



African Banking Corporation Limited v Stallion Gulf Limited & 2 others (Environment and Land Case Civil Suit E001 of 2021) [2023] KEELC 16161 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16161 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2021
MN GICHERU, J
MARCH 2, 2023
IN THE MATTER OF: SECTIONS 90(3) OF THE LAND ACT, 2012
IN THE MATTER OF: AN APPLICATION BY A
CHARGE FOR DELIVERY OF VACANT POSSESSION

BETWEEN

AFRICAN BANKING CORPORATION LIMITED PLAINTIFF

AND

STALLION GULF LIMITED 1ST DEFENDANT

WINNIE WANGU MUGWERU 2ND DEFENDANT

MARTIN MUGWERU 3RD DEFENDANT

RULING

1. This ruling is on the originating summons dated December 20, 2021. The summons which is under order 37, rules 4 and 14 of the *Civil Procedure Rules*, sections 90(3) and 94 of the *Land Act* and all enabling provisions of law seeks the following orders.
 - (v) The plaintiff and/or its agents, servants, employees and representatives be granted access to Land Parcel No Ngong/Ngong/10236 for purposes of;
 - a. Taking physical possession and management of the premises,
 - b. Collecting rental income payable in respect thereof and applying the same towards the first Defendant's loan facility, and
 - c. Conducting a valuation with a view to selling the suit property.
 - (vi) The OCS Ngong Police Station to enforce compliance with paragraph 5 of this order



2. The summons is supported by fifteen grounds, a supporting affidavit by Joel Ullembe Simidi, the Plaintiff's recoveries manager and fourteen annexures. The gist of the above material is that in 2013, the first Defendant approached the Plaintiff for a credit facility of Kshs 5 million.

A legal charge was created and registered over the suit land on 22/1/2014 for the amount of Kshs 5 million. In October, 2015, the first Defendant approached the Plaintiff again for additional credit facilities. The Plaintiff approved the second request and in addition to the legal charge over the suit property, the second and third Defendants offered personal guarantees and indemnity to the Plaintiff as security for payment of the restructured credit facility.

3. By August 2016, the first and second Defendants were in default of their loan repayment obligations as a result of which a demand letter was issued to them on 24/8/2016. The default by the Defendants continued and on November 15, 2016, a statutory notice was issued as required by the law. The notice did not elicit any response from the Defendants and this prompted the Plaintiff to issue a 40 days notice as required by the law to sell the Defendants' property.

The second Defendant filed ELC Case No 902/2017 seeking to stop the sale of the suit land. The suit and the application for injunction were dismissed on 16/9/2019.

The default by the Defendants continues and the sum owed to the plaintiff by the Defendants as at the date of filing the application on December 20, 2021 was Kshs. 14, 971,582.00. The Plaintiff continues to suffer harm, loss and damage from the Defendant's unjust and unconscionable conduct hence, the filing of this summons.

4. The summons is opposed by the Defendants and the third Defendant Martin Mugweru has sworn replying affidavit dated 24/1/2022 in which he states the following.

Firstly, he says that the amount due to the Plaintiff as at 25/3/2019 was Kshs 5, 566, 400/- and that the Defendants are willing to settle the sums owing once they have been ascertained.

Secondly, the amount now demanded of Kshs 14, 971, 582 exceeds double the principal sum which is contrary to the Banking Act (in *duplum* rule).

Thirdly, the Plaintiff's remedy of entering the suit property, taking physical possession and management thereof for the purposes of collecting rental income and applying the same towards the loan facility and/or conducting a valuation has not crystallized.

There are various issues raised in addition to the above such as failure to issue the requisite notice, failure to appoint a receiver of the income of the charged land, failure of the chargee to serve a notice to enter the suit property, failure to lease or sublease the charged land and finally that these remedies could have been exercised without intervention of this court.

5. Counsel for the parties filed written submissions on 31/3/2022 and 3/11/2022 respectively. The issues raised are as follows.

- a. What amount is due and owing by the Defendant?
- b. Whether the sum demanded by the Plaintiff of Kshs 14, 971, 582/= exceeds double the principal sum advanced contrary to the in duplum rule.
- c. Whether the Plaintiffs remedies have crystallized.
- d. Whether the exercise of the remedy to enter the suit premises and collect rental income extinguishes other remedies.
- e. Whether the Plaintiff's remedy to enter the suit premises was frustrated.



- f. Whether an order of eviction of the second Defendant from her matrimonial property is contrary to her right to housing.
- g. Whether the suit survives the second Defendant who died on 2/2/2022 and was buried on the suit property.
6. I have carefully considered the summons in its entirety including the affidavits, grounds, annexures, the submissions and the case law cited therein and the entire record. I find that the Defendants issues as identified would settle the summons.
7. On the first issue, I find that the amount due and owing by the Defendants is in dispute at this particular stage because we are at an interlocutory stage and pleadings are not yet closed. Once we have the trial, the amount due shall be known.
8. On the second issue, I find that since the amount due is still in dispute and the trial has not taken place, we do not know, as yet, whether it exceeds double the principal sum advanced contrary to the in duplum rule.
9. On the third issue, I find that the Plaintiffs remedies have crystallized. There is prima facie evidence which is not controverted by the Defendant that they lost ELC Case No. 902/2017 in which they had sought to injunct the Plaintiff.
- Secondly, the third Defendant has at paragraph 5 of the replying affidavit dated 24/1/2022 admitted that as at 25/3/2019 Kshs 5,566, 400/- was owing to the Plaintiff and they were willing to settle out. No evidence of settling the amount has been adduced.
- Thirdly, I am satisfied that the Defendants were duly issued with a letter by the Plaintiff on 14/4/2021 giving them notice of take over and management of the suit property.
10. On the fourth issue, I am not certain if the remedy sought by the Plaintiff in this summons extinguishes other remedies. I find that it all depends on whether the rent raised will be sufficient to offset the loan amount due. If it is sufficient, then whatever remains will revert to the Defendant.
- What I am certain is that the plaintiff has a right under section 90(3) (d) of the *Land Act* to do what it seeks to do in the current application.
11. On the fifth issue, I find that by merely opposing this application, the Defendants are frustrating the Plaintiffs remedy to enter the suit premises. If there was no frustration, they would not have bothered to defend the summons at all.
12. Secondly, they would not have filed ELC 902/2017 which delayed the Plaintiff in exercising its remedy.
13. On the sixth issue, I find that eviction of the second defendant is not contrary to her right to housing because she waived that right the moment she charged the suit property.
- Secondly, the defendants' right to housing is not to be guaranteed by the plaintiffs but by the state. Since the plaintiff is not the state, they have no obligation to provide housing to the defendants.
14. Finally on the issue of survivorship, I find that the suit survives the second defendant because it is against her property and not against her person. It is in rem and not in personam. Since she left behind the land which she charged before she died, then the suit survives the second defendant.
15. For the above stated reasons, I find merit in the summons dated December 20, 2021 and I allow it in terms of prayers 5 and 6. It is so ordered.



DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF MARCH,
2023.

M.N. GICHERU

JUDGE

