



Mukoya v National Bank of Kenya Ltd (Environment & Land Case 105 of 2016) [2022] KEELC 170 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 105 OF 2016**

AA OMOLLO, J

JUNE 8, 2022

BETWEEN

AMISI ONYANGO MUKOYA PLAINTIFF

AND

NATIONAL BANK OF KENYA LTD DEFENDANT

JUDGMENT

1. The plaintiff filed a suit against the defendant via a plaint dated 30th August 2016 which he later amended the plaint on 5th February 2021 and prayed for judgment against defendants for;
 - a) Permanent injunction restraining the defendant, their agents, employers, workers and assignees from selling, trespassing, cultivating or in any way interfering with the plaintiff's L.R. South Teso/Angoromo/2299.
 - b) The plaintiff be discharged from the obligations of the charge.
 - c) The defendant be ordered to execute a discharge of charge over L.R. South Teso/Angoromo/2299 and L.R. South Teso/Angoromo/2296.
 - d) Alternative to prayers above, the plaintiff prays that the intended sale of the plaintiff's charged land comprised in L.R. South Teso/Angoromo/2299, 2538, 2900 and L.R. South Teso/Angoromo/2296 be stopped.
 - e) Costs of the suit.
2. The plaintiff impleaded that in 1989 he sought for a loan of Kshs.30,000/= from the defendant that was granted to him in consideration of him charging his L.R. South Teso/Angoromo/2299 and L.R. South Teso/Angoromo/2296 to secure repayment thereof with interest at the rate of 15%. He stated that the defendant has through a redemption notice issued by Colinet Auctioneers dated 27/06/16 threatened to sell the security property L.R. South Teso/Angoromo/2299, if an alleged mortgage debt



of Kshs.8,656,900/= is not paid within 45 days from the date of the letter. He further stated that the defendant has not complied with the requisite conditions as concerns service of statutory notice to a chargor thus making the attempt to recover from him the money demanded illegal; hence the intended sale of his property by the defendant should be stopped.

3. The defendant entered appearance and put in a defence dated 22nd November 2016 which was amended on 25th March 2021. They denied that they failed to comply with the requisite conditions on service of the statutory notice to the plaintiff. They denied that their claim of Kshs.8,656,900.40/= against the plaintiff is statute barred under the law of Limitations of Action Act. They denied having committed any breach of the fundamental terms of the charge by unilaterally changing the interest rates and that interest stopped running upon the default by the plaintiff as alleged. They contended that on or about 24/11/88 the plaintiff at his own request was granted a term loan of Kshs.30,000/= as working capital which amount was to be repaid at the rate of Kshs.1,000/= per month with interest within a period of 30 months.
4. It is pleaded further that on or about 11/1/1989 the plaintiff at his request was further granted another loan facility of Kshs.200,000/= and a further Kshs.250,000/= which was to be repaid at the rate of Kshs.5,210/= per month until in full and all the loan facilities granted were secured by a legal charge on the plaintiff's L.R. Nos. South Teso/Angoromo/2296, 2299, 2538 and 2900. That the plaintiff defaulted and they took steps to recover the loan.
5. The matter was set down for hearing on 21/7/2021 with the plaintiff, Amisi Onyango Mukoyatestifying as PW1. Through his written witness statement dated 10/4/2019 and 7/3/2017 as his evidence in chief, PW1 testified that he is a businessman selling timber and to his knowledge, he sought and attained financial advances from the bank on three occasions totalling Kshs.480,000/= itemised as follows;
 - i) Kshs.30,000/= was advanced to him at Busia Branch of the defendant bank in 1989 which he fully paid.
 - ii) Kshs.250,000/= was advanced to him at Kisumu branch of the defendant bank repayable with interest at the rate of 19% with a charge over his L.R. South Teso/Angoromo/2538.
 - iii) Kshs.200,000/= was advanced to him at Nakuru branch of the defendant branch, repayable with interest at the rate of 15.5% with a charge over L.R. South Teso/Angoromo/2538.
6. He continued that the defendant was not regularly serving him with monthly or yearly bank statements hence he could not at any given time know his debt to them. It is his evidence that the inability to regularly service his loan was due to the ever increasing debt burden arising out of arbitrary variation of the interest by the defendant. For instance, in a letter dated 4/3/1993, the bank notified him that it had varied interest to 21%. By a letter dated 9/9/1993, the bank notified him that the interest had been varied to 27% and in an undated letter, the bank advised its customers that it had varied interest to 30% for new loans but for those with arrears of loan, it was varied to 40%.
7. PW1 added that the defendant acting in breach of the charges or letters of offer arbitrarily varied the rate of interest upward from time to time thereby making it difficult for the plaintiff to service the loan. He stated that the rate of interest stopped accruing after breach of the terms of the charge by either party and the alleged arrears in the sum of Kshs.8,658,900/= cannot be true since the defendant had not provided a breakdown of their pleadings as to how they arrived at the said figure. He averred



