



**Rafiki Microfinance Bank Limited v South Eastern Investment Limited
& 3 others (Commercial Case E047 of 2020) [2025] KEHC 1612 (KLR)
(Commercial and Tax) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E047 OF 2020
MN MWANGI, J
FEBRUARY 14, 2025**

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED PLAINTIFF

AND

SOUTH EASTERN INVESTMENT LIMITED 1ST DEFENDANT

JOHNSON MUNYAO MUSAU 2ND DEFENDANT

ANTHONY KIILU MUSAU 3RD DEFENDANT

LALI KATHULI 4TH DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 17th February 2020 and amended on 24th May 2024 instituted this suit against the defendants seeking judgment against them as hereunder -
 - i. A declaration that the plaintiff is entitled to exercise its statutory power of sale over Title Numbers Mavoko Town Block 3/45186, Mavoko Town Block 3/45187, Mavoko Town Block 3/45188, Mavoko Town Block 3/45189, Mavoko Town Block 3/45190, Mavoko Town Block 3/45191, Mavoko Town Block 3/45192, Mavoko Town Block 3/45194, Mavoko Town Block 3/45195, Mavoko Town Block 3/45196, Mavoko Town Block 3/45197, Mavoko Town Block 3/45198, Mavoko Town Block 3/45199, Mavoko Town Block 3/45200, Mavoko Town Block 3/45202, Mavoko Town Block 3/45203, Mavoko Town Block 3/45204, Mavoko Town Block 3/45205, Mavoko Town Block 3/45206, Mavoko Town Block 3/45207, all registered under the name of Paul Mulalya Mumo, which were surrendered to the plaintiff as security for a loan advanced to the 1st defendant;



or in the alternative;

- ii. Payment of the said sum of Kshs.16,482,022.60 by the defendants jointly and severally, being the outstanding balance;
 - iii. Interest on (ii) above at Court rates from the date of filing suit;
 - iv. Costs of this suit; and
 - v. Any such other or further relief as this Honourable Court may deem appropriate.
2. The plaintiff's case is that it advanced a loan of Kshs.15,000,000/= to the 1st defendant on 21st March 2016, which was to be repaid in sixty (60) equal monthly instalments at an 18% annual interest rate. The loan was secured by land titles registered under Paul Mulalya Mumo and personal guarantees from the 2nd, 3rd & 4th defendants. The plaintiff stated that a loan restructuring was done on 8th December 2017 with an outstanding balance of Kshs.13,339,389.00, changing the interest rate to 25% per annum.
 3. The plaintiff's contention is that the defendants later defaulted, thereby increasing the outstanding balance to Kshs.22,915,179.90 as at 31st January 2020. The plaintiff contended that despite multiple demand letters, the defendants failed to make full repayment, leading to the institution of this suit. The plaintiff asserted that as at 22nd May 2024, the outstanding amount that was due and owing from the defendants to the plaintiff was Kshs.16,482,022.60.
 4. In opposition to the suit, the defendants filed a statement of defence dated 26th August 2020 which was amended on 30th May 2024. The defendants denied all the averments in the plaintiff's plaint and averred that any money still owed to the plaintiff shall be repaid if they are granted more time, as they depend on the sale of the plots of land to settle the loan.
 5. This matter proceeded to hearing where both the plaintiff and the defendants called one witness each in support of their cases.

Plaintiff's Case.

6. John Cheruiyot Langat testified as PW1. He adopted his witness statements dated 6th May 2023 and 24th May 2024 as his evidence in chief and produced the documents contained in the plaintiff's list and bundle of documents dated 17th February 2020 as plaintiff exhibit Nos. 1 to 10, and those contained in the plaintiff's supplementary bundle of documents as plaintiff exhibit Nos. 11 & 12. He testified that sometime in March 2016, the 2nd, 3rd & 4th defendants as Directors of the 1st defendant company, sought a loan from the plaintiff. He stated that on 21st March 2016 the plaintiff advanced Kshs.15,000,000/= to the 1st defendant, repayable in sixty (60) equal monthly instalments with an 18% annual interest rate, which loan was secured by land titles registered under Paul Mulalya Mumo and Directors' guarantees.
7. He stated that it was agreed between the parties herein that in case of default, an additional interest of 1.5% per month would apply. He stated that following a restructuring Agreement executed by the 2nd & 4th defendants, the aforesaid loan was restructured on 8th December 2017, with an outstanding balance of Kshs.13,339,389.00 and the interest rate was increased to 25% per annum. That the 2nd and 4th defendants signed the restructuring Agreement. Mr. Langat contended that the defendants later defaulted, and as at 20th April 2024, the outstanding amount that was due and owing from the defendants to the plaintiff was Kshs.16,482,022.60, which continues to accrue interest. He testified that the securities held by the plaintiff are simple deposits thus they cannot be sold in a public auction in the absence of a Court order.



8. During cross-examination, Mr. Langat stated that as per the terms and conditions of loan, the defendants were to purchase a property, subdivide and use the proceeds of the sale of plots to repay the loan. He noted that sub-division was done, some plots were sold and some money channeled to the plaintiff. He further stated that the loan restructure was as a result of problems that the defendants were encountering. Mr. Langat stated that the plaintiff was willing to give the defendants time to repay the loan if the defendants could indicate when they intend to do so.
9. In re-examination, PW1 stated that repayment of the loan advanced to the defendants was not conditional on the defendants selling the properties as the same was not provided for in the letter of offer.
10. On being examined by the Court, PW1 stated that the plaintiff had released the titles to the properties that had been sold and had retained titles to the properties that had not been sold.

Defendants' Case.

11. Mr. Johnson Munyao Musau testified as DW1. He adopted his witness statement dated 30th August 2022 as his evidence in chief. He acknowledged that the plaintiff advanced the 1st defendant a loan to be repaid over sixty (60) months. He denied that the defendants neglected their repayment obligations, stating that the loan was used for land subdivision and service provision. He testified that they relied on land sales to repay the loan, but sales have been lower than expected due to factors like the COVID-19 Pandemic, economic challenges, and election-related uncertainty. Mr. Musau confirmed that the defendants are still committed to clearing the loan arrears if given more time and that they have already made partial payments of Kshs.7,000,000/=. He proposed that they could make periodic payments until full settlement of the outstanding loan balance within two years.
12. During cross-examination, he confirmed that the defendants owed the plaintiff Kshs.16,482,022.60 as at 22nd May 2024. He testified that at the time of procuring the loan in question, they did not inform the plaintiff that they were to purchase a piece of land since the loan was for sub-dividing a piece of land that belonged to the 1st defendant, construct roads, and provide water and sewerage. Mr. Musau could not confirm whether there was a provision in the letter of offer to the effect that repayment of the loan was conditional on selling the plots. He confirmed that the defendants were willing to execute transfers of the plots for the titles being held by the plaintiff.
13. In re-examination, he testified that Clause 3 of the letter of offer dated 22nd March 2016 talks of business proceeds which refers to sales being channeled through the plaintiff. He further testified that bullet 4 under the said Clause 3 required the defendants to open an escrow account to channel funds from the sale of the plots.
14. On closure of the plaintiff's and the defendants' case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 25th June 2024 by the law firm of N. K. Mugo & Company Advocates, while the defendants' submissions were filed on 14th October 2024 by the law firm of Muttisya & Co. Advocates.
15. Ms Wanja, learned Counsel for the plaintiff cited the provisions of Section 79 (6) of the Land Act which provides for creation of an informal charge and submitted that the facility advanced to the defendants was secured by simple deposits over various title numbers. She submitted that in view of the consistent default by the defendants to service the loan facility in question, the Court should grant the plaintiff vacant possession on the titles attached as collateral, to enable the plaintiff to exercise its statutory power of sale over them, or in the alternative order the defendants to pay the outstanding balance of



Kshs.16,482,022.60. Counsel relied on the case of Jamii Bank Limited v Wapak Developers [2018] eKLR, to buttress these submissions.

16. Ms Wanja argued that the loan required repayment in sixty (60) equal monthly instalments, with no link to plot sales, and that Clause 3 of the offer letter only required sales proceeds to be deposited into the account, not as a repayment condition. In addition, she stated that the Directors' guarantees made them personally liable in case of default, and the Title Deeds were only loan security, not a repayment source. In urging the Court not to grant the defendants more time to repay the loan in question, Counsel relied on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR. She also referred to the provisions of Order 13 Rule 2 of the Civil Procedure Rules, 2010 and the case of Choitram v Nazari [1984] KLR. She asserted that in view of the defendants' admission to being indebted to the plaintiff in the sum of Kshs.16,482,022.60, this Court should enter judgment for the plaintiff against the defendants on admission.
17. Ms Alusiola, learned Counsel for the defendants relied on the case of Hassan Abdul Hafedh Zubeidi v Edermann Property Limited & 2 others [2013] eKLR, and submitted that the parties herein having executed the letter of offer dated 21st March 2016 are bound by the terms thereunder. She further submitted that Clause 3 of the said letter of offer provided for all business proceeds to be channeled through the plaintiff, thus corroborating the defendants' position that the loan repayment was based on the proceeds of sale of the plots. She referred to the provisions of Section 90(1) of the *Land Act* and stated that since the plaintiff holds title deeds of parcels of land belonging to the defendants as security, it ought to have exercised its statutory power to sell and recover the money owed.

Analysis And Determination.

18. I have considered and analyzed the evidence adduced in line with the pleadings filed, together with the written submissions filed by Counsel for the parties. The issue that arises for determination is whether the plaintiff is entitled to the reliefs sought.
19. It is not disputed that the plaintiff advanced to the 1st defendant a loan of Kshs.15,000,000/= which was to be repaid within sixty (60) months but the 1st defendant defaulted in its loan repayment obligations leaving a balance of Kshs.16,482,022.60 as at May 2024 which is due and owing to the plaintiff. It is noteworthy that on being cross-examined, DW1 denied that the 1st defendant negligently refused to repay the said facility. He stated that the defendants relied on land sales to repay the loan, but sales had been lower than expected due to factors like the COVID-19 pandemic, hence the inability to keep up with the 1st defendant's loan repayment obligations.
20. From the record, it is evident that the defendants' position is that repayment of the loan in question was based on the proceeds of sale of the plots. DW1 could however not confirm whether this position was provided for in the letter of offer. This Court notes that in as much as PW1 in cross-examination stated that as per the terms and conditions agreed on, the defendants were to purchase a property, subdivide and use the proceeds of the sale of plots to repay the loan, in re-examination he confirmed that repayment of the loan in question was not conditional on the defendants selling the properties, as the same was not provided for in the letter of offer.
21. On perusal of the letter of offer dated 21st March 2016, it is clear that the 1st defendant was advanced a loan facility of Kshs.15,000,000/= by the plaintiff secured by simple deposits over several title numbers and Directors' guarantee and indemnity from the 2nd, 3rd & 4th defendants. It is also clear that under Clause 4 of the said letter of offer, the said loan facility was to be repaid directly from the 1st defendant's savings account by sixty (60) months' equal instalments of Kshs.380,902.00 with effect from the first



month of drawdown until the loan was paid in full. The 1st defendant was to ensure that its account held sufficient funds to meet the repayment obligation.

