



REPUBLIC OF KENYA



KENYA LAW
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**Platinum Credit Limited v Oure (Civil Appeal 188 of 2022)
[2025] KEHC 551 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 188 OF 2022
PN GICHOHI, J
JANUARY 22, 2025**

BETWEEN

PLATINUM CREDIT LIMITED APPELLANT

AND

AGGREY ONYANGO OURE RESPONDENT

(Being an appeal against the Judgement and Decree of the Small Claims Court at Nakuru in Case Number E454 of 2022 delivered by Hon. E Oboge on 18th November, 2022- Platinum Credit Limited vs Aggrey Onyango Oure)

JUDGMENT

1. The background of this Appeal is that the Appellant filed a Statement of Claim dated 24th August 2022 before the Small Claims Court seeking the following reliefs against the Respondent: -
 - a. Judgement in the sum of Kshs 539,897.51 with interest at contractual rates of 4% per month until payment in full.
 - b. An order that the claimant may execute judgement of the sum above by way of attachment and sale of land title Number Suna East/Wasweta 1/21061.
 - c. Costs of the claim.
2. The Claim was that the Respondent herein sought and received a Mkopo Kodi loan of Kshs 350,000 from the Appellant herein on 22nd April, 2021 and the agreement was that the said loan was to be paid in 18 equal monthly instalments of Kshs 34,783 by the 10th day of each month commencing 10th June, 2021 and ending on 10th December, 2022.
3. As proof of his capacity to service the loan, the Respondent informed the Appellant that he collected sufficient income from the rental houses erected on his parcel of land reference Suna East/Wasweta



- 1/21061. He therefore surrendered to and deposited with the Appellant, the title for the said property as security for the said loan.
4. The Appellant claimed that in breach of the agreement between the parties, the Respondent failed, refused and neglected to pay loan as per the agreement and the loan continued to accrue interest and the total outstanding amount owing from the Respondent was Kshs 539,897.51 as at 29th June, 2022, which they sought for immediate payment and default for the trial Court to grant them leave to sale the subject parcel of land to recover the said money.
 5. The Respondent opposed the claim by filing a response dated 4th October, 2022. He stated that he had regularly serviced the loan until July, 2021, when his employment with the judiciary was terminated causing him financial difficulties which he always communicated with the Appellant herein.
 6. He maintained that he has so far paid a total of Kshs. 165,301.28, leaving a balance of Kshs. 184,698.00 plus interest of Kshs. 177, 310.00 all totalling to Kshs. 362, 008.00 which he is still keen in repaying as demanded by the Claimant within 90 days from the date of that response.
 7. He stated that in any event he has not been issued with statutory notice of sale required before any attachment and sale of land can be allowed. He thus prayed for the claim to be dismissed with costs.
 8. Upon hearing both parties, the trial court dismissed the entire claim for the reason that the Appellant herein did not serve the Respondent the statutory notices to enable him cure the default before proceeding to court.
 9. Aggrieved by this judgement, the Appellant herein filed a Memorandum of Appeal dated 15th December, 2022 where he raised the following grounds of Appeal: -
 1. The learned Magistrate erred in law in finding that the statutory notices ought to have been issued to the Respondent prior to the institution of the Claim.
 2. The learned Magistrate erred in failing to consider that the Claimant had not registered a charge against the Respondent property land title number Suna East /Wasweta 1 /21061 and hence no statutory notices under the land Act and the Auctioneers Act were required to be issued to the Respondent.
 3. The Learned Magistrate erred in law in dismissing the suit on account of non-service of demand letter upon the Respondent.
 4. The learned Magistrate erred in law in dismissing the claim for non-service of demand letters, yet the issue was not pleaded by the Respondent in his pleadings.
 5. The learned Magistrate erred in failing to consider that the demand letter dated 18th May, 2022 was sent to the Respondent's postal address by way of registered posts.
 6. The learned Magistrate erred in failing to enter judgement against the Respondent in the amount admitted to be owed to the claimant.
 10. The Appellant therefore prayed that: -
 1. This Appeal be allowed with costs to the Appellant.
 2. The judgement and decree of the small claims court claim number E454 of 2022; Platinum Credit Limited Vs Aggrey Onyango Oure delivered on 18th November, 2022 be set aside.



