



REPUBLIC OF KENYA



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**Mycredit Limited v Gaitho & 2 others (Environment and Land Appeal
E028 of 2023) [2025] KEELC 4153 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E028 OF 2023**

**MD MWANGI, J
MAY 22, 2025**

BETWEEN

MYCREDIT LIMITED APPELLANT

AND

EDWARD WAKABA GAITHO 1ST RESPONDENT

FIDELIS WANJIKU KINUTHIA 2ND RESPONDENT

NAOMI WAGUTHI WACUKA 3RD RESPONDENT

JUDGMENT

Background.

1. This appeal was initiated by way of the memorandum of appeal dated 7th December 2023. It is an appeal against the judgment of the Ngong Chief Magistrates Court in CMCELC 25 of 2020 (Hon. Achieng, CM) delivered on 9th November 2023 on the grounds that the trial court erred in law and fact;
 - i. In disregarding the 1st Respondent affidavit deposited in the 13th January, 2020 despite the fact that the 1st Respondent did not deny swearing that affidavit.
 - ii. In finding that the affidavit was full of falsehoods enunciated by the 1st Respondent and yet proceeded to unjustly accrue benefit to the 1st Respondent in spite of his own illegality.
 - iii. In penalizing the appellant for the 1st Respondents fraudulent misrepresentation as to his marital status and yet awarded the 1st Respondent for the same.
 - iv. In finding that the condition for transfer of the property as security was unfair and in contravention of Article 40 of *the Constitution* when there was no such allegation or prayer in the pleadings.



- v. By failing to consider and analyze the credible evidence tendered by the appellant including the identification documents personally furnished by the 1st Respondent to the Appellant.
 - vi. By dismissing the Appellants counterclaim in its entirety and yet upheld the fact that the 1st Respondent entered into an agreement to guarantee the loan issued to the 3rd Respondent.
2. The appellant prays that the judgment of the subordinate court delivered on 9th November 2023 and any subsequent order and decree be set aside. Further, that the appellant's counterclaim dated 6th May 2021 be allowed with costs. The appellant further prays for the costs of this appeal.
 3. The case before the subordinate court was jointly initiated by the 1st and 2nd respondents herein who are lawfully married as husband and wife respectively under the *Marriage Act*. Their claim was that the parcel of land known as Ngong/Ngong/64929 (hereinafter referred to as 'the suit property') was their matrimonial home.
 4. The 1st and 2nd respondents alleged that sometimes in January 2020, they learnt that the appellant had illegally and fraudulently transferred the title of their matrimonial home to its name. It further came to their knowledge that the purported transfer to the appellant company was made as a purported guarantee of Kshs. 3,000,000/- loan advanced to the 3rd respondent by the appellant.
 5. The 1st respondent on his part alleged that he never sought a loan facility with the appellant company neither did he consent to the fraudulent transfer. He further claimed that the intention of the appellant company in any event was not to charge the suit property but was to fraudulently transfer it to itself through illegal, fraudulent and predatory means.
 6. The 2nd respondent on the other hand stated that she was neither consulted nor was her spousal consent sought considering that the suit property was matrimonial property that was purportedly charged/held/transferred in favour of the appellant. The actions, whatever they were, amounted to fraud and illegalities as particularized at paragraph 11 of the plaint.
 7. The 2nd respondent accused the appellant of collusion with 3rd parties to have the 1st respondent place his title to guarantee a risky/unserviceable loan taken by a stranger; illegally holding /transferring/ charging the suit property over a loan that they never received; and illegally and fraudulently refusing to allow the plaintiffs understand the nature of the transactions and redeem the suit property, amongst the other issues enumerated thereunder.
 8. The 1st and 2nd respondents sought orders of a permanent injunction, a declaration that the guarantee/charge/transfer/lien over the suit property was irregular, unlawful, illegal, fraudulent, and void ab initio for lack of a spousal consent, exemplary damages and costs and interests of the suit.

Response by the appellant

9. In response to the 1st and 2nd respondents' suit, the appellant had filed a statement of defence and counter claim. It denied the 1st and 2nd respondents' claims against it putting them to strict proof. It averred that the 1st respondent had transferred the suit property on his free will to its name as security for a loan facility of Kshs. 3,000,000/- advanced to the 3rd respondent. It asserted that the 1st respondent was fully aware of the advancement of the loan and the security of the loan by way of a transfer of the suit property in favour of the appellant. The 1st respondent had even sworn an affidavit of his marital status affirming that he was not married. It asserted that in view of the affidavit by the 1st respondent, it did not require any spousal consent. The appellant denied any unlawful and illegal acts on its part.



10. While reiterating the contents in its statement of defence, the appellant counter-claimed against the 1st and 2nd respondents seeking for judgment against them for a declaration that it is the registered proprietor of the suit property together with the developments thereon, an order of vacant possession and eviction of the 1st and 2nd respondent from the suit property; in the alternative, the appellant prayed for an order that the 1st respondent pays the sum of Kshs. 7,544, 839.74/- together with interest at the rate of 11.5% per month from 29th March 2024 until payment in full. It also sought the costs of the suit and counterclaim with interest.
11. The appellant pleaded that the 3rd respondent approached it seeking a loan facility that was to be secured by the 1st respondent by way of a transfer of the title to the suit property into its name. The parties additionally signed a deed of guarantee and indemnity.
12. The appellant affirmed that after conducting due diligence on the credit-worthiness of the 3rd respondent and the sufficiency of the security offered by the 1st respondent, it was satisfied that the 3rd respondent qualified for a loan of Kshs. 3 million and that the guarantee offered by the 1st respondent was sufficient. The appellant therefore proceeded to advance the 3rd respondent a loan of Kshs. 3 million and the parties duly executed the letter of offer which contained the terms and conditions of the loan. The 1st respondent and the 3rd respondent too executed a loan agreement. The 1st respondent additionally executed a deed of indemnity and guarantee.
13. In accordance with the terms and conditions of the loan, the 1st respondent and the appellant embarked on the transfer of the suit property whereupon the 1st respondent duly executed the transfer form on his own free will and furnished the appellant with the documents to facilitate the transfer, being;
 - a. Original title for the suit property,
 - b. Duly executed transfer form,
 - c. Letter of consent from the land control board,
 - d. Copy of national identity card,
 - e. Copy of KRA PIN,
 - f. Three passport size photos,
 - g. Affidavit of marital status,
 - h. Payment registration number (PRN) invoice for capital gains exemption to facilitate payment of stamp duty.
 - i. Payment registration number (PRN) invoice for payment of stamp duty on the transfer of land documents.
14. The suit property was accordingly transferred in favour of the appellant on 23rd January 2020 and a title deed issued in its name which title it holds as a security for the loan repayment. In the event of default, and without due notice, the appellant is to take possession and sell the suit property to recover the amount due and owing.
15. The appellant's case was that the 3rd respondent totally defaulted in repaying the loan and in spite of demands, she refused to pay the same. The amount due as at 29th March 2021, was Kshs. 7,541,839/-. Consequently, a demand notice was sent to the 1st respondent being the guarantor but he too refused and or ignored to repay the same despite his undertaking to do so in the event of default by the 3rd respondent.



16. The appellant asserted that the 1st respondent was therefore obligated to give it vacant possession of the suit property in accordance with the terms of the loan agreement which he had duly executed.
17. The 3rd respondent did not file any response to the 1st and 2nd respondent's suit before the subordinate court. She too did not participate in the proceedings therein.

Hearing before the Trial Court.

18. The case proceeded to hearing before the trial court. The 1st and 2nd respondents testified as witnesses in their case. The appellant on its part called one witness. The parties filed their respective written submissions upon the close of the hearing.

Determination by the Trial court.

19. The trial court found in favour of the 1st and 2nd respondents. The court found that whereas it was not in doubt that the 1st respondent had entered into an agreement to guarantee the loan issued to the 3rd respondent by the appellant on the security of the suit property; the suit property was nonetheless matrimonial property. Since there was no spousal consent, the transaction or agreement entered into by the 1st respondent was therefore invalid. The affidavit sworn by the 1st respondent to the effect that he was unmarried and single contained falsehoods and was therefore not valid rendering the guaranteed agreement illegal and unenforceable. The subsequent transfer of the suit property was also illegal and the same had to be reversed. The learned Magistrate further found the condition that required the transfer of the suit property given as a security to the appellant at the signing of the agreement to be unfair and in contravention of the right to property enshrined in Article 40 of *the Constitution*.
20. The trial Magistrate went ahead to dismiss the appellant's counterclaim for want of merit. She stated that the appellant could not seek repayment of the loan from the 1st respondent as the guarantee agreement had been declared invalid. The court allowed the 1st and 2nd respondents' case issuing a declaration to the effect that the guarantee and the subsequent transfer of the suit property was unprocedural and unlawful. The court too issued a permanent injunction and an order directing the Land Registrar to rectify the entries in the register in respect of the suit property in favour of the appellant and cancellation of the title in the name of the appellant.
21. The court ordered parties to bear their respective costs of the suit.