22. In the premise, this Court agrees with the plaintiff's position that the letter of offer dated 21st March 2016 neither expressly provided that repayment of the loan in question would be based on the proceeds of the sale of the plots nor can the same be implied from the provisions thereunder. To the contrary, it can be easily deduced from the letter of offer that the facility advanced to the 1st defendant was to be repaid in sixty (60) equal monthly instalments with funds from its savings account.
23. In view of the foregoing the next question for determination by this Court is what the available options are to the plaintiff for recovering its money from the 1st defendant. The defendants' position is that since the plaintiff holds Title Deeds of parcels of land belonging to the defendants as security, it ought to have exercised its statutory power to sell and recover the money owed. It is however noteworthy that the loan was secured by simple deposits which can be equated to an informal charge as opposed to a formal charge. Informal charges are provided for under Section 79(6) of the [Land Act](#) which states that –

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.
24. The Court in the case of *Tassia Coffee Estate Limited & another v Milele Ventures Limited* [2013] eKLR, in determining whether there was creation of an informal charge held that -

...It would appear that the Defendant having deposited his title deed for the suit property with the Plaintiffs, it created an informal charge in favour of the Plaintiffs over the suit property as security for the payment of the balance ... The Plaintiff therefore becomes the Chargee of an informal charge over the suit property and enjoy a lien by deposit of documents ... (Emphasis added).

25. In this case, it came out clearly from the evidence of both PW1 & DW1 and also from the letter of offer dated 21st March 2016 that the facility advanced to the defendants was secured by simple deposits over several title numbers, no formal charge in favour of the plaintiff was ever created over the said title numbers. Therefore, there is no contention that the plaintiff herein is a chargee under an informal charge. In such instances, the plaintiff does not have similar rights as a chargee with rights under a formal charge. Being a holder of an informal charge, the plaintiff can only sell the land it holds title to, with leave of Court, pursuant to the provisions of Section 79(7) of the [Land Act](#) which states 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.



26. In this case, in view of the fact that the defendants do not dispute that the plaintiff advanced to the 1st defendant a loan that was secured by an informal charge, and noting that the 1st defendant has defaulted in its loan repayment obligations, and further noting that as at 22nd May 2024 the 1st defendant owed the plaintiff Kshs.16,482,022.60, it is my finding that this is a proper case for the Court to grant the plaintiff leave to sell the parcels of land whose titles were deposited with it by the 1st defendant, as security for the loan in question. Since approval of the Court had to be sought first to sell the said parcels of land, the plaintiff is yet to comply with the duties and obligations of a chargee including the obligation to protect and secure the equity of redemption and trusteeship to the chargee by issuing the requisite statutory notices prior to the exercise of its statutory power of sale.
27. As such, this Court finds that before exercising its statutory power of sale over the suit properties, the plaintiff must issue the defendants with all the requisite statutory notices contemplated under Sections 90 & 96 of the Land Act.
28. In the end, this Court finds that the plaintiff's suit is successful. Section 27 of the Civil Procedure Act provides that costs follow the event. The 1st defendant shall therefore bear the costs of this suit.
29. In the upshot, this Court enters judgment in favour of the plaintiff against the defendants as hereunder -
- i. A declaration is hereby issued that the plaintiff is entitled to exercise its statutory power of sale over Title Numbers Mavoko Town Block 3/45186, Mavoko Town Block 3/45187, Mavoko Town Block 3/45188, Mavoko Town Block 3/45189, Mavoko Town Block 3/45190, Mavoko Town Block 3/45191, Mavoko Town Block 3/45192, Mavoko Town Block 3/45194, Mavoko Town Block 3/45195, Mavoko Town Block 3/45196, Mavoko Town Block 3/45197, Mavoko Town Block 3/45198, Mavoko Town Block 3/45199, Mavoko Town Block 3/45200, Mavoko Town Block 3/45202, Mavoko Town Block 3/45203, Mavoko Town Block 3/45204, Mavoko Town Block 3/45205, Mavoko Town Block 3/45206, Mavoko Town Block 3/45207, all registered under the name of Paul Mulalya Mumo, which were surrendered to the plaintiff as security for a loan advanced to the 1st defendant, subject to compliance with the law on realization of securities; and
 - ii. Costs are awarded to the plaintiff and shall be borne by the 1st defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kamene h/b for Ms Wanja for the plaintiff

Ms Alusiola for the defendants

Ms B. Wokabi - Court Assistant.