- that the defendants did not serve him with the requisite statutory notices as required by law before the intended sale of his securities. He relied on the documents filed which were produced as PEX 1-9.
8. During cross-exam by the counsel for the defendant, the plaintiff admitted to taking loans with the defendant totalling Kshs.480,000/=. That with each loan, he was given letters of offer which he signed and four titles were used as security being L.R. NO. 2538, 2900, 2296 and 2299. According to him, he paid the first loan in 1998 before turning around to state that he used to pay then it reached a point the defendant increased the interest from the agreed 15% to 21% then 27% and later 40%. He was aware the interest was varied because they wrote him a letter and he was therefore unable to complete the loan. He denied being served with any statutory notice. That for the loan given from the defendant's Kisumu Branch, he gave the bank an address of Box 35 Siaya. Some letters he would receive from the bank and others through the post office. He said that he only received one letter which informed him of increasing the interest by 40%. The letter demanding for the balance of the loan, he received from the auctioneer in the year 2016. He denied receiving the letters dated 2007 and 2015 and he had not seen the registered notices from his advocate. He stated that he is refusing the bank from selling because of the variation of the interest and the last instalment he paid was in 1993.
 9. On re-examination, the witness said that he took Kshs.30,000/= secured by L.R. Nos. 2296 and 2299 which he paid fully but the bank did not return his titles. He denied signing any loans using these titles as security stating that the loan given from Nakuru branch was secured with title number 2538 and it was consolidated with the previous titles. He stated that he did not agree to the consolidation of the securities and he did not sign anything to say he agreed to the interest variation. The bank came to sell the land in 2016 without serving him with a redemption notice and the bank has not specified which loan he had not paid. He reiterated that he did not receive any statutory notice.
 10. The defence case proceeded for hearing on 9/11/2021 with Ezra Omari Ondiekithe relationship officer of the defendant testifying as DW1. He adopted the witness statement dated 9/5/2019 as his evidence in chief. DW1 opened his evidence by stating that vide a letter of offer dated 24th November 1988, the plaintiff was advanced a sum of Kshs.30,000/= to provide working capital which amount was to be repaid at the rate of Kshs.1,000/= per month plus interest within a period of 30 months and it was a term of the loan agreement that the defendant will hold legal charge for Kshs.30,000/= over L.R. No. 2296 and 2299. On or about 12th July 1989, the plaintiff applied for another loan facility to the tune of Kshs.300,000/= for the purposes of promoting his business and on 11th January 1990, the plaintiff's request was accepted and was granted a loan facility of Kshs.200,000 to enable him boost his wholesale and retail business and tender for supply of mtama and wimbi to the National Cereal Board on the clear understanding that the loan amount together with interest thereon will be repaid at the rate of Kshs.5,600/= per month for a period of 30 months.
 11. It was a further condition that the defendant was to hold a legal charge for the Kshs.200,000/= over L.R. No. 2538 situated in Busia Township then valued at Kshs.535,000/=. On 8th October 1990, the plaintiff again applied for a further loan facility of Kshs.250,000/= to enable him increase stock of his hardware business and the request was accepted on 10th November 1990. It was a condition of the loan facility that the defendant will hold legal charge for Kshs.300,000/= over L.R. No. 2900 then valued at Kshs.450,000/=. It was a further condition of the loan agreement that the defendant reserved the right to set off all or any account of the plaintiff and to consolidate all the securities held on any account to be made inter-available for liabilities which may be guaranteed by the plaintiff but are not covered by the loan agreement.
 12. He continued that the plaintiff failed to honour his obligation and as at 23rd January 2001, a sum of Kshs.3,277,565.30/= was owing to the defendant. Dw1 said that the defendant called upon the



plaintiff vide a letter dated 23rd January 2001 to submit a written repayment proposal or call on the defendant for discussion on a repayment plan. On 12th August 2015, the defendant served the plaintiff with chargee's statutory notice in respect of L.R. No. 2538 for a recovery of a sum of Kshs.3,278,765.30/= and also on the same day was served with the chargee's statutory notice in respect of L.R. 2299 and 2296 for a recovery of Kshs.219,521.30. On 27th November 2015, the defendant served the plaintiff with charges notice in respect of L.R. No. 2900 for recovery of a sum of Kshs.5,147,393.80/=. The plaintiff did not comply with the notice served upon him and on 28th September 2015, the plaintiff was served with chargee's notice of intention to sell L.R. 2299 and 2296. It was on receipt of the said notice that the plaintiff filed the present suit against the defendant.