Appellant's Submissions

11. On the trial court's finding that the Appellant ought to have issued statutory notice before instituting the claim, the Appellant submitted that the Respondent deposited his title deed with the Respondent for the sole purpose of ensuring that the land was not sold to third parties before the loan was cleared. It was reiterated that the title was not charged to the Appellant as such, there was no need to issue any statutory notices.
12. On the grievance in regard to dismissal of the claim for non-service of a demand letter, the Appellant submitted that there is no requirement in law that a demand letter must be issued before a suit can be instituted against a defaulting party but nonetheless, the Appellant did issue a demand letter dated 18th May, 2022 to the Respondent vide his declared postal address.
13. The Appellant further submitted that the trial court erred in dismissing the suit for non-service of demand letter, when the issue was not pleaded in the Response to claim. It was argued that parties are bound by the pleadings as was stated in *Odinga & Another V Independent Electoral and Boundaries Commission & 2 others* [2017] KESC 31 (KLR), where the Supreme Court stated that: -

“In the case of *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & anr*, Civil Appeal Nos 5710-5711 of 2012; [2014] 2 SCR the Supreme Court of India held that [paragraph 8]... It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”
14. The Appellant further relied on the case of *Obare Mochache Walter V Samwel Apoko Onkwani & 2 Others* [2018] eKLR, where the Court quoted the decision by Kimaru J (as he then was) in *Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others* [2010] eKLR who held as follows:-

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition”.
15. He therefore submitted that the issue of service of the demand letter was neither raised in the pleadings nor submitted by either party hence, the court erred in raising it and addressing itself on the same.
16. It was further submitted that the trial court erred in failing to address the substantive issues raised in the Claim when enough evidence was tendered in support of the Claim and moreover, the Respondent admitted to owing the Appellant the sum of KShs. 362,008, which the court ought to have entered judgement in favour of the Appellant at least on the admitted sum instead of dismissing the entire claim on the issue of service that was not raised by either party.



17. In conclusion, the Appellant urged this Court to allow the Appeal and set aside the trial court's judgement.

Respondent's Submissions

18. The Respondent framed three issues for determination that is; whether the trial court erred in dismissing the claim, whether the Appellant is deserving of the reliefs sought in the Appeal and who bears the costs of this Appeal.
19. On the first issue, it was submitted that it is not contested that the Respondent herein secured a loan of Kshs. 350,000 from the appellant, neither is it contested that the security given was deposit of title deed and not charge of the said title deed and therefore, the only issue for determination was whether the Appellant was obliged to issue any statutory notices under the Land Act or any other law before instituting the trial court's suit.
20. The Respondent submitted that contrary to the Appellant's passionate submissions that it was not entitled to issue the said statutory notices to the Respondent, the Appellant was indeed required to serve them on the Respondent.
21. Referring section 79 (6) of the Land Act, 2012 which provides for creation of informal charges, the Respondent cited the case of Tassia Coffee Estate Limited & Another Vs Milele Ventures Limited [2013] eKLR, where while considering the question of an informal charge, the Court observed as follows: -

“Going by these provisions of the law, it would appear that the Defendant/Respondent having deposited his title deed for the suit property with the Plaintiffs/Applicants, it created an informal charge in favour of the Plaintiffs/Applicants over the suit property as security for the payment of the balance of the purchase price for those other parcels of land. The Plaintiffs/Applicants therefore became chargees of an informal charge over the suit property and enjoy a lien by deposit of documents.”

22. Similarly, the Respondent herein submitted that the transaction entered into between the parties herein was that of an informal charge. Arguing that that the general rule is that a charge has a statutory power of sale of charged property upon default by the borrower, the Respondent submitted that section 79 (7) of the Land Act is however specific to informal charge that it must be with leave of the court for it provides that: - “A chargee holding an informal charge 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.”
23. Flowing from the above, the Respondent cited the case of HFC Limited Vs Njora (Environment & Land case No. E027 of 2023 [2024] KEELC(KLR), where the Court held that: -

“Whereas the Land Act of 2012 does not set forth specific considerations that the Court should make in determining whether to grant or deny leave to sell the land, my reading of the law is that a chargee holding charge, whether formal or informal, must satisfy some fundamental conditions. These include:

- i. The Chargee must proof that the Chargor is indebted to the Chargee and has defaulted in payment of the debt thereof;
- ii. The Chargee has given a redemption notice to the Chargor; and
- iii. The Chargor has failed to comply with the notice.



This Court insists that the foregoing set conditions must be met conjunctively. Of great importance before exercise of the right of sale is the equity of redemption. Section 89 of the Land Act (2012) provides for the equity of redemption. The equity of redemption grants the Chargor a reasonable opportunity to redeem the property, by repaying the principal amount and interest as agreed by the parties before it is disposed off by the Chargee.”

24. Based on the above authority, the Respondent submitted that section 90 of the Land Act envisions a redemption notice, failure to which, the charge can exercise its remedies. In the circumstances, the Respondent argued that since this was an informal charge, the Appellant was required to also give redemption notice before exercising his rights under the Act, which was not done in this case, as such the trial court was justified in dismissing the trial court’s case.

Analysis And Determination

25. The Appeal from the Small Claims Court is on matters of law only as provided for under Section 38 (1) of the Small Claims Court Act.

26. What constitutes points of law has been settled and need not be overemphasised. Further in the case of Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 of 2013, the Court of Appeal held that the exercise of judicial discretion is a point of law and in so holding, it cited the case of Maina vs Mugiria, [1983] KLR 78 where the Court of Appeal held:-

“On a second appeal, only matters of law may be taken. If the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law”

27. The issue as to failure by the trial court to exercise its discretion is equally a point of law. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court stated: -

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

28. After considering the Appeal herein and the rival submission of the parties, the issues for determination are: -

1. Whether the issue of statutory notice was raised by the parties or by the court suo moto.
2. Whether there was an informal charge created in the circumstances herein.
3. Whether the trial court was justified in dismissing the suit.
4. Who bear costs of the Appeal.

29. On the first issue, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination when the same was not pleaded or submitted on by the parties.



30. In regard to pleadings, the Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited* [2015] eKLR rendered itself as follows:-

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

31. A perusal of the lower court file and the Record of Appeal reveals that indeed the issue was not pleaded in the Response to Claim but the Respondent herein raised it in paragraph (g) of his witness statement where he stated: - “THAT in any event the Claimant is yet to issue me with statutory Notices required before the attachment and sale of the land parcel SUNA EAST/WASWETA 1/21061.” The Respondent concluded that statement by praying that the Claimant’s suit against him “be dismissed and that the Claimant be ordered to follow the due process before attachment and sale of the suit land.”

32. The issue was also dealt with during hearing and cross examination conducted on 28th October, 2022. Indeed, the Appellant’s witness who testified as its Legal Officer and maintained that the title was not charged and that no Statutory Notices were served as the title was not charged.

33. However, one of the reliefs sought by the Appellant was leave of the Court to exercise his right of a chargee to sell the subject parcel of land to recover the loan advanced to the Respondent. Before such prayer can be granted, there are procedures that an Applicant must satisfy the court that it followed in order to obtain leave in his favour.

34. A look at the trial court’s judgment shows that it addressed its mind to the said procedure and therefore, it did not address any issue outside the parties’ pleadings.

35. On the second issue, that is whether an informal charge was created in the circumstances of this case, it is not disputed that the parties herein entered into a loan agreement, where the Respondent was given Kshs 350,000 and he deposited his title deed for land reference number Suna East/Wasweta 1/21061 as security.

36. Both parties also confirmed that the said title deed was not charged and that the title deed was deposited with the Appellant and an agreement entered barring the Respondent from transferring the parcel of land until the loan was paid in full. From the facts of the case, it is evident that the parties herein entered into an informal charge, for the Appellant to secure the loan advanced to the Respondent.

37. Section 79 of the *Land Act* provides that: -

“Informal charges

- (1) An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition.



- (2) The power conferred by subsection (1) shall include the power to create second and subsequent charges.
- (3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a 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 assented to by all such persons.
- (4) The power conferred by this section shall be exercisable subject to—
 - (a) any prohibition or limitation imposed by this Act or any written law; and
 - (b) any restriction contained in an instrument creating or affecting the interest in land that is to be the subject of a charge.
- (5) A formal charge shall take effect only when it is registered in a land register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.
- (6) An informal charge may be 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 chargor and the chargee”;
 - (b) the chargor deposits any of the following—
 - (i) a certificate of title to the land;
 - (ii) a document of lease of land;
 - (iii) any other document which it is agreed evidences ownership of land or a right to interest in land.
- (7) A chargee holding an informal charge 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.
- (8) An arrangement contemplated in subsection (6)(a) may be referred to as an “informal charge” and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a “lien by deposit of documents.”
- (9) A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court.” [Emphasis added]

38. On that basis, for informal charges to be created, the intention of the parties has to be put in writing to disclose clear intent to offer the title deed or an interest in land to secure the payment of a debt whether existing, contingent or future, which instrument is then accepted by the chargee as a written commitment and the deposit of any document agreed to evidence the ownership of the land by the Chargor.



39. In this case, the Appellant herein exhibited a statutory declaration, an appraisal questionnaire and the title deed, which demonstrated that the Respondent herein entered into an agreement to be bound by the terms therein and offered the subject title deed as security to secure the loan borrowed. In the circumstances, this Court is satisfied that the transaction between the parties herein created an informal charge.
40. On procedure of exercising the remedies of chargee in informal charges, it is true that the *Land Act* does not distinguish between a formal and informal charge, in making consideration to be deliberated in determining whether leave contemplated under Section 79 (9) of the *Land Act* should be granted.
41. Accordingly, this Court finds that a chargee holding charge, whether formal or informal, must satisfy some fundamental conditions and these include the following: -
1. The Chargee must proof that the Chargor is indebted to the Chargee and has defaulted in payment of the debt thereof
 2. The Chargee has given a Redemption Notice to the Chargor.
 3. The Chargor has failed to comply with the notice.
42. On the first condition, it is noted that even though the Respondent admitted owing the Appellant only Kshs 362,008 while the Appellant maintained that the sum owing is Kshs.539, 897.51, the fact of the matter is that it has been demonstrated that the Respondent owes the Appellant some money.
43. With regard to whether any redemption notice was issued, the Appellant submitted that the Respondent's title deed was not charged as such, there was no need of issuing any redemption notice. This Court is persuaded by the decision of the Court in *Kingdom Bank Limited v Okotsi* (Civil Suit E004 of 2021) [2022] KEHC 12771 (KLR) that: -
- “...For clarity purposes, once the informal charge is determined to have been created, the duties and obligations of a chargee including the obligation to protect and secure the equity of redemption and trusteeship to the chargee are called into play and accordingly, the statutory notices, including notices of default and notice of intention to sell, shall issue, if not yet issued in strict compliance with the Act.”
44. Without belabouring the point, it is evident that the Appellant never issued/served Statutory Notices on the Respondent before taking action on him such as seeking leave of the court to dispose of the parcel of land used as security, regardless of his argument that no Notices were issued as the title had not been formally charged.
45. With the Appellant having failed to issue the necessary notices as are required under the *Land Act* or any other written law, there would be no issue of non-compliance by the Respondent.
46. The trial court was justified in finding against the Appellant for failing to follow due procedure before seeking leave of court to sell the subject parcel of land.
47. Further, in light of the circumstances of this case, this Court finds that the argument by the Appellant that judgment ought to have been entered on admitted sum cannot hold.
48. In conclusion this Court finds no merit in the Appeal and therefore, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED NAKURU THIS 22ND DAY OF JANUARY, 2025.



PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Mwanzile for the Appellant

Mr. Opar for Respondent

Ruto, Court Assistant

