



**Housing Finance Corporation v Khamisi & another (Environment and Land Appeal E001 of 2024) [2025] KEELC 3690 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3690 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E001 OF 2024  
LC KOMINGOI, J  
APRIL 24, 2025**

**BETWEEN**

**HOUSING FINANCE CORPORATION ..... APPELLANT**

**AND**

**JAPHETH AFWAYI KHAMISI ..... 1<sup>ST</sup> RESPONDENT**

**SOLOMON KIPNGETICH TANUI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement and Decree of Hon. V. Kachuodho in Kajiado CM ELC Case No. 8459 of 2021 delivered on 15th December 2023)*

**JUDGMENT**

1. In the Judgement dated and delivered on 15<sup>th</sup> December 2023 in CM Kajiado ELC Case No. 8459 of 2021, the learned Hon. V. Kachuodho determined:

“...From the Loan Account Statement as at 11/06/2021, the time of auction, the loan arrears balance was Kshs. 8,391,789 there was no evidence tendered for the Court to understand how the 1<sup>st</sup> Defendant arrived at the said loan balance Kshs. 9,824,149.33, considering that it had already sold the suit property - the security for the loan at Kshs. 7,300,000. I am therefore not convinced to grant prayers as sought in the 1<sup>st</sup> Defendant counterclaim...”

2. Aggrieved, by this decision the Appellant filed this Appeal seeking the setting aside of the Judgement and this Appeal be allowed with costs on the grounds that:

1. The learned Magistrate erred in law and fact by finding that the Appellant was not entitled to the sum of Kshs. 9,824,149 from the 1<sup>st</sup> Respondent as claimed in its counterclaim, being the outstanding balance on the loan facility and interest accrued.



2. The learned Magistrate erred in law and fact by failing to appreciate that the 1<sup>st</sup> Respondent had failed to pay the loan facility took out from the Appellant necessitating the sale by auction of the secured property title No. Kajiado/Kaputiei North/33191 to the 2<sup>nd</sup> Respondent.
3. The learned Magistrate erred in law and fact by failing to appreciate that the amounts recovered from the sale of the secured property Kajiado/Kaputiei North/33191 was not sufficient to repay the outstanding loan amount and interest accrued thereon.
4. The learned Magistrate erred in law and fact by failing to appreciate that the 1<sup>st</sup> Respondent is indebted to the Appellant, which indebtedness has not been denied.
5. The learned Magistrate erred in law and fact by failing to award the Appellant costs of the suit.
3. The 1<sup>st</sup> Respondent sought to file his cross appeal out of time, but the same was dismissed for want of prosecution.
4. This Appeal was canvassed by way of written submissions.

### **The Appellant's submissions.**

5. It was submitted that, the Appellant through a letter of offer dated 23<sup>rd</sup> July 2014 advanced to the 1<sup>st</sup> Respondent a loan of Kshs. 8,925,000 and the 1<sup>st</sup> Respondent provided title to property Kajiado/Kaputiei North/33191 as security. The charge over the suit property was registered on 19<sup>th</sup> November 2014. The 1<sup>st</sup> Respondent however defaulted on the loan repayment which resulted to the Appellant exercising its statutory power of sale. The Appellant issued statutory notices as per Section 90(1) 2) (3) and Section 96(2) of the Land Act as well as Rule 15 (d) of the Auctioneers Rules 1997. The Appellant also carried out a valuation of the suit property prior to the auction as per Section 97(1) and (2) Land Act.
6. After issuance of the notices, the 1<sup>st</sup> Respondent files Chief Magistrates Court Case No. 3118 of 2016: Japheth Afwayi v Housing Finance Corporation seeking injunctive orders. The prayer for injunctive reliefs was however denied by the court and the suit dismissed for want of prosecution on 3<sup>rd</sup> March 2020. Following this dismissal, the suit property was sold on 11<sup>th</sup> June 2021 through a public auction for Kshs. 7,300,000 to the 2<sup>nd</sup> Respondent. This amount was however not sufficient to settle the outstanding amount of Kshs. 17,418,568.31 owed by the Appellant as of 29<sup>th</sup> November 2021 when the 2<sup>nd</sup> Respondent concluded the payment.
7. After the auction, the 1<sup>st</sup> Respondent filed MCC ELC 8459 of 2021 through a Plaint dated 13<sup>th</sup> July 2021 and Amended on 19<sup>th</sup> August 2022 seeking a permanent injunction against the Appellant and 2<sup>nd</sup> Respondent from interfering, possessing or occupying the suit property. The Appellant filed its statement of defence and counterclaim dated 7<sup>th</sup> December 2021 in which it sought dismissal of the Plaint and a judgment of Kshs. 9,824,149.33 against the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent did not file the response/defence to the counterclaim. The 2<sup>nd</sup> Respondent filed his statement of defence dated 8<sup>th</sup> November 2021 in which he sought the dismissal of the suit and a declaration for grant of vacant possession of the suit property.
8. On 15<sup>th</sup> December 2023 judgement was delivered where the trial court dismissed the Appellant's counterclaim and the 1<sup>st</sup> Respondent's plaint, and allowed the 2<sup>nd</sup> Respondent's counterclaim. This decision thus led to the filing of this Appeal.
9. On whether the trial court erred in law and fact and in finding that the Appellant had not proven that the 1<sup>st</sup> Respondent owed it the sum of Kshs. 9,824,149.33, it was submitted that the trial court erred in



