.

14. Kasamani went on to dismiss ground 4 as a fishing exercise and an unacceptable omnibus invitation this court to interrogate facts, issues and law which were not part of the trial. In conclusion, it was argued that Kasamani's equity of redemption was clogged by the acts and omissions of Housing by engaging in actions contrary to the terms and conditions of the charge agreement. Citing the case of **Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR**, Kasamani argued that the appeal has no merit and urged the court to strike it out for want of a decree or to dismiss it with costs both of the appeal and the subordinate court matter.

15. I have considered the appeal and the parties' respective submissions. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**. I will deal with grounds 1 and 2 of the appeal together and grounds 3 and 4 together.

16. Before I delve into analysing the grounds of appeal, I need to deal with a preliminary issue that Kasamani raised; that the record of appeal herein is defective for not containing a certified copy of the decree in terms of **Order 42 Rule 2** of the **Civil Procedure Rules**. The rule provides:

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

17. I have perused the record of appeal herein. There is, at page 253 of the record, a copy of the decree issued on 10th June 2012 and duly signed by the magistrate. Thus, the argument that the record of appeal is defective for not containing a certified copy of the decree cannot stand.

18. Under grounds 1 and 2 of the appeal, Housing faulted the learned magistrate for holding that it offers banking services and that it is therefore governed by the **Banking Act**. The learned magistrate held as follows in relevant portion of the judgment:

It is therefore trite law from the foregoing that the said section 44 A of the Banking Act is retrospective and applies to loans which were taken before it came into operation on 1.5.2007.

The 1st defendant performs Banking services of lending money to clients among others and so its transactions are regulated by the Banking Act.

... Section 44A of the said Act provides that the interest rates charged should not exceed the principal amount at the time the loan starts being non-performing. The 1st defendant, counter claimed KSH 5, 512,761/= plus interest till payment in full at 13 % p.a the plaintiff has admitted owing 1st defendant KSH. 3,000,000/=. It is clear from the statement that the loan of principal amount started being nonperforming. The loan was non performing from the word go and so the interest should not exceed the principal amount which is KSH 1,500,000/= as provided for under section 44A (2) (a) & (b) of the Banking Act. The effect of this is that that plaintiff cannot owe more than KSH 3,000,000/=. The counter claim for KSH 5,512,761 /= plus interest till payment in full does not stand in view of the said "Duplum" rule.

19. According to Housing, it has a unique nature and mission to provide affordable housing for Kenyans hence its legal framework is found within the **Housing Act** and not the **Banking Act**. It thus contends that **Section 44A** of the **Banking Act** is not applicable to it.

20. Housing is established under **Section 3** of the **Housing Act**. Under **Section 8 (1) (b)** of the Act, it is empowered to grant loans *inter alia* to any individual person for the purpose of enabling him to acquire land and construct thereon approved dwellings or to carry out approved scheme. Under **Section 8 (2)** of the Act, every loan made by Housing under the Act is to bear interest at such rate as Housing may from time to time prescribe.

21. The learned magistrate held that Housing offers "banking services of lending money to clients among others and so its transactions are regulated by the Banking Act". Whether or not **Section 44A** of the **Banking Act** applies to Housing is a question both of law and fact.

22. **Section 44A** of the **Banking Act** came into force on the 1st May, 2007. Its effect is to limit the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. See **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another [2020] eKLR**.

23. **Section 44A (1)** and **(2)** of the **Banking Act** provide:

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following -

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

24. The question that then arises is whether Housing is “an institution” within the meaning of **Section 44A** the **Banking Act**. One needs not look any further than **Section 2** of the Act which defines "institution" to mean a bank or financial institution or a mortgage finance company. In turn, "bank" is defined by the section to mean a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank. The section further defines "financial institution" as meaning a company, other than a bank, which carries on financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of the Act.

25. **Section 2** of the **Banking Act** also has a definition of "banking business" which largely revolves around accepting money from members of the public on deposit or on current account and employing of the money by lending or investment. Finally, the section defines "mortgage finance company" to mean a company (other than a financial institution) which accepts from the members of the public, money on deposit repayable on demand or at the expiry of a fixed period or after notice; or on current account and payment on and acceptance of cheques.

26. As I understand it, **Section 44A** the **Banking Act** applies only to banks or financial institutions or mortgage finance companies as defined at **Section 2** of the **Banking Act**. The key factor in the definition is that the activities of banks or financial institutions or mortgage finance companies revolve around accepting money from members of the public on deposit or on current account and employing of the money by lending or investment. It has not been shown that Housing accepts money from members of the public on deposit or on current account with a view to lending or investing such moneys. On the contrary, **Section 7** of the **Housing Act** makes it clear that the sources of Housing’s funds are not deposits but borrowings by Housing and such moneys as voted or appropriated by parliament, repayments by local authorities, companies, societies or individual persons on account of loans advanced by Housing. I find that **Section 44A** of the **Banking Act** does not apply to Housing. That answers grounds 1 and 2 of the appeal.

27. Under grounds 3 and 4 of the appeal, Housing has faulted the learned magistrate for holding that Kasamani was not served with statutory notices. Kasamani’s case before the subordinate court was that he was not served with the requisite statutory notices. He testified to that effect. On the other hand, Housing’s case was that the notices were served. Martin Shivere who testified on behalf of Housing as DW1 referred the court to documents which were marked as DMFI 25 to 36 in an effort to prove service of statutory notices. Ultimately however, Housing closed its case without producing DMFI 25 to 35 as exhibits. I have perused the material on record and I have not seen any proof that Housing served Kasamani with the notices required under **Sections 90** and **96** of the **Land Act**. I find that the notices were not served upon Kasamani. That being the case, the right to exercise chargee’s remedies under **Section 90** of the **Land Act** has not accrued to Housing.

28. In his testimony, Kasamani admitted defaulting and specifically stated that he owed Housing KShs 3,000,000 as at the date of his testimony. Although Housing has not demonstrated compliance with **Sections 90** and **96** of the **Land Act**, there would be no basis upon which to cancel the registration of the charge or to eternally restrain Housing from pursuing the remedies available to it as a chargee. If default on the part of Kasamani persists, Housing should be able to pursue the remedies available to a chargee provided that it first complies with the law relating to issuance of statutory notices.

29. In view of the foregoing discourse, this appeal succeeds in part. I set aside the orders made by the subordinate court and replace them with the following orders:

a) The appellant (Housing) is restrained whether by itself, its servants and or agents from selling or alienating the property known as L.R No. N/Wanga/Mayoni/I733 until the appellant will have complied with the law relating to the exercise of a chargee’s remedies under Sections 90 and 96 of the Land Act and all other applicable law.

b) The appellant’s (Housing’s) counterclaim is dismissed.

c) Each party shall bear own costs of this appeal as well as own costs of the proceedings before the subordinate court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JANUARY 2022.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

NO APPEARANCE FOR THE APPELLANT

NO APPEARANCE FOR THE RESPONDENTS

COURT ASSISTANT: E. JUMA