



REPUBLIC OF KENYA



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Koit Developers Limited & 7 others v National Bank of Kenya Limited (Commercial Suit E493 of 2022) [2025] KEHC 8767 (KLR) (Commercial and Tax) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E493 OF 2022**

A MABEYA, J

JUNE 20, 2025

BETWEEN

**KOIT DEVELOPERS LIMITED 1ST PLAINTIFF
SAMAN DEVELOPERS LIMITED 2ND PLAINTIFF
KENETE ENTERPRISES LIMITED 3RD PLAINTIFF
GILERA LIMITED 4TH PLAINTIFF
NASOLE ENTERPRISES LIMITED 5TH PLAINTIFF
BAIA ENTERPRISES LIMITED 6TH PLAINTIFF
MARIMIO ENTERPRISES LIMITED 7TH PLAINTIFF
LINGALA ENTERPRISES LIMITED 8TH PLAINTIFF**

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiffs against the defendant via a plaint dated 9/12/2022. They sought a declaration that the defendant's illegal transfer of the plaintiffs' properties constituted unlawful deprivation of the properties. That damages be awarded for unlawful deprivation of property in the sum of Kshs. 711,207,000/= together with interest on the said amount and costs of the suit.
2. It was the plaintiffs' case that they had appointed one Mr. Sammy Boit Arap Kogo as their agent to negotiate the terms of a Joint Venture Agreement ("the JVA arrangement") with Bethlehem Trading Company Ltd (BTCL) for the importation and sale of sugar. That under that arrangement, BTCL was responsible for arranging for the opening of Letters of Credit (LC) with the defendant and handling



- the actual importation of sugar. On their part, the plaintiffs were to provide security for the LC by allowing charges to be registered over their properties, which were valued at Kshs. 205,000,000/-.
3. Pursuant thereto, BTCL approached the defendant for the opening of the LC and the plaintiffs provided their title deeds to facilitate the creation of the charges over their properties. The titles provided were for LR. Nos. 20066, 20075, 20076, 20077, 20078, 20082, 20087 and 20088, Malindi (“the suit properties”). They contended that it was their expectation that the proceeds from the sugar sale would be used to clear the debt under the LC after which, the suit properties would be discharged and titles returned.
 4. They contended that after the LC was opened and the Charges created over the titles, the JVA arrangement failed because the defendant canceled the LC. The titles were not to be used for any other purpose since the intended transaction had collapsed. Despite as aforesaid, the defendant failed to discharge the Charges nor return the titles. As a result thereof, the plaintiffs had been unable to exercise their proprietary rights over the properties as guaranteed by the *Constitution*.
 5. In November 2022, the plaintiffs discovered that the defendant had transferred the suit properties to Orascom (K) Ltd, a third party, under unclear and suspicious circumstances. That the said transfer was unlawful and it caused the plaintiffs substantial financial loss equivalent to the market value of the suit properties. Consequently, they claimed damages from the defendant for unlawful deprivation of property with the measure of damages being the current market value of the suit properties.
 6. In opposition to the suit, the defendant filed a statement of defence dated 24/1/2023. The defendant stated that at the plaintiffs' request, it had agreed to lend BTCL a loan facility of Kshs. 160,000,000/=. To secure this loan, the plaintiffs executed Charges over the suit properties, with each charge amounting to Kshs. 20,000,000/=.
 7. That the Charges were registered with the Registrar of Companies on 15/12/1994 and Certificates of registration issued accordingly. That the suit properties belonged to the respective plaintiffs as follows: -
 - a. L.R. No. 20066 - 1st Plaintiff.
 - b. L.R. No. 20076 - 2nd Plaintiff.
 - c. L.R. No. 20075 - 3rd Plaintiff.
 - d. L.R. No. 20088 - 4th Plaintiff.
 - e. L.R. NO. 20077 - 5th Plaintiff.
 - f. L.R. No. 20078 - 6th Plaintiff.
 - g. L.R. No. 20082 - 7th Plaintiff.
 - h. L.R. No. 20087 - 8th Plaintiff.
 8. Additionally, that the loan was further secured by personal guarantees by BTCL's directors, Joram Shivachi and Jotham K. Nyukuri, for a total sum of Kshs. 205,000,000/=, which corresponded to the assessed value of the suit properties as per the valuation reports by Lloyd Masika Limited.
 9. That on 23/12/1994, the defendant issued an LC to D.G. Bank Frankfurt Main (now DZ Bank AG) in Germany for USD 4,250,000 to facilitate BTCL's sugar shipment to Mombasa. The letter specified that the latest shipping date was 17/3/1995, with the Letter of Credit expiring on 30/4/1995. The transaction was expected to be completed within this period.



