



**Kamau v Small Enterprises Finance Company Limited (Commercial Case E488 of 2023)
[2025] KEHC 172 (KLR) (Commercial and Tax) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E488 OF 2023
RC RUTTO, J
JANUARY 17, 2025**

BETWEEN

TERESIA WANGARI KAMAU APPLICANT

AND

SMALL ENTERPRISES FINANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Applicant instituted this suit vide an Originating Summons dated 12/11/2020. The same was brought pursuant to Article 40 of *the Constitution* of Kenya, Sections 25 and 56 (5) of the *Land Registration Act* 2012, Sections 80 and 85 of the *Land Act* 2012, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 37 Rule 4, 14, 15, 16, 17, 18, 18, 19 & 20 of the Civil Procedure Rules.
2. The summons sought determination of the following questions: -
 - i. Whether the court should issue a declaration that the Defendant's continued holding of legal charges over L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867 is unlawful, inequitable and unconsciable;
 - ii. Whether the court should make an order for the unconditional release/discharge over L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867;
 - iii. Whether the court should make an order directing the Defendant to deliver up the documents of Title over all that property known as L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867;
 - iv. Whether the court should issue a permanent injunction restraining the Defendant, either by itself or its agents, servants, employees or otherwise, from dealing with all those parcels of



land known as L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867;

- v. Whether the court should issue damages for loss of user.
3. The summons was supported by the Plaintiff's witness statement dated 20/11/2020 which was adopted during the hearing. The Plaintiff contended that in 1988, she was granted a loan of Kshs. 390,000 by the Respondent to boost her small business. Following the loan, her properties, that is, L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741, and L.R No. Loc. 4/Ngararia/867, were charged as security. In 1994, her business faced financial constraints, prompting the Respondent to authorize auctioneers to proclaim her tools of trade, which were subsequently sold at a grossly undervalued price of Kshs. 181,000. She only became aware of this undervaluation in 1996. The Plaintiff asserted that she has since completed repayment of the loan and requested the Respondent to discharge the charge and release the title documents to her. However, the Respondent has failed to comply. She further stated that the Respondent has unlawfully retained possession of the title documents for over 20 years, thereby preventing her guarantors from developing the properties due to concerns that the Respondent might subject them to further loss through irregular actions.
 4. The Defendant opposed the summons through a Replying Affidavit sworn on 16/3/2021, contending that the charge over the suit properties remains subsisting and that the Applicant has failed to take any steps to offset the outstanding debt arising from the loan facility she obtained. Additionally, the Defendant argued that the claim is barred by Section 4(1) of the Limitation of Actions Act.
 5. The summons proceeded to hearing on 16/6/2022 and 29/6/2023, during which each party testified. The court directed the parties to file their respective written submissions, which were subsequently highlighted on 1/10/2024.

Applicant's Submissions

6. The Applicant relied on her submissions dated 13/11/2023 whereby she submitted on five issues. On the issue of whether the suit is barred by the provisions of Section 4(1) of the Limitation of Actions Act, the Applicant submits that the charges over the subject properties remain subsisting and that the present suit seeks the discharge of those charges. Consequently, the cause of action related to the discharge of the charge remains valid as long as the charges subsist. The Applicant further contends that the limitation period would only begin to run upon the occurrence of an event that extinguishes the charge. In support of this position, she relies on the decisions in *Rajnikant Khetshi Shah v Habib Bank A.G. Zurich* [2016] eKLR and *Habib Bank A.G. Zurich v Rajnikant Khetsu Shah* [2018] eKLR.
7. On the issue of whether the Defendant is estopped from claiming any rights over the charged premises, the Applicant submits that she owes no monies to the Respondent, having fully repaid the loan through monthly installments and the proceeds from the auction of her plant and machinery. She states that a cause of action was previously brought for the recovery of the alleged debt in the High Court Civil Suit No. 1690 of 1996, *Small Enterprise Finance Company Limited v Teresiah Wangari t/a Kamau Furniture Workshop & 2 others*. In her defense in that matter, she asserted that she had fully settled the loan. The bank failed to prosecute the suit, which was subsequently dismissed by the court. A subsequent application to reinstate the suit was also dismissed. The Applicant contends that the Respondent's attempt to revive its claim to recover the alleged debt in the current proceedings is *res judicata* and that the Respondent is estopped from raising the issue. She relies on the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, which addresses the doctrine of *res judicata*.