13. The witness asserted that for every loan given, there was a letter of offer which set out the terms and conditions of the loan and there was a clause on the interest and how the bank can vary that interest. The plaintiff signed all these letters of offer and provided his address of service as BOX 300, Busia and 35 Siaya. He stated that the plaintiff was duly served with statutory notices through postal service and the notices were given on 12th August 2015 and 27th November 2015. That before the notices were given, there was correspondence exchanged between the bank and the plaintiff. He produced the documents in his list of documents dated May 2019 as DEX 1-12 and documents in the further list of document as DEX 13-14. He prayed that the suit be dismissed with costs.
14. Upon cross examination by the counsel for the plaintiff, he testified that the plaintiff took 3 distinct facilities from the defendant and the facilities have not been consolidated. The last payment by the plaintiff was in 1993. Between 1993-2015 there were correspondence between the bank and the plaintiff. That there were no steps taken to recover the debt between 1993-2015. The plaintiff responded to their letters on one occasion though he did not produce any such letter. He stated that Kshs.3,278,000/= is in respect of the loan taken from Nakuru and that the plaintiff only paid 3 instalments of that loan before defaulting
15. The parties agreed to exchange written submissions. Which the plaintiff filed on 1st December 2021. He submitted that the defendant has not produced any evidence to show how much was outstanding against the plaintiff as capital and interest respectively when he started defaulting and he is therefore unable to verify the correctness of any sum sought to be recovered. The variations in the interest from 15.5% to 21%, 27%, 30% and 40% were not consented to by the plaintiff, they were not reduced into an instrument of variation to be registered in Land Registry as required by Section 71 of the Registered Land Act (repealed) thus it does follow that the amount sought to be recovered accrued out of illegal and unlawful interest and therefore unrecoverable.
16. The plaintiff submits further that one month after the default, there arose a right for the defendants to exercise their rights of sale under the Registered Land Act. Instead the defendant went to sleep and never exercised their rights within 12 years' statutory period under Section 19 of the Limitation of Actions Act and further he relied on Section 44A of the Banking Act. He urged the court to allow his suit and order that the plaintiff be discharged from their obligations under the charges and stop the threatened attachment and sale of the securities and further that a permanent injunction be issued against the defendant restraining them from selling the securities or in any other way interfering with the securities. He relied on the case of *Francis Aggrey Opiyo Halonyre v Housing Finance of Kenya* Busia HCCC No. 11 of 1998.
17. The defendant filed their submissions on 3rd December 2021 and submitted that the plaintiff has failed to prove his case for an award of injunction as required in the Case of *Giella vs Cassman Brown*. An injunction being an equitable remedy should bar the plaintiff from seeking recourse from this court because he who comes to equity must do so with clean hands and instead of engaging the defendant



in litigation, it would have been prudent of him to make a proposal to the defendant on how the loan would be settled. They urged the court to dismiss the suit with costs. They relied on the holdings in the cases of; Kenya Breweries Ltd v Okeyo (2002) I EA, *Kitur v Standard Chartered Bank & 2 Others* Eldoret HCCC NO. 50 OF 2002, Tanad Transporters v Kenya Shell Limited, *Sammy Japheth Kavuluku v Equity Bank Ltd & Another* 2014 eKLR.

18. Having carefully considered both parties' pleadings together with the evidence they adduced and submissions, the issues that come up for determination are;
 - a) Whether the suit is merited on account of breach of contract by the defendant;
 - b) Whether the defendant's right to foreclose is time barred;
 - c) Who should pay the costs of this suit?
19. On the first issue, it is not in dispute that the plaintiff took out loan facilities from the defendant totalling Kshs.480,000 between 1988 to 1990. It is also not in dispute that the plaintiff last made a payment on the loan facility in 1993. He admitted that he stopped paying the loan because the interest variations made it difficult for him to complete the loan. The plaintiff further admitted that he received notifications from the defendant notifying him of the variations in the interest rates evidenced by the letters from the bank addressed to him dated 4/3/1993, 9/9/1993 and one undated circular set to take effect on 1/11/1993 produced as PEX 3-5. According to the plaintiff, the interest should have stopped accruing as soon as the defendant varied the interests. The plaintiff has not elaborated what he did on receipt of the notices on variation of interests, such as visiting the bank to negotiate or filing a claim to stop the bank from charging the new interests.
20. On the first issue, the plaintiff has said that he is not inclined to pay the loan back since the defendant failed to register the variations in interest as required by the then relevant statute which was the Registered Land Act. The plaintiff has placed reliance on Section 71 of the *Registered Land Act* which provides as follows;