10. The defendant denied that the LC was cancelled and contended that the LC expired upon lapse of its validity period due to BTCL's failure to deliver the sugar by 17/3/1995. It denied that it had unlawfully refused to discharge the Charges and maintained that the suit properties could not be released until the loan facility was fully settled.
11. That as lender and chargee, its rights superseded the plaintiffs' proprietary rights over the charged properties, given that BTCL had an outstanding debt. The defendant denied knowledge of any illegal or wrongful transfer of the suit properties and put the plaintiffs to strict proof. It further denied that the plaintiffs had suffered any loss, insisting that the plaintiffs had not substantiated their claims.
12. The defendant also contended that the suit was res judicata, arguing that a similar matter had been litigated in HCCC No. 482 of 2006, which concerned the same dispute over the suit properties. That the same had been dismissed with costs on 9/7/2007. The defendant also challenged the court's jurisdiction, reiterating that the matter had already been adjudicated upon. Accordingly, the defendant prayed for the dismissal of the suit with costs.
13. Pw1, Sammy Boit Arap Kogo, testified for the plaintiffs. He adopted his witness statement dated 9/12/2022 as his evidence-in-chief and produced the bundle of documents dated 9/12/2024 and the further supplementary bundle dated 11/12/2024 as PExh1 and 2. He reiterated the facts set out in the plaint.
14. During cross-examination, he told the Court that he was given power of attorney to transact business on behalf of the plaintiffs. That the discharge of the charged properties was to be effected within two years of the JVA arrangement. That the JVA arrangement was agreed at 60% share for Jirongo and 40% for him.
15. Regarding the LC, he testified that as per the Irrevocable Memorandum, the bank was supposed to return the title deeds once the transaction was completed. That however, although the LC was canceled by the defendant, there was no documentary evidence to confirm that fact. That BTCL did not deliver the sugar even after the LC had lapsed.
16. He further testified that the bank did not advance any money to BTCL, and since the LC lapsed, there was no lending and no money was released. He referred to a letter dated 8/12/1995 in which the plaintiffs had warned the bank against allowing BTCL to take a loan. That if BTCL took any loan, that was strictly between BTCL and the defendant and the plaintiffs bore no liability for such an arrangement. He further told the Court that the defendant sold the plaintiffs' properties without issuing any courtesy notices to them.
17. In re-examination, he stated that according to the LC, the defendant was not supposed to release any payment until the goods were loaded in Kenya. However, this never happened, meaning the bank did not make any payments. Consequently, there was no default on the part of the plaintiffs. Despite this, the title deeds remained in the bank's possession and were never released to the plaintiffs.
18. Pw2 was Kenneth Mwema, a property valuer at Lloyd Masika. He testified and produced eight valuation reports found at pages 239 to 310 of PExh1 as evidence. During cross-examination, he stated that the total valuation of the eight properties amounted to Kshs. 205 million at the time of valuation. That each valuation report pertained to a different plaintiff individually. He further testified that the valuations were conducted in 1994, but the property transfers were only discovered in November 2022. He confirmed that the property values had significantly escalated since 1994, with the updated valuations reflected at page 332 of PExh1.
19. The defendants did not call any witnesses, and the parties did not file any submissions.