Directions by the Court in respect of the appeal.

22. The court directed that the appeal be canvassed by way of written submissions. Both sides complied by filing their respective submissions which now form a part of the record of this court. I have had the opportunity to read and consider them in writing this judgment.

Issues for determination.

23. Having carefully analyzed the proceedings before the trial court and the resulting judgment of as well as the submissions by the parties before this court, the sole issue for determination is whether the appeal before me is merited to warrant the interference with or the setting aside of the judgment of the trial court. Of course the court will have to determine on the issue of the costs of the appeal.

Analysis and determination.

24. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the



appeal. A first appellate court is allowed to subject the whole of the evidence to fresh scrutiny and make conclusions about it.

25. Mativo J (as he then was) in the case of Mursal & another -vs- Manese (suing as the legal administrator of Dalphine Kanini Manese) (Civil Appeal No. E20 of 2021) {2022} KEHC 282 (KLR) (6TH April 2022) (Judgement), had this to say on the responsibilities of a first appellate court,

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand”.

26. The Learned Judge emphasize on the critical role of a first appellate court further stating that;

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust. The 1st appeal has to be decided on facts as well as on law.

In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the *Civil procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion”.

27. From my analysis of the pleadings and the submissions before the trial court as well as before this court, the relationship between the appellant and the 1st respondent is what is referred to under Section 79(8) of the *Land Act* as an informal charge.

28. It is appropriate at this juncture to state that land transactions or transaction involving land in this country are highly regulated transactions and for good reason. The Land Policy, 2009, which is the basis upon which the Land Laws are based on notes in its preamble that land in Kenya is a highly emotive issue and has been the source of various conflicts including the clamour for independence of his country. That justifies the numerous legislations and rules regulating transactions involving land.

29. An informal charge is created where;

- a. A chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land with the repayment of money or money’s worth obtained from the chargee plus interest as agreed by the parties;
- b. The chargor deposits any of the following;
 - i. A certificate of tittle to the land;
 - ii. A document of lease of land.
 - iii. Any other document which is agreed evidences ownership of land or right to interest in land.

30. The law places various restrictions on the chargee;

- i. The chargee may only take possession of or sell the land which is the subject of an informal charge on obtaining an order of the court to that effect.



- ii. A charge of a matrimonial home, shall be valid only if any document or form used in applying for such charge, or used to grant the charge is executed by the chargor and any spouse of the chargor living in that matrimonial home or there is evidence from the document that it has been asserted by all such persons.
31. From the evidence presented before the trial court, there is overwhelming evidence that the suit property the subject of this appeal is matrimonial property. The 2nd respondent who is the wife of the 1st respondent did not however execute the documents used in applying for the charge or used to grant it.
32. The appellant's explanation is that the 1st respondent executed an affidavit stating that he was not married.
33. Even though the 1st respondent may have executed an affidavit stating that he was not married, that does not change the fact that the suit property is matrimonial property. It is a false affidavit.
34. The appellant as the chargee had the legal obligation to conduct due diligence and establish the truth about the status of the suit property. In any event the chargee's valuer had explicitly indicated in his report that the suit property was matrimonial property. The appellant has only himself to blame for failing to conduct due diligence.
35. That said, the guarantee created without adherence to the law is invalid, unlawful, unenforceable, null and void.
36. This court agrees with the findings of the trial court in that respect.
37. Courts do not enforce illegal contracts; 'ex turpi causa non oritur actio' and no court will lend its aid to a man who found his cause of action on an immoral or an illegal contract; 'ex dolo malo non oritur actio'. The trial court arrived on the correct decision.
38. In the case of David Sironga Ole Tulai -vs- Francis Arap Muge & 2 others (2014) eKLR, the court was categorical that,

“No court of law will enforce an illegal contract or one, which is contrary to public policy.”

39. Consequently, the appeal herein fails. It is dismissed with costs to the 1st and 2nd respondents.
It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF MAY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Karue for Mr. Chimei for the appellant

Ms. Kilisiet for the 1st and 2nd respondents

N/A by the 3rd respondent

Court Assistant: Mpoye