'The amount secured the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation executed by the parties to the charge.'
21. The plaintiff made reference to the provisions of section 71 of the Registered Land Act Cap 300 (repealed) that the variation of the interest was of no effect because the same was not registered on the title. The said section in part says "... the rate of interest or term of the charge may be varied by the registration of the instrument of variation executed by the parties to the charge". The wording of section is not couched in mandatory terms therefore failure to register per se does not nullify the variation.
22. In any event, if variation of the interest amounted to breach of contract as pleaded by the plaintiff, then his claim on the breach was also time bound to be brought within six (6) years from the date of the breach in accordance with section 4 of the *Limitation of Actions Act* which provides thus;
 - (4) In Part III, references to a right of action include references to a cause of action and to a right to receive money secured by a mortgage or charge on any property or to recover proceeds of the sale of land, and to a right to receive a share or interest in the movable estate of a deceased person; and references to the date of the accrual of a right of action are -
 - (a) in the case of an action for an account, references to the date on which the matter arose in respect of which an account is claimed;



- (b) in the case of an action upon a judgment, references to the date on which the judgment was delivered;
- (c) in the case of an action to recover arrears of rent or interest, or damages in respect thereof, references to the date on which the rent or interest became due.

23. The third issue for determination is the service of lack thereof of the statutory notice. The plaintiff told the court that he was not served with the statutory notices between 2007 and 2015 as required by law. That he only received a notification of sale dated 29/6/2016 from the auctioneers produced as PEX 6. The defendant averred that they did serve the plaintiff with statutory notices to his provided addresses being P.O BOX 309 Busia and 35 Siaya. The defendant produced copies of the said statutory notices dated 12/8/2015 as Dex 13 together with certificates of posting showing the letter was sent to the Plaintiff's address of P.O Box 309 Busia, and one dated 27/11/2015 sent to P.O Box 35, Siaya.

24. The address provided by the plaintiff for the charge over the suit property is P.O Box 309, Busia. The defendant has demonstrated that they did serve upon the plaintiff the requisite statutory notices. Further, the defendant did serve the plaintiff with a notice of intention to sell through the auctioneers dated 27/6/2016 using the same address of 309, Busia. The Plaintiff has admitted receipt of the auctioneers notice which then confirms that indeed the postal address of 309 Busia is his. The applicable law at the time the parties entered into the contract was the Registered Land Act Cap 300. Section 153 of the Registered Land Act provides as follows in regards to service;

153. A notice under this Act shall be deemed to have been served on or given to any person -

- (a) if served on him personally;
- (b) if left for him at his last known place of residence or business in Kenya;
- (c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;

25. Further, the plaintiff has claimed that the defendant's right to exercise their power of sale is barred as per Section 19 of the Limitation of Actions Act which states as follows;

“An action may not be brought to recover a principal sum of money secured by a mortgage on land or moveable property, or to recover proceeds of the sale of land after the end of twelve years from the date when the right to receive the money accrued.”

26. The plaintiff alleges that the defendant's power of sale is late by 28 years since both parties have admitted that the plaintiff defaulted in loan repayment in 1993. Further, he has relied on Section 44 of the Banking Act which limits the defendant on what they can recover. While I do appreciate that the defendant served the plaintiff with the notice of intention to sell in 2015 which is 22 years after the plaintiff defaulted on the loan repayments, I do note that through the years they kept sending the plaintiff statutory notices and did not leave their claim dormant for 22 years before trying to exercise their power of sale. In my opinion and I so hold that as long as the loan was due the charge remained secured by the suit titles, the time was continuous so that nothing interrupted the contract between the parties to invoke the application of the provisions of section 4 of Cap 22. I therefore hold that the plaintiff's averment that the defendant's right of power of sale is time barred is unfounded.

27. The last issue is one of costs. Costs do follow the event and since this present suit unsuccessful, the costs is awarded to the defendant.



DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE 2022.

A. OMOLLO

JUDGE

