



REPUBLIC OF KENYA



**KENYA LAW**  
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**HFC Limited v Hamberger (Civil Appeal E136 of 2024)  
[2025] KEHC 12295 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 12295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E136 OF 2024**

**F WANGARI, J  
JULY 17, 2025**

**BETWEEN**

**HFC LIMITED ..... APPELLANT**

**AND**

**ANN WANGUI HAMBERGER ..... RESPONDENT**

*(Being an appeal against the Judgment and decree of Hon. M. L. Nabibya (SPM) delivered on 18th April 2024 in Mombasa Chief Magistrate's Court CMELC No. 638 of 2020, Anne Wangui Hamberger v Housing Finance Company of Kenya Limited)*

**JUDGMENT**

1. The appeal herein emanates from a suit in the trial court brought forth vide a Plaint dated 25/06/2020 where the Plaintiff/Respondent averred that at all material times relevant to this suit, the Plaintiff entered into a mortgage loan facility with the Defendant/Appellant for Kshs. 6,000,000, charged over property known as L.R./Title No. 11628 Section II Mainland North. That the Plaintiff has dutifully been repaying the mortgage to the Defendant and when the account was in arrears the same was settled promptly by the Plaintiff.
2. The Plaintiff further stated that on or about 11/06/2020, on perusal of the Standard Daily Newspaper, she noted that the charged property was due for auction on 26/06/2020. That she has since cleared all pending arrears of Kshs. 515,000 and that it was a term of the mortgage loan facility that once arrears have been settled, the auction would be suspended. The Plaintiff further avers that the Defendant has since refused to suspend the auction and insist on proceeding with the same contrary to the terms of the mortgage loan facility thus in breach of the contract.
3. The Plaintiff/Respondent prayed that there be a declaration that the Defendant was in breach of mortgage loan facility dated 18/07/2013, a declaration that the auction is illegal, null and void, a



- permanent injunction against the defendant not to auction property LR/Title No. 11628 Section 11 Mainland North when not in arrears, costs of the suit, and any other relief that this court may grant.
4. The Defendant/Appellant entered appearance and filed a 'Statement of Defence' dated 20/07/2020 where they denied averments in the Plaintiff save for admitting being a limited liability company, entering into a mortgage loan facility with the Plaintiff, having been no other suit pending before the court of law between the parties over the same subject matter, and jurisdiction of the court.
  5. Further, it is stated in the Defendant's Witness Statements of the Branch Managers, Anthony Mugendi and Paul Nyamari, dated 23/03/2021 and 23/10/2023 respectively that Clause 13.1 & 13.2 of the Letter of Offer and Clause 7.1 and 7.2 of the Charge declared that a failure to pay any single instalment would constitute an event of default which would make the entire facility due and payable on demand. That the Plaintiff defaulted in making payments in 2018 and as at 31<sup>st</sup> July 2018, she was in arrears of Kshs. 156,274.36.
  6. That this prompted the Defendant to issue her with a 3 months statutory notice dated 19<sup>th</sup> July 2018 and a 40 day Notice to Sell dated 14/08/2019. That on receiving the notices, the Plaintiff vide a letter dated 23/09/2019 pleaded for time. That the Defendant vide a letter dated 07/10/2019 indulged the Plaintiff subject to her paying the arrears which then stood at Kshs. 640,182.15 within 21 days.
  7. That the Plaintiff did not pay the amount and as a result, the Defendant instructed Legacy Auctioneers to realize the security, who then served the Plaintiff with the required redemption notices, which were forwarded to the Defendant under the cover letter dated 12/02/2020.
  8. That by a letter dated 03/04/2020, the Plaintiff through her advocates requested that the auction slated for 17/04/2020 be suspended. That the Defendant declined the Plaintiff's request vide the letter dated 08/04/2020 because the arrears had risen to Kshs. 646,583. That the auction scheduled for 17/04/2020 was unsuccessful and a fresh one was scheduled for 26/06/2020 and the Plaintiff notified through an advertisement dated 11/06/2020.
  9. That on 19/06/2020, the Plaintiff made a payment of Kshs. 509,000 and insisted that the auction be called off. The demand was however rejected for reasons that payment did not clear the outstanding amount and that payment did not settle the auctioneer fees that had become due. That the Plaintiff insisted that she should not pay the auctioneer's fees and as at the time the Plaintiff moved to court to seek the injunction, her account was in arrears of Kshs. 55,172.84 as at 09/07/2020.
  10. The suit was heard in the trial court and judgment delivered on 18<sup>th</sup> April 2024 where the court held: -
    - “I do not think the plaintiff can successfully fail to pay the auctioneer charges considering he admitted to late payment even after notification.
    - I therefore believe that defendant's acts of intending to sell the security of the loan when there is currently no evidence of arrears will occasion her unnecessary loss.
    - Whereas, I decline to declare that the defendant breached the mortgage agreements on reasons that the plaintiff was in default at some point.
    - I do proceed to state that the prayer to declare the auction data 26/6/2020 as spent and a permanent injunction is hereby issued against the sale of LR Title 11628 section II Mainland North when not in arrears.
    - Cost and interest allowed.”



11. Being dissatisfied, the Appellant appealed against the Judgment and Decree through the Memorandum of Appeal dated 17/05/2024 on grounds that the learned magistrate erred in law and fact in finding that there was 'currently no evidence of arrears' when that was not the Respondent's pleaded case, in finding that the Respondent was not in arrears when the evidence on record showed that the Respondent was in arrears even as at March 2021, and in concluding that the Respondent was not in arrears despite her finding that the Respondent was bound to pay, but had not paid, the auctioneer's charges.
12. The Appellant prayed for orders that the appeal be allowed with costs and that the Judgment and the resultant decree be set aside in its entirety and be substituted with an order dismissing the suit with costs.
13. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 14/10/2024 argued that the trial court having permitted a sale if there was default opened a perpetual dispute as to when there was default. The Appellant cited the case of Daniel Kiminja & 3 Others v County Government of Nairobi (2019) KEHC 2059 (KLR) and submitted that the correct starting point should have been when the suit was filed on 25<sup>th</sup> June 2020 and not at the time of writing judgment on 18/04/2024.
14. The Appellant further submitted that in the eyes of the law, the default to be rectified was Kshs. 3,893,870.50 as stated in the redemption notice dated 06/02/2020. The Appellant relied on the holding in Anthony Njenga Muna v Equity Bank Limited & 2 Others (2016) eKLR. That if the Appellant's email of 21/05/2020 was the default that needed rectification, the amount therein was Kshs. 618,531.65 and the Respondent in her testimony stated that she paid Kshs. 509,000 which was outside the agreed window period. That the Respondent was bound to pay the auctioneer's fees which had not been cleared as at date of judgment and as was held in Festus H. K. Mngambwa v Housing Finance Co. of Kenya (2009) eKLR, the auctioneer's charges were payable by the Respondent. That as at 17/03/2021, the statement of account shows that the Respondent was still in arrears of Kshs. 1,138,027.78 and that it is impossible to appreciate how the trial court concluded that there was evidence the arrears had been cleared.
15. As at the time of writing the Judgment herein, the Respondent had not filed her submissions. This court will therefore proceed to determine the appeal on merit.

### **Analysis**

16. I have considered the Record of Appeal and the submissions on record. The issues for determination are: -
  - a. Whether the Respondent was in arrears as at the time judgment was delivered
  - b. Who should bear costs
17. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
18. It is not in dispute that the Respondent took a mortgage facility with the Appellant Bank. It is also not in dispute that at some point, the Respondent fell into arrears of the loan repayment and the



Respondent commenced recovery proceedings. It is as a result of the recovery proceedings that the Respondent filed the suit in the lower court.

19. The trial court held granted a permanent injunction against the Respondent from selling the security i.e. LR/ Title No. 11628 Section Ii Mainland North when not in arrears. the issue for determination is when there is a default that would warrant the Respondent to exercise its statutory power of sale. The Appellant submitted that the orders of the court would open a perpetual dispute as to when there is default and this court was called upon to intervene.
20. The dispute calls for the perusal of the filed documentary exhibits before this court. I have perused through the Letter of Offer dated 13/07/2013 and signed by the parties on 05/08/2013. I have also perused through the Charge dated 04/02/2013 and signed by the parties on 02/12/2013.
21. I make reference to the Letter of Offer clause 13 on “Events of Default”. Clause 13.2.2 states as hereunder;

“Declare the loan due and payable whereupon the same shall become immediately due and payable together with all interests accrued thereon and all other amounts payable in connection therewith”
22. Further, I make reference to the Charge that was registered in the land office on 12/02/2014. To be more specific, the following clauses refers;

Clause 2; Covenant to Pay

Clause 7: Events of Default

Clause 8: Enforcement
23. From the above clauses, in the event of default by the Respondent, the Appellant is at liberty to exercise the statutory power of sale as per the terms agreed upon by the parties. The parties are bound by the terms they agree upon unless there is evidence of fraud, coercion and undue influence.
24. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR it was held as follows;

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR.
25. From the above, the parties are bound by the terms of their agreement and the court could not change the terms by giving conditions as to when the exercise of the statutory power of sale could take place. On this account, the Judgment of the court granting a permanent injunction when not in arrears is hereby set aside, and the parties to abide by the terms of the Letter of Offer and the Charge.
26. In the event of default, the Appellant to follow the requisite procedures before exercising the statutory power of sale.
27. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. I hereby direct that each party to bear its own costs.

## **Determination**

28. Following the foregone discourse, the upshot is that the following orders do hereby issue: -



- a. That the appeal has merits to the extent that the Permanent Injunction against the Appellant is hereby lifted.
- b. That in the event of Default, the Appellant to exercise its Statutory Power of Sale as per the terms of the agreement.
- c. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JULY, 2025**

.....

**HON. F. WANGARI**

**JUDGE**

In the presence of;

Mr. Kongere Advocate the Appellant

N/A by the Respondent

Norah, Court Assistant