8. Furthermore, the Applicant submits that the dismissal of the earlier suit for want of prosecution, along with the subsequent dismissal of the application for reinstatement, constitutes a final determination of the issues in question. She relies on the authority of *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR to support this position. The Applicant further submits that the Bank's right to allegedly recover the money owed has been extinguished through its acquiescence and waiver and therefore is estopped from attempting to claim this right in the present proceedings particularly because she has been constantly writing to the Defendant bank seeking to be discharged to no avail.
9. On the issue of whether the court should issue a declaration that the Respondent's continued holding of the legal charges is unlawful, inequitable, and unconscionable, the Applicant submits that although charges are registered against the three properties and reflected in the Land Registry searches, the Respondent failed to provide the actual charge documents to the court. The Applicant argues that the Respondent has not presented a credible reason to justify the continued existence of the legal charges on the suit properties. The Applicant submits that she produced a loan offer dated 2nd August 1988, which outlined the loan terms, including a principal amount of Kshs. 390,000 repayable over seven years with a one-year grace period at an interest rate of 14% per annum. She notes that the Respondent only provided statements covering the period from 31st December 1992 to 30th November 1995, while statements for the crucial period from 1988 to December 1992 are missing. As a result, it is impossible to verify the payments made by the Applicant during that period. Furthermore, the Applicant contends that the loan statements provided by the Respondent are inconsistent with the agreed monthly installments of Kshs. 8,695, as set out in the Respondent's Replying Affidavit. She also points to an entry dated 14th September 1995 for the storage of machinery, which aligns with her claim that the Respondent sold her plant and machinery. However, the statements do not reflect any credit entry for the proceeds of the sale, despite the Respondent's acknowledgment of having received Kshs. 181,000 from the auction.
10. The Applicant argues that these omissions and discrepancies raise doubts about the authenticity and accuracy of the account statements. To the extent that the statements are considered valid, they demonstrate the unconscionable nature of the charges levied on the account, which contravened the agreement between the parties. In support of her submissions, the Applicant relies on the case of *Keziah Njambi Maingi & Another v Barclays Bank of Kenya* [2014] eKLR, asserting that the only equitable and lawful recourse is to allow her to exercise her right to redeem the properties, consistent with the principle of equity of redemption.
11. On the issue of whether the court should order the unconditional discharge of the charges and release of the title documents, the Applicant submits that, in the absence of any justification by the Respondent for maintaining the charges over the subject properties, she is entitled to exercise her right of redemption. The Applicant asserts that this right includes having the Respondent release the title documents into her possession, along with the necessary documentation to facilitate the discharge of the charges.
12. On whether the court should issue damages for loss of user, the Applicant relies on the case of *Jackson Mwabili v Peterson Mateli* [2020] eKLR. She submits that the loss of user of the subject properties was a direct, natural, and probable consequence of the Respondent's failure to discharge the title and release the documents to her. The Applicant contends that this failure has persisted for 20 years, beginning on 9th December 2003, when a formal request for the title documents was served upon the Respondent. The Applicant further submits that the Respondent has taken undue advantage of the apparent inequality between the parties, acting unconscionably and unreasonably by refusing to release the documents in question.