20. I have carefully considered the pleadings and the evidence on record. The main issue for determination is whether the plaintiffs have established a case against the defendant. In addressing this issue, the Court will analyze three key issues, were the Charges supposed to be discharged at any given time, was the transfer of the suit properties to a 3rd party lawful and whether the plaintiffs suffered any loss and if so, the measure thereof.
21. It is undisputed that the defendant issued an LC dated 23/12/1994 to BTCL for importation of sugar. To facilitate this transaction, the plaintiffs offered the suit properties as security and Charges were registered against them. The JVA arrangement did not materialize and the LC therefore lapsed. There was no release of any money as no sugar imported.
22. That being the case, the defendant was obligated to discharge the properties and return the title deeds as the purpose for which they were offered had failed. The defendant disputed this fact and argued that BTCL still had an outstanding loan facility.
23. From the evidence on record, the plaintiffs had offered the suit properties specifically for securing an LC. When that transaction failed, the plaintiffs formally notified the defendant through letters dated 28/12/1995, 8/12/1995, and 8/1/1996, informing it that the LC had expired and cautioned against advancing any funds to BTCL.
24. In its letter dated 28/12/1995, the 5th plaintiff explicitly stated that the plaintiffs would not be liable if the defendant permitted BTCL to convert the LC into a loan facility. In response, the defendant, through a letter dated 28/12/1995, acknowledged this position and assured the plaintiffs that no loan facilities would be granted against the Charged titles for any purposes other than that initially agreed upon.
25. An examination of the LC confirms that it was required to be utilized within 26 days from the date of the bill of lading but always within the validity period of the documentary credit. The deadline set in the LC was 30/4/1995. Any transaction conducted beyond this date was therefore invalid.
26. It is clear that the LC, which formed the basis of the contractual relationship between the defendant and the plaintiffs had expired. Thereafter, there was no justification whatsoever for the defendant to continue holding the plaintiffs' titles. It was duty bound to discharge the suit properties.
27. The defendant contended that BTCL still owed it funds. This in the view of the Court is a spurious and baseless claim. Firstly, there was no evidence to rebut the testimony of Pw1 that the titles were strictly offered for the purposes of the LC and nothing else. Secondly, there was evidence that the defendant itself admitted this fact from the correspondence produced. Thirdly, there was no evidence that the defendant advanced any loan to BTCL and that loan was sanctioned by the plaintiffs or the plaintiffs agreed to give security for the same.
28. In commercial transactions, a creditor is only entitled to enforce a Charge only where there is an outstanding obligation secured by that Charge. There was no evidence that there was any transaction that was secured by the suit properties after the LC lapsed. Accordingly, the defendant had no legal basis to continue holding the properties or to dispose of them.
29. The Court notes that the defendant did not call any witness to support its defence. Where a defendant fails to attend a hearing and produce evidence, its defense remains an unproven statement of fact. See *John Didi Omulo v Small Enterprises Finance Co Ltd & Another* [2005] eKLR and *CMC Aviation Ltd v Cruisair Ltd* [1978] eKLR, where the courts held that averments in pleadings, unless supported by evidence, cannot form the basis of a decision.



30. In the present case, there is no evidence that any funds were disbursed before the expiration of the LC. Furthermore, BTCL, through its director, acknowledged that delivery of the sugar did not take place due to technical issues with the supplier. Given these facts, the Court is convinced that the defendant had no legal right to retain the plaintiffs' properties under the registered charges.
31. Pw1 testified that the suit properties were transferred to a third party, a fact that remained uncontroverted. The plaintiffs produced official searches that demonstrated that the properties are registered in the name of Orascom K Limited. This evidence was not challenged by the defendant.
32. There was no evidence that was produced to justify the transfer of the suit properties to a 3rd party. The transaction for which the titles were offered having collapsed, the defendant had no right to continue charging the suit properties, leave alone to sell or transfer them to any 3rd party. The transfer of the suit properties was without any basis, was unlawful and infringed on the plaintiffs' proprietary rights.
33. In view of the foregoing findings, the Court holds that as a result of the defendant's actions, the plaintiffs were unlawfully deprived of their assets, the suit properties, leading to financial loss and damage and are therefore entitled to damages.
34. The plaintiffs have claimed a sum of Kshs. 711,207,000/- as the market value of the properties. In support of this claim, Pw2 testified that the properties had significantly appreciated in value over 28 years. He produced valuation reports which indicated the current market value, demonstrating the extent of the loss suffered by the plaintiffs due to the unlawful transfer of those properties.
35. The defendant did not call any witnesses to challenge or rebut the valuation reports. There was no any evidence to show the current value of the suit properties are apart from the valuations produced and relied on by the plaintiffs.
36. In view of the foregoing, I find that the plaintiffs have proved their case against the defendant. I find that the suit is merited and the same is allowed in the terms of the plaint as follows: -
 - a. A declaration hereby issues to the effect that the defendant unlawfully refused to discharge the Charges registered against the plaintiffs' properties, namely, LR. Nos. 20066, 20075, 20076, 20077, 20078, 20082, 20087 and 20088, Malindi.
 - b. A declaration hereby issues that the transfer and registration of the plaintiffs' properties, namely, LR. Nos. 20066, 20075, 20076, 20077, 20078, 20082, 20087 and 20088, Malindi, by the defendant in the name of Orascom K. Limited was illegal.
 - c. The defendant do pay to the plaintiffs a sum of Kshs. 711,207,000/= being the loss suffered by the plaintiffs for the illegal transfer of their properties.
 - d. The amount in (c) above shall attract interest at court rates from the date of this judgment until payment in full.
 - e. The defendant shall bear the costs of the suit.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE

