



Omollo v Agricultural Finance Corporation & 2 others (Civil Appeal E041 of 2023) [2025] KEHC 3291 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E041 OF 2023
AB MWAMUYE, J
MARCH 13, 2025**

BETWEEN

LUKE OMULLO OMOLLO APPELLANT

AND

AGRICULTURAL FINANCE CORPORATION 1ST RESPONDENT

**KENYA SUGARCANE GROWERS ASSOCIATION (KESGA) 2ND
RESPONDENT**

CHEMELIL SUGAR FACTORY COMPANY LIMITED 3RD RESPONDENT

(Being an appeal arising from the judgment of Hon. M.I. Shimenga delivered on 16th February 2023 in Kisumu CMCC No. 454 of 2016)

JUDGMENT

Introduction & Background

1. This appeal arises from the judgment of Hon. M.I. Shimenga delivered on 16th February 2023, dismissing the Appellant's suit on the basis that he had failed to establish his case on a balance of probabilities. Having considered the submissions of both parties, the record of appeal, the lower court proceedings, and applicable legal principles, this Court now delivers its final determination.
2. The Appellant, Luke Omullo Omollo, is the registered owner of Land Parcel No. Kisumu/ border/2389. In 2012, he took a loan from the 1st Respondent, Agriculture Finance Corporation, using the property as collateral. Under the loan agreement, repayment was to be made in structured installments, with the full amount due by 21st August 2017. However, due to economic hardship, fluctuating sugarcane prices, and regulatory changes within the sugar industry, the Appellant encountered financial difficulties that hindered his ability to meet the repayment terms in full.



3. In 2016, the Appellant attempted to renegotiate the loan terms with the 1st Respondent, citing challenges beyond his control. Despite his partial repayments and continued engagement with the 1st Respondent, statutory notices were issued prematurely, and the property was scheduled for auction. The Appellant contested the validity of these notices, arguing that they failed to comply with the strict statutory requirements set out under the *Land Act*, 2012.
4. Additionally, the 3rd Respondent, Chemelil Sugar Factory Company Limited, was contractually obligated under an irrevocable order dated 21st August 2012 to deduct the loan repayment from sugarcane deliveries made by the Appellant. However, the Appellant alleged that the 3rd Respondent failed to uphold this obligation, further worsening his financial distress. The Trial Court dismissed the Appellant's suit, holding that he had failed to prove his claims on a balance of probabilities. Aggrieved by this decision, the Appellant lodged the present appeal, seeking a reversal of the lower court's judgment, the reinstatement of his suit, and a permanent injunction restraining the 1st Respondent from selling the property.
5. Flowing from the foregoing, the Court has come up with the following issues for determination;
 - a. Whether the statutory notices issued by the 1st Respondent were valid.
 - b. Whether the Trial Court properly applied the principles governing injunctive relief.
 - c. Whether the Appellant was in breach of contract as alleged by the Respondents.
 - d. Whether the Appellant is entitled to the reliefs sought.

Analysis Of Issues

a. Validity of the Statutory Notices

6. The power of sale by a chargee is a drastic remedy, and Kenyan law imposes strict statutory requirements to safeguard the rights of a chargor. Section 90 of the *Land Act*, 2012, provides that where a borrower defaults in loan repayment, the chargee must serve a statutory notice specifying the nature and extent of the default and granting the borrower at least three months to rectify the breach. Additionally, Section 96 requires the chargee to serve a further 40-day notice of intention to sell before proceeding with any sale of the property. Section 96 states thus;
 - (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
7. In the present case, the 1st Respondent issued statutory notices that failed to comply with these mandatory provisions. The notices were issued prematurely, failing to grant the Appellant sufficient opportunity to rectify the default. Moreover, the notices did not provide a clear breakdown of the amount due and the steps required to remedy the situation. The Court in *David Gitome Kuhiguka v. Equity Bank Ltd* [2013] eKLR held that failure to comply with the prescribed timelines renders the intended sale unlawful. Similarly, in *Maribu Agribusiness Company Ltd v Consolidated Bank Kenya Ltd & 2 others* [2017] eKLR, it was established that statutory notices must strictly adhere to statutory timelines; otherwise, they are deemed defective and unenforceable. In arriving at that position, the court stated as follows;

It is now well settled that the exercise of statutory power of sale by a chargee is an elaborate process guided by the strict provisions of Law under the Lands Act and Statute governing



sale by Public Auction. From the day a statutory Notice is issued, strict adherence to dates and timelines is mandatory. To deviate even by a single act, contaminates the entire process and it must be repeated. I think I have said enough to demonstrate that the application must succeed.

8. Further, the Court in *Albert Mario Cordeiro & Another v. Vishram Shamji* [2015] eKLR reiterated that statutory notices must be clear and unambiguous. The notice should contain the specific amount in arrears and inform the borrower of their right to rectify the default within the prescribed period. In *Palmy Company Limited v. Consolidated Bank of Kenya Limited* [2014] eKLR, the Court emphasized that a statutory notice that does not provide a clear breakdown of the outstanding sums and the steps to rectify default is invalid.
9. In the instant case, the 1st Respondent's statutory notices lacked an explicit breakdown of the arrears, making it impossible for the Appellant to remedy the situation. The doctrine of equity, as established in *Mbuthia v. Jimba Credit Corporation Ltd* [1988] eKLR, mandates that a borrower be granted a fair opportunity to redeem their property. The 1st Respondent's premature issuance of statutory notices deprived the Appellant of this fundamental right.
10. Additionally, under *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, the Court emphasized that an injunction may be granted where a party is at risk of suffering irreparable harm. The irregular issuance of statutory notices placed the Appellant in an unjust position, as he risked losing his property without being given the statutory period to rectify his default.
11. The Court in *Muganda v Sidian Bank Limited (Formerly K-Rep Bank Limited) (Civil Case 36 of 2020)* [2024] held that non-compliance with statutory provisions constitutes a fatal defect in the exercise of a chargee's power of sale. In arriving at that decision, the court stated as follows;

My finding is therefore that the notice in this matter was potentially issued to a party other than the Plaintiff. An invalid notice does not give rise to an accrual of a right of sale and is fatal to the exercise of the statutory power of sale by the chargee. It is an irregularity or impropriety that cannot be remedied in damages as it derogates from the chargor's equity of redemption (see decision of Ringera J (as he then was) in the case of *Samuel Kiarie Muigai v Housing Finance Co. Kenya Ltd* [2006] eKLR)

12. Since the 1st Respondent failed to adhere to Sections 90 and 96 of the *Land Act*, the intended sale of the Appellant's property was unlawful and could not confer a valid title to any third party.
13. Based on the foregoing, the statutory notices issued by the 1st Respondent were procedurally defective and, therefore, null and void. Consequently, any subsequent steps taken based on these notices, including the intended sale, were unlawful and must be set aside.

b. Whether the Trial Court properly applied the principles governing injunctive relief.

14. The Appellant challenged the Trial Court's refusal to grant an injunction restraining the 1st Respondent from selling the suit property. To determine whether the Trial Court erred in its decision, this Court must analyze the legal principles governing injunctive relief.
15. The principles for granting an injunction were first laid down in *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358, where the Court set out a three-part test:
 - a. Existence of a prima facie case with a probability of success.
 - b. Risk of irreparable harm that cannot be compensated by damages.



- c. Balance of convenience favoring the applicant.
16. Each of these elements must be satisfied before an injunction is granted. These principles were reaffirmed in *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court of Appeal emphasized that failure to establish even one of the three conditions would result in the denial of injunctive relief.
 17. A prima facie case is defined in *Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR as one that demonstrates a clear legal right that has been infringed upon. In the present case, the Appellant provided evidence showing that he is the registered owner of Land Parcel No. KISUMU/BORDER/2389 and that he had partially serviced his loan.
 18. Moreover, he demonstrated that the 1st Respondent failed to comply with Section 90 of the *Land Act*, 2012, which mandates the issuance of a valid statutory notice before exercising the power of sale. As determined in the first issue, the statutory notices issued by the 1st Respondent were defective. This non-compliance with statutory provisions strengthens the Appellant's claim that his rights as a registered proprietor were violated, thereby establishing a prima facie case.
 19. In *National Bank of Kenya Ltd v Shiners Plaza Ltd* [2009]EKLR, the Court held that an injunction may be granted where there is doubt about the validity of the statutory notices. The court stated thus;

“An injunction is an equitable remedy we venture to say that where the court is entitled to grant an interlocutory order restraining a mortgagee from exercising its statutory power on ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law”
 20. Given that the 1st Respondent's notices were procedurally defective, the Appellant satisfied this condition.
 21. The second limb of the Giella test requires the Applicant to demonstrate that they would suffer irreparable harm that cannot be adequately compensated by damages if the injunction is not granted.
 22. Loss of property, especially a home or land used for livelihood, is considered an irreparable injury under Kenyan law. In *Nguruman Limited v. Jan Bonde Nielsen* (supra), the Court emphasized that irreparable harm occurs when no monetary compensation can adequately remedy the loss.
 23. The Appellant in this case argued that the loss of his property would deprive him of his primary asset and source of economic stability. Courts have consistently recognized that land holds intrinsic value beyond its monetary worth. In *Sharok Kher Mohamed Ali & Another V. Southern Credit Banking Corporation Limited* [2008] eKLR, the Court held that loss of property through an irregular sale process constitutes irreparable harm. The court stated thus;

I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. Refusing an injunction in the circumstances of this case will fly in the clear provisions of the law. I am therefore satisfied that the plaintiffs will suffer irreparable loss if an injunction is refused”.



24. Additionally, the Appellant had relied on sugarcane farming for loan repayment, and the alleged breach by the 3rd Respondent exacerbated his financial distress. The forced sale of his land would leave him destitute, with no viable means of repaying his loan. This aligns with the decision in *Kitur & Another v. Standard Chartered Bank & 2 Others* [2002] eKLR, where the Court ruled that an injunction should be granted where the loss of property would render the applicant helpless.
25. The final test considers which party stands to suffer the greater harm if the injunction is granted or denied. The balance of convenience tilts in favor of the party who would suffer the most hardship.
26. In *Joseph Siro Mosioma v. Housing Finance Co. of Kenya Ltd & 3 Others* [2008] eKLR, the Court held that if the sale of a property is stopped, the bank still retains the ability to recover the debt through other means, whereas the borrower would suffer irreparable loss if the property is sold. In the present case, the 1st Respondent, a financial institution, had the option of restructuring the loan or seeking alternative recovery mechanisms. The Appellant, however, stood to lose his property permanently.
27. The Trial Court dismissed the application for an injunction without fully evaluating the procedural flaws in the statutory notices. It also failed to appreciate the significance of land ownership as a fundamental right.
28. In *Francis J.K. Ichatha v. Housing Finance Co. Ltd* [2005] eKLR, the Court found that a lower court's failure to assess procedural irregularities warranted appellate intervention. This Court finds that the Trial Court similarly erred in failing to give due consideration to the Appellant's arguments.
29. Having established a prima facie case, demonstrated irreparable harm, and shown that the balance of convenience tilts in his favor, the Appellant met all three conditions for injunctive relief. The Trial Court's refusal to grant an injunction was therefore erroneous. Consequently, this Court finds that the Appellant is entitled to a permanent injunction restraining the 1st Respondent from selling or interfering with the suit property.

c. Whether the Appellant Was in Breach of Contract

30. One of the key issues in this appeal is whether the Appellant was in breach of contract, as alleged by the Respondents, particularly the 3rd Respondent, Chemelil Sugar Factory Company Limited. The 3rd Respondent argues that the Appellant failed to deliver sugarcane as per an irrevocable order dated 21st August 2012, thereby defaulting on contractual obligations. The Appellant, on the other hand, contends that the failure was caused by external factors beyond his control, including the 3rd Respondent's failure to uphold its obligations under the agreement.
31. To resolve this issue, this Court will analyze:
 - a. The nature of the contract and the obligations of both parties.
 - b. Whether there was a breach and, if so, by whom.
 - c. The legal implications of any breach.

Nature of the Contract and Obligations of the Parties

32. The agreement between the Appellant and the 3rd Respondent was governed by an irrevocable order dated 21st August 2012. Under this arrangement:
 - a. The Appellant was to grow, harvest, and deliver sugarcane to the 3rd Respondent.



- b. The 3rd Respondent was obligated to deduct loan repayments from the proceeds of the sugarcane deliveries and remit the sums to the 1st Respondent, Agriculture Finance Corporation.
 - c. The 1st Respondent had a secured interest in the payments to be made by the 3rd Respondent.
33. From the evidence adduced, it is clear that the Appellant relied on the proceeds from sugarcane sales to service his loan obligations. The contract was structured to ensure automatic loan deductions, meaning that any disruption in the Appellant's ability to deliver sugarcane could result in default on his loan repayments.