dismissing its counterclaim by finding that the Appellant did not prove this claim. This is because the 1<sup>st</sup> Respondent failed to repay his loan facility and admitted in cross examination to owing the Appellant Kshs. 9,824,149.33. It was also submitted that the statements produced demonstrated how the Kshs. 9,824,149.33 was arrived at, and ought to be repaid for breach of contract citing Kenya Commercial Bank v Philip Odongo Kabita T/A Odongo Kabita Valuers [2002] eKLR and Abdi Ahmed Abdi Kawir Trading as A. A. Kawir Building Contractors Company alias A. A. Kawir Building Contractors and Civil Engineering v County Council of Isiolo [2017] eKLR. Counsel also submitted that the 1<sup>st</sup> Respondent did not file a defence to the Counterclaim and it should therefore be allowed as prayed as held in Mark Macauley v Rob De Boer & Fiona De Boer [2002] eKLR.

10. On the issue of costs, this Appeal should be allowed with costs as well as costs at the trial court because costs follow the event as per Section 27 of the *Civil Procedure Act*.

#### **The 1<sup>st</sup> Respondent's submissions.**

11. At the time of writing this judgement, the 1<sup>st</sup> Respondent had not filed his submissions.

#### **The 2<sup>nd</sup> Respondent's submissions.**

12. On the 5<sup>th</sup> of December 2024, Mr. Serpepi, counsel for the 2<sup>nd</sup> Respondent intimated to the Court that they did not intend to file any written submissions.

#### **Analysis and Determination.**

13. I have considered the grounds of appeal, the record of appeal, the written submissions and the legal authorities cited. I find that the issues for determination are:
  - i. Whether the Learned Magistrate erred in dismissing the Appellant's counterclaim seeking for Kshs. 9,824,149 from the 1<sup>st</sup> Respondent;
  - ii. Whether this Appeal is merited;
  - iii. Who should bear costs of the suit.
14. Being a first appeal, the Court has a duty to re-evaluate the case and make its own findings with consideration that it neither saw nor heard the witnesses. This was the Court of Appeal's holding in Transparency International - Kenya v Omondi (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR).

“ This being a first appeal, we are required to analyse the evidence afresh and reach our own conclusions but also warning ourselves that we did not have the advantage of seeing the witnesses. It is thus the duty of the court to analyse and re-assess the evidence on record and reach our own conclusions...”

15. In *Selle & another VS Associated Motor Boat Company Ltd & others* [1968] EA 123 cited in *Barnabas Biwott VS Thomas Kipkorir Bundotich* [2018] eKLR, the Court stated thus; “...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court---is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
16. It is the Appellant's case that the 1<sup>st</sup> Respondent owes it an outstanding amount of Kshs. 9,824,149. It is claimed that the loan amount of Kshs. 8,925,000 advanced in 2016 accrued interest to the sum of



- Kshs. 17,418,568 as of 3<sup>rd</sup> December 2021. Therefore, the charged property auction amount of Kshs. 7,500,000 paid by 6<sup>th</sup> July 2021 was not enough to offset the accrued loan interest.
17. The Learned Trial Magistrate in her judgement found that the Appellant was within its right to exercise its statutory power of sale following the 1<sup>st</sup> Respondents default in loan repayment and dismissed the 1<sup>st</sup> Respondent's suit at the lower court (the Plaintiff therein).
  18. On the issue of the balance of Kshs. 9,824,149.33 claimed by the Appellant against the 1<sup>st</sup> Respondent, the learned Trial Magistrate held: "...The 1<sup>st</sup> Defendant claimed counterclaim for Kshs 9,824,149.33, being balance of the loan amount as 3/12/2021. From the Loan Account Statement as at 11/06/2021, the time of auction, the loan arrears balance was Kshs. 8,391,789 there was no evidence tendered for the Court to understand how the 1<sup>st</sup> Defendant arrived at the said loan balance Kshs. 9,824,149.33, considering that it had already sold the suit property - the security for the loan at Kshs. 7,300,000. I am therefore not convinced to grant prayers as sought in the 1<sup>st</sup> Defendant's counterclaim..."
  19. This decision is what necessitated this Appeal on the grounds that the learned trial magistrate erred in her finding.
  20. It is not in contention that a loan facility was taken by the 1<sup>st</sup> Respondent and defaulted in its payments as acknowledged in his testimony at the Trial Court. Following this default, the Appellant exercised its statutory power of sale and through a public auction disposed of the property to the 2<sup>nd</sup> respondent for Kshs. 7,500,000 a sale that the Court held was valid.
  21. The single issue for determination therefore is whether the Trial Magistrate erred in finding that the Appellant had not proved his entitlement to Kshs. 9,824,149 as claimed.
  22. From the Lower Court proceedings, this Court notes that the Appellant's witness in his testimony testified that "... The Plaintiff loan balance as at 28<sup>th</sup> May 2021 before time of auction was Kshs. 16,650,227. From the bundle, the amount the Plaintiff had paid has not been computed..."
  23. I agree with the Appellant's submissions that the 1<sup>st</sup> Respondent failed to make repayments towards servicing the loan facility as per the terms of the letter of offer dated 23<sup>rd</sup> July 2014 and as such, it was in breach of contract to which the Appellant is entitled to compensation.
  24. I am of the view that the Appellant was able to demonstrate how Kshs. 9,824,149.33 came into being by producing the loan statement account which set out the debt owed and how the proceeds of the auction of the suit property were utilised. This is from page 308 to 319 of the Record of Appeal.
  25. It appears the 1<sup>st</sup> Respondent admitted during the trial that he was indebted to the Appellant. This is buttressed by the fact that the 1<sup>st</sup> Respondent did not file a defence to the counterclaim.
  26. To this extent, I find that the learned trial Magistrate erred in finding that the 1<sup>st</sup> Respondent was not indebted to the Appellant. In the case of Kenya Commercial Bank VS Phillip Odongo Kabita t/ a Odongo Kabita Valuers [2002] eKLR , Ringera J. (as he then was) stated thus; "Whether the claim be in tort or in contract, restitutio in integrum is the guiding principle in law. The Plaintiff should be restored to the same position as he would have been had the breach of contract or tort complained of not occurred. The other principle is that only those losses which are not too remote should be compensated."
  27. By their very nature, banks are in business of selling money to earn some profit. The Appellant gave away its money to the 1<sup>st</sup> Respondent in 2014 and he defaulted in 2015. In my view, the loan became non-performing in 2015.



28. Under Section 44 (1) and (2) of the *Banking Act*, banks are allowed to recover a crude interest which should not exceed the principal owing when the loan becomes non-performing.
29. The 1<sup>st</sup> Respondent has not demonstrated that the amount owing is excessive.
30. In conclusion, I find that the learned Trial Magistrate erred in finding that the Appellant had not proven that the 1<sup>st</sup> Respondent owed it the sum of Kshs. 9,824,149.33.
31. I find merit in this Appeal and the same is allowed. In essence, the Judgement and the Decree of the lower Court dated 15<sup>th</sup> of December 2023 is hereby varied to allow the Appellant's counterclaim together with interest at court rates from 3<sup>rd</sup> December 2021 till payment in full. The Appellant shall have costs of this Appeal and of the suit at the lower Court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**L.KOMINGOI**

**JUDGE**

In The Presence Of:

N/A for the Appellant

N/A for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Court Assistant: Mutisya