Respondent's submissions

13. The Respondent submits that it is legally holding the charges over the subject properties pursuant to the agreement between the parties. It relies on Section 85 of the Land Act, 2012, asserting that a charge can only be discharged upon the payment of all money secured by the charge, which the Applicant has neither done nor provided proof of having done. Additionally, the Respondent argues that the Applicant has failed to provide evidence that an auction of her plant and machinery was conducted to offset the outstanding balance.
14. The Respondent contends that the Applicant remained silent for several years without remitting any installments to reduce the loan facility, thereby breaching her obligations under the agreement. To support this position, the Respondent relies on the case of *Kitur v Standard Chartered Bank & 2 others* [2002] 1 eKLR and Section 90(1) of the Land Act, 2012.
15. The Respondent further submits that it cannot release the title documents until the Applicant settles the loan and accrued interest. Regarding the Applicant's reliance on the principle of equity of redemption, the Respondent argues that this principle allows a borrower to extinguish the mortgage and retain ownership of the property by repaying the debt. Since the Applicant has not repaid the debt, the Respondent asserts that she cannot invoke the principle. To bolster its submissions, the Respondent relies on *Ze Yu v Yang Nova Industrial Product Ltd* [2003] 1 EA 362 (CCK) and *Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 others* [2005] eKLR.
16. On the issue of whether the court should issue injunctive orders and direct the Respondent to release the title documents, the Respondent submits that the Applicant, having failed to repay the debt, cannot seek the court's assistance while remaining in breach of her obligations. In opposing the orders sought, the Respondent relies on the cases of *Peter Maina Waihenya & Another v Industrial and Commercial Development Corporation (ICDC) Ltd & Another* [2021] eKLR, *Habib Bank A.G Zurich v Rajnikat Khetshi Shah* [2018] eKLR, and *Kenteb Cons Ltd v New Gatitu Service Station Ltd & Another* [1990] eKLR.
17. On whether the court should issue damages for loss of user, the Respondent submits that such damages fall under the category of special damages, which must be specifically pleaded and substantiated with documentary evidence detailing the alleged loss. The Respondent argues that the Applicant has failed to meet this requirement, and as such, the claim for damages cannot be granted.
18. In conclusion, the Respondent contends that the Applicant has not satisfied the prerequisites necessary for the granting of the orders sought and, therefore, urges the court to dismiss the application.

Analysis and Determination

19. Upon evaluating and/or appraising the Originating Summons and the statement in Support thereof together with the Respondent's affidavit, as well as the written submissions filed by both parties, I distill the following issues for determination;
 - i. Whether the suit is barred by the provisions of Section 4 (1) of the Limitations of Actions Act.
 - ii. Whether the Applicant has laid a basis for the grant of the orders of the release of the title documents to her.
 - iii. Whether the Applicant is entitled to damages for loss of user.
20. On the first issue, namely, whether the suit is barred by the provisions of Section 4 (1) of the Limitation of Actions Act, I note that while this issue was raised by the Respondent in its response to the summons,



the same was not addressed in their submissions. This omission suggests that the Respondent may have abandoned the claim regarding the suit being time barred. That notwithstanding, I am obligated to address the same as it was raised. I take note that the issue at hand involves the prayers for an order for the unconditional release/discharge over L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867. As it is, the charges on the titles remain subsisting. In *Habib Bank A.G Zurich v Rajnikant Khetsi Shah* [2018] eKLR, cited by the Applicant, the court stated as follows:

“The Judge held and rightfully so that as long as the legal charge was not discharged, it was a continuing security and as long as the debt it secured remained unpaid a suit can be filled either to recover the debt or to discharge the charge....A cause of action under a continuing security never dies of lapses.”

21. Guided by this authority, I do concur with the applicant’s submissions that the cause of action related to the discharge of the charge remains valid for as long as the charges subsist and that the time period for purposes of limitation would begin to run upon the occurrence of an event that extinguishes the charge.
22. On the second issue, whether the Applicant has laid a basis for the grant of orders directing the release of the title documents as outlined in the preliminary paragraphs of this judgment. The applicant seeks to compel the Respondent to release the title documents charged to it.
23. It is not disputed that the Applicant secured a loan from the Respondent in 1988 amounting to Kshs. 390,000/=, repayable over a period of seven years at an interest rate of 14% per annum. It is further undisputed that the Respondent’s suit for recovery of the outstanding loan repayments, being High Court Civil Suit No. 1690 of 1996: *Small Enterprises Finance Company Limited v Teresiah Wangari Kamau & Others*, was dismissed by the court.
24. The Applicant asserts that she has fully repaid the loan facility, both through monthly installments and proceeds from the auction of her plant and machinery. In support of this claim, the Applicant has attached evidence, including a letter dated 8th July 1988 from the Respondent, confirming the amount realized from the sale of her machinery. Notably, the Respondent, in its response to the summons, neither admitted nor denied the existence of this letter. In its submissions, however, the Respondent argued that no evidence has been provided by the Applicant regarding the sale and proceeds from the machinery.
25. I note that the Respondent’s failure to deny or challenge the authenticity of the letter dated 8th July 1988 supports the Applicant’s assertion that the machinery was indeed sold and the proceeds credited to her account as stated in the letter. This letter, therefore, corroborates the Applicant’s claim that repayments were made, at least in part, through the auction of her machinery. Nevertheless, it is significant to note that while the Applicant claims to have fully repaid the loan, she has not provided a detailed breakdown of the total amounts paid, making it difficult to ascertain whether the loan has been fully settled.
26. The Respondent, in its submissions, continues to assert that the Applicant has not fully repaid the outstanding loan without disclosing the specific amount allegedly due. While the Respondent has provided the Applicant’s loan statements covering the period from 1992 to 1996, it has failed to furnish statements for the period from 1988, when the loan was issued, to 1991, as well as from 1996 to date. It is a well-established principle of law that he who alleges must prove. The absence of a complete account statement from the inception of the loan to the present undermines the Respondent’s claim of any outstanding balance. This lack of comprehensive documentation leaves both the court and the Applicant unclear on the actual amount, if any, that remains unpaid. Given that a property was



charged, the bank bears the responsibility of providing a detailed statement of the amounts charged, as it is the entity receiving payments. Furthermore, the Respondent has not denied receiving letters from the Applicant, such as the one dated 3rd December 2018, in which the Applicant sought an explanation regarding the non-discharge of the charges and, in the alternative, requested reasons for the delay. The letter in part reads, “In the premises, kindly release the original title deed listed below, to us. In the alternative, do promptly inform us of any reason (s) that warrant your continued withholding of the same.”

27. The Respondent’s failure to address or comment on these letters further weakens its position and raises questions on what they are attempting to conceal. Consequently, in the absence of any other explanation by the respondent, this court therefore finds that the Respondent is intentionally and without justifiable cause holding the charge in L.R No. Loc. 1/Thuita/472, L.R No. Loc. 1/Thuita/741 and L.R Loc. 4/Ngararia/867.
28. The Respondent must therefore be estopped from asserting any rights over the charged properties when it has failed to take any action to recover the alleged outstanding loan amount since the dismissal of the recovery suit.
29. It raises the question of what the status of the charges would have been had the Applicant not instituted this suit. Does it imply that the charges would persist indefinitely, solely at the discretion of the Respondent? Such conduct is not only inequitable but also contrary to the principles of fairness and justice that guide the enforcement of financial agreements and the equitable right of redemption. The consequence of the Respondent’s actions is that the Applicant’s right of redemption should be unclogged and allowed to be exercised in accordance with equitable principles. I am persuaded by the court’s decision in the case of *Rajnikantkhetshi Shah v Habib Bank A.G. Zurich* [2016] eKLR where the court stated as follows:-
 - (34) In the final analysis, I find that the conduct of the Defendant bank was contrived to defeat the law and particularly, the equity of redemption of the Plaintiff. In fact the conduct of the bank was inconsistent with the very right of the bank under the Charge to realize the security given in the Charge. It caused prolonged delay – which is deliberate and inconsistent with its pretentious pronouncement that it reserved the right to institute suit anytime. Nothing prevented the Defendant from filing any such suit. It is surprising, that it did not even file a counterclaim in this case which would have acted as a cross-action. Their explanation on their anticipated suit is not really useful as it is made merely as a defence. In such scheme of things, the court cannot even make any finding on the would-be suit. All these things portray the Defendant as an indolent suitor who has abstained from asserting its legal and statutory rights under the Charge for over 33 years with the sole aim of clogging the chargor’s equity of redemption. There is complete acquiescence; laches catches up with the Defendant in the whole transaction. And as acquiescence is an element of laches, estoppel would arise. The Defendant bank was truly aware of its rights but it has deliberately refused to enforce them, if at all, such that in the circumstances of this case, it will be inequitable to allow them to enforce or set it up against the plaintiff now or later. Implied waiver arises. Estoppel also operates against the Defendants bank; and its right against the plaintiff would be lost. Therefore, in this case, all ingredients are present for the invocation of estoppel against the Defendant bank to enforce its rights as against the Plaintiff in this case. This is a matter of law and equity.
30. The conduct of the Respondent is inconsistent with the legitimate exercise or enforcement of the right to realize the security under the charge. The Applicant’s right of redemption and equity of redemption continue to subsist for as long as the charge remains in effect. Therefore, I direct that the Respondent