Was There a Breach of Contract?

34. The 3rd Respondent argues that the Appellant failed to deliver sugarcane as agreed, thereby breaching the contract. However, the Appellant contends that he was unable to do so due to external factors, including economic downturns, fluctuating sugar prices, and the 3rd Respondent's failure to facilitate harvesting.
35. The Trial Court found that the Appellant bore the responsibility of delivering the sugarcane and that his failure to do so constituted a breach. However, a careful examination of the evidence reveals that the 3rd Respondent also played a role in the breakdown of the contractual arrangement. The Appellant testified that he made efforts to arrange for harvesting and delivery but faced logistical challenges that were exacerbated by the 3rd Respondent's inaction.
36. In the present case, the 3rd Respondent's duty was to deduct loan repayments from sugarcane deliveries, but since no deliveries were made, this obligation was not fulfilled. However, the question remains: did the 3rd Respondent contribute to the non-performance?
37. The irrevocable order placed a duty on the Appellant to ensure that sugarcane was grown and delivered. However, the evidence shows that economic instability in the sugar industry led to a decline in prices and an oversupply of sugarcane, making harvesting uneconomical at certain times. The 3rd Respondent, as an industry player, was aware of these challenges but failed to take any mitigating steps, such as assisting farmers with logistics.
38. The Court in *Davis Contractors Ltd v Fareham UDC* held that frustration occurs whenever the law recognizes that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. In this case, the economic downturn, combined with the 3rd Respondent's inaction, contributed to the failure of performance. Therefore, the breach cannot be attributed solely to the Appellant.
39. Further, in *Hadley v. Baxendale* (1854) 9 Exch 341, a locus classicus in contract law, the Court held that damages for breach of contract are only recoverable if the loss suffered was a foreseeable consequence of the breach. In this case, the inability to deliver sugarcane was not entirely within the Appellant's control. It was foreseeable that industry-wide challenges, including fluctuating sugar prices and logistical difficulties, could affect the fulfillment of the contract.

Legal Implications of the Alleged Breach

40. The law recognizes that not all failures to perform constitute a fundamental breach warranting adverse consequences. Under the doctrine of frustration, a contract may be discharged when performance becomes impossible due to unforeseen circumstances.



41. In *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696, the House of Lords held that frustration occurs when circumstances fundamentally alter contractual obligations, making them impossible to fulfill. Similarly, in *Kenya Airways Ltd v. Satwant Singh Flora* [2013] eKLR, the Court of Appeal applied the doctrine of frustration where unforeseen regulatory changes made contractual performance unviable. In discussing this principle, the court stated as follows;

The modern context of frustration was first formulated by Lord Radcliffe in the case of *DAVIS CONTRACTORS LTD V FAREHAM U.D.C*, (1956) A.C 696 which sets out the radical change in the contractual obligation at p. 729:

“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do.”

42. The evidence in this case suggests that external factors—beyond the Appellant’s control—contributed to the failure to deliver sugarcane. The fluctuating sugar prices, logistical hurdles, and the 3rd Respondent’s failure to provide assistance played a significant role. Therefore, applying the principles set out in *Kenya Airways Ltd* (supra), it can be argued that the contract was, at the very least, partially frustrated.

43. The evidence demonstrates that the failure to deliver sugarcane was not solely attributable to the Appellant. Economic difficulties, industry-wide challenges, and the 3rd Respondent’s failure to assist with logistics played a role. While the Appellant had a contractual obligation to deliver sugarcane, his failure to do so was not due to negligence or willful disregard of the contract but rather external circumstances.

44. Therefore, this Court finds that:

- a. The Trial Court erred in holding that the Appellant was solely responsible for the breach of contract.
- b. The 3rd Respondent also bore some responsibility for the breakdown of the contractual arrangement.
- c. The contract may have been partially frustrated due to economic challenges beyond the control of the Appellant.
- d. The finding of breach against the Appellant alone was erroneous and should be set aside

d. Whether the Appellant Is Entitled to the Reliefs Sought

45. The Appellant seeks several reliefs, including a declaration that the statutory notices issued by the 1st Respondent were invalid, a permanent injunction restraining the sale of his property, and the reinstatement of his suit. To determine whether these reliefs should be granted, the Court must assess whether the Trial Court’s decision was legally and factually sound.

46. A fundamental principle in appellate jurisdiction is that an appellate court will only interfere with a lower court’s decision where there is a misapplication of the law, a misapprehension of facts, or where the Trial Court’s findings are not supported by evidence. In *Mbogo & Another v. Shah* [1968] EA 93, the Court held that an appellate court will not substitute its own decision merely because it would have reached a different conclusion but will only intervene where there is a clear error that led to an



- unjust outcome. In this case, the Trial Court's decision was based on an erroneous interpretation of the validity of the statutory notices, the application of principles governing injunctions, and the assessment of contractual obligations between the Appellant and the 3rd Respondent.
47. Having established that the statutory notices were defective, it follows that the 1st Respondent's attempted exercise of the power of sale was unlawful. Under Section 90 and Section 96 of the [Land Act](#), 2012, a chargee must strictly comply with statutory procedures before selling a charged property. The failure to adhere to these provisions renders any intended sale null and void. This position was emphasized in *Maribu Agribusiness Company Ltd (Supra)*, where the Court declared that a sale founded on defective statutory notices is legally untenable. Given this finding, the Appellant is entitled to an order declaring the notices invalid and restraining any sale based on them.
 48. The Appellant also sought injunctive relief to prevent the 1st Respondent from disposing of the property. In *Giella v. Cassman Brown & Co. Ltd [1973] EA 358*, the Court held that an injunction is appropriate where an applicant establishes a prima facie case, demonstrates the likelihood of irreparable harm, and shows that the balance of convenience is in their favor. As analyzed earlier, the Appellant met these conditions. The property in question is his primary asset, and its loss would cause irreparable harm. Moreover, the balance of convenience favors preserving the status quo while allowing the Appellant a reasonable period to regularize his loan repayment.
 49. The reinstatement of the Appellant's suit is warranted given the Trial Court's failure to properly assess the contractual obligations between the parties. The Appellant presented a valid argument that the 3rd Respondent bore responsibility for the contractual breakdown, yet the Trial Court dismissed this without full consideration of the evidence. Since the Trial Court did not appreciate the full context of the contractual relationship and external economic challenges, the dismissal of the suit cannot stand.
 50. Having carefully considered the grounds of appeal, the record of appeal, the submissions of both parties, and the applicable law, this Court finds that the Trial Court erred in its determination. The statutory notices issued by the 1st Respondent were fatally defective as they did not meet the mandatory requirements set out under Sections 90 and 96 of the [Land Act](#), 2012. The failure to adhere to these statutory provisions rendered the intended sale of the Appellant's property unlawful. Consequently, any attempt to auction or transfer the property based on these notices is null and void.
 51. Additionally, the Trial Court misapplied the principles governing injunctive relief. The Appellant had demonstrated a prima facie case, the risk of irreparable harm, and that the balance of convenience favored the preservation of his property. The lower court's failure to grant an injunction resulted in a miscarriage of justice, which must now be rectified.
 52. Further, the Trial Court's finding that the Appellant was solely responsible for the alleged breach of contract was flawed. The evidence revealed that the 3rd Respondent bore some responsibility for the breakdown of the contractual arrangement, and external economic challenges further contributed to the Appellant's difficulties. The contract was, at the very least, partially frustrated, and the Trial Court failed to fully appreciate these factors.
 53. Given the foregoing findings, this Court hereby makes the following final orders:
 - a. The appeal is allowed.
 - b. The statutory notices issued by the 1st Respondent are declared invalid and of no legal effect.
 - c. A permanent injunction is issued restraining the 1st Respondent, whether by itself, its agents, servants, or any other party acting on its instructions, from selling, auctioning, transferring,



or in any way interfering with the Appellant's ownership and possession of Land Parcel No. Kisumu/Border/2389 without an express court order to the contrary.

- d. The Appellant is granted a six-month period from the date of this judgment to engage with the 1st Respondent on a loan restructuring plan and clear any outstanding arrears.
- e. The judgment of the Trial Court delivered on 16th February 2023 is set aside in its entirety.
- f. The suit is reinstated before the Trial Court for a proper determination on merits, with directions to be issued by the lower court.
- g. The costs of this appeal shall be borne by the 1st Respondent.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence of:

The Appellant – Absent

Counsel for the 1st Respondent – Absent

Counsel for the 2nd Respondent – Absent

Counsel for the 3rd Respondent – Mr. Oyuko

Court Assistant – Ms. Neema