is estopped from invoking any right to recover any outstanding loan balance (if any) and that the respondent should unconditionally discharge the charge documents.

31. On the third issue, concerning the Applicant's entitlement to damages for loss of use, the Applicant has submitted that the failure of the Respondent to provide the title documents has hindered her from making significant developments on the subject premises. Consequently, she and the guarantors have been unable to participate in the real estate boom that has occurred over the past 20 years, and it is therefore just that the Respondent be held liable for damages. The court acknowledges that the Applicant has laid the foundation for the claim of damages. However, the Applicant has not specifically pleaded the nature of the damages sought. In response, the Respondent asserts that the damages being sought are special damages, which must be specifically pleaded.
32. While I agree with the Respondent's observation that the Applicant has not specified the nature of the damages, the Applicant contends that the damages are general in nature. It is the court's view that such specifications must be made in the party's pleadings and not in submissions, as a party is bound by their pleadings, and submissions should not be used to introduce new prayers. Notwithstanding this, assuming the damages sought are general damages, the court cannot award them as the present suit has been initiated through an Originating Summons, a procedure which does not contemplate the awarding of damages. I am persuaded by the decision in the case of *Satnam Sing Chana & another v Jutendra Trikamdas Swualy & another* [2021] eKLR where the court in declining to issue the award of damages stated as follows:-
 - “ 40. Nevertheless, even assuming, that a foundation for award of Damages had been laid by the Plaintiffs, (which is not the case) I would still not be disposed to pronounce myself on the issues of Damages and or to award same, given that the subject suit has been commenced by way of Originating Summons, which does not envisage an award of Damages.
 41. In support of the foregoing observation, I beg to restate the finding and holding of the court in the case of *Kenya Commercial Bank v Osebe* (1982) eKLR, where the honourable court observed as hereunder;

“Nevertheless, believing as I do that there was no power to award damages on this originating summons, I would allow the Bank's appeal on that ground, with the result that the other questions raised, such as the measure of damages, do not now fall to be decided. I would allow this appeal, to the extent of setting aside the award of Kshs 180,000 damages and leave the respondent to pursue his remedy in this respect by suit, if so advised.”
 42. Based on the foregoing Decision, it is my considered view that if the Plaintiffs were keen to pursue the issues of Damages, whatever such Damages entail, then such a course ought to have been pursued in the ordinary manner of pleadings and particularly, by way of Plaint.
 43. In a nutshell, no Damages are awarded to the Plaintiffs.
33. Therefore, this court declines to award any damages to the Applicant, as such damages can only be pursued and granted through the ordinary procedure of pleadings, such as a plaint.
34. Having reviewed the issues for determination, I come to the conclusion that the Originating Summons herein is merited and same is allowed as follows;



- i. Declaration be and is hereby issued that the Defendant's continued holding of legal charges over L.R No. Loc 1/Thuita/472, L.R. No. Loc 1/Thuita 741 and L.R Loc 4/Ngararia/867 is unlawful, inequitable and unconsciable.
- ii. The Defendant be and is hereby ordered to unconditionally release/dischage the charges over L.R No. Loc 1/Thuita/472, L.R. No. Loc 1/Thuita 741 and L.R Loc 4/Ngararia/867.
- iii. The Defendant and or its agents be and are hereby restrained from dealing with L.R No. Loc 1/Thuita/472, L.R. No. Loc 1/Thuita 741 and L.R Loc 4/Ngararia/867, in any manner, whatsoever.
- iv. The claim for Damages is hereby dismissed.
- v. Costs of the suit to be borne by the Defendant

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2025

For Applicant

For Respondent

Court Assistant

