



Swaleh & another v Kenya Finance Corporation Limited & another (Civil Suit 119 of 2021) [2024] KEHC 1421 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 119 OF 2021
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

SWALEH SAID SWALEH 1ST PLAINTIFF

ZAITUN SAID SWALEH 2ND PLAINTIFF

AND

KENYA FINANCE CORPORATION LIMITED 1ST DEFENDANT

ALI KINGA WASSA 2ND DEFENDANT

JUDGMENT

1. In the Complaint dated and filed on 3rd December 2021, the Plaintiff pleaded among others that:
 - i. The 1st Defendant advanced a loan to the 2nd Defendant for Kshs. 600,000/- on security charged on Land Reference 126 Section I Mainland North CR No. 1861/1 sometimes in 1994.
 - ii. The Plaintiffs hold conformed grants and are beneficiaries of Land Reference 126 Section I Mainland North CR No. 1861/1.
 - iii. The original title was deposited and is under custody of the 1st Defendant.
 - iv. The Defendant defaulted in the loan payment and the 1st Defendant has held lien over the title and declined to execute discharge of charge in favour of the 2nd Defendant.
 - v. As a consequence, the rights of the Plaintiffs in the suit premises are prejudiced because they are unable to enjoy their interest in the suit premises.
2. The Plaintiff therefore prayed for reliefs as follows:



- a. A Declaration that the continued holding of the charge dated 30th September 1994 over Land Reference 126 Section I Mainland North CR No. 1861/1 by the 1st Defendant is unlawful, inequitable and unconscionable.
 - b. The 1st Defendant be directed to hand over to the Plaintiffs an appropriate instrument of discharge of charge on the land reference number 126 Section I Mainland North CR No. 1861/1.
 - c. In default of execution of the instrument in (b) above, the Deputy Registrar to execute te discharge of charge discharging the charge registered on land reference no.126 Section I Mainland North CR No. 1861/1 on the 30th September 1994.
 - d. Cost
3. The 2nd Defendant filed Statement of Defence dated 21st July 2022 in which it substantially denied the claim.
 4. The 1st Defendant did not enter appearance or file a defence.

Evidence

5. At the hearing, the 1st Plaintiff adopted the Plaintiffs' Joint Witness Statement and Bundle of Documents dated 3rd December 2021 which he produced in evidence.
6. It was his case on cross examination that the 2nd Defendant is his nephew and took a loan without the Plaintiffs' knowledge and charged the suit property with the 1st Defendant.
7. Further, that only one third of the suit premises was used as security and two-thirds was not charged.
8. He prayed for the reliefs sought in the Plaintiff.
9. The 2nd Defendant closed his case without testifying or calling a witness.

Analysis

10. The suit consists of largely undisputed matters. The 2nd Defendant's Defense denies the averments in the Plaintiff but per his advocate's opening statement, the 2nd Defendant subsequently paid the loan. The 1st Defendant would be in a better position to confirm whether the loan was settled but it chose not to defend the suit.
11. In the case of *Kerai Ghanshyam v James Wambua Muendo* [2021] eKLR, the court stated as doth: -
 14. I am alive to the Court of Appeal's position in *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* [2014] eKLR that espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”



In the above case, the court held that submissions alone does not amount to evidence. The appellant in the lower court failed to tender evidence and hence the respondent's evidence remained uncontroverted.

12. Further, in the case of *Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya)*, Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in *Edward Muriga through Stanley Muriga –vs- Nathaniel D. Schulter*, Civil Appeal No. 23 of 1997 that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.”

13. The Defence filed by the 2nd Defendant in this case contains mere allegations that were not substantiated in evidence and I so find.
14. In material, Order 10 of the Civil Procedure Rules deals with consequence of non-appearance, default of defense and failure to serve.
15. Under the said Order 10, Rules 4 to 7 provide for the instances where interlocutory judgment may be entered.
16. These instances include where:
- a. the plaintiff makes a liquidated claim or a liquidated claim with some other claim as under rule 4;
 - b. or as under rule 5 where the Plaintiff makes a liquidated claim with or without some other claim and there are several defendants of whom one or more appear and some others fail to appear.
17. In such circumstances, the court on application by the Plaintiff will enter interlocutory judgment for the liquidated sum against the Defendant(s) who have not appeared and the other claim will await hearing.
18. Moreover, under Order 10 Rules 6 and 7 of the Civil Procedure Rules, the procedure provided is for the entry of judgment where the claim is for pecuniary damages and in that case, interlocutory judgment will be entered against a defendant who fails to appear, or to file a defense and subsequently the suit is set down for assessment of damages.
19. Conversely, however, in the instant suit there is no provision for entry of interlocutory judgment as the Plaintiffs claim does not fall under any of the provisions under Order 10 Rules 4,5,6 and 7 where interlocutory judgment may be entered.
20. The Plaintiff claims for:
- a. A Declaration that the continued holding of the charge dated 30th September 1994 over Land Reference 126 Section I Mainland North CR No. 1861/1 by the 1st Defendant is unlawful, inequitable and unconscionable.



- b. The 1st Defendant be directed to hand over to the Plaintiffs an appropriate instrument of discharge of charge on the land reference number 126 Section I Mainland North CR No. 1861/1.
 - c. In default of execution of the instrument in (b) above, the Deputy Registrar to execute te discharge of charge discharging the charge registered on land reference no.126 Section I Mainland North CR No. 1861/1 on the 30th September 1994.
 - d. Cost
21. Therefore, it follows that in this instant matter, Order 10 Rules 9 and 10 would come into play. Rule 9 provides thus:-
- 9. Subject to Rule 4 in all suits not otherwise specifically provided for by this order, where any party served does not appear the Plaintiff may set the suit down for hearing.
22. Rule 10 provides; -
- 10. The provisions for Rules 4 and 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defense
23. Faced with similar circumstances as in this case, the court in *James Ngara Mukiri & another v Josephine Wangari Mukiri* [2013] eKLR opined as follows:
- In the circumstances of this case therefore no interlocutory judgment could be entered and indeed the deputy registrar did not enter any as he merely directed the plaintiff to fix the case for formal proof hearing and hence there was no interlocutory judgment available for setting aside.
24. However, my duty is to assess the pleadings and evidence produced by the Plaintiffs against the standard of proof in civil cases even if nothing was filed or proved by way of Defence.
25. The Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau (2016)* eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-
- “We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly dis credited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”
26. I consequently have to discern the testimony and evidence produced by the Plaintiff in court. I note from the documents produced that there was indeed a charge in the name of one Kibwana Bin Swaleh who is deceased. There is also a Grant of Administration in favour of the Plaintiffs as legal representatives of the Estate of the said Deceased person.



27. On the issue whether the loan was settled, I have already stated that the 1st and 2nd Defendants were in a better position to respond to this issue. The 1st Defendant did not defend the suit and the 2nd Defendant did not call any witnesses to testify in Court and his counsel relied on the filed Defence. The averments in the Plaint are thus uncontroverted.
28. However, the burden of proof remains with the Plaintiffs and on a balance of probabilities.
29. I now proceed to establish whether the Plaintiffs are entitled to the reliefs sought. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”
30. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
31. I note that the Plaintiffs did not seek any relief against the 2nd Defendant. The Plaintiffs seek that the charge registered n the suit premises be discharged. On a balance of probabilities, I am inclined to find in favour of the Plaintiffs. If the loan was settled, thee is no reason 1st Defendant continues to hold lien on the title to the suit property. If the loan is still outstanding, nothing would have stopped the 1st Defendant from defending the suit to say so. the Defence by the 2nd Defendant contains mere allegations.
32. Worse still, in my view, the 2nd Defendant’s Defence is a bundle of mere denials because whereas the 2nd Defendant denies taking any loan, notwithstanding, he instructed his counsel to inform the court that he had settled the loan liability and moved to close his case without any testimony or evidence to assert the allegations. I am inclined to find in favour of the Plaintiffs. In any event, the Plaintiffs sought no relief against the 2nd Defendant.
33. I am consequently satisfied that the Plaintiffs have established the case as against the 1st Defendant on a balance of probabilities.

Determination

34. The upshot I allow the Plaintiffs’ suit as follows:
- a. A Declaration is hereby issued that the continued holding of the charge dated 30th September 1994 over Land Reference 126 Section I Mainland North CR No. 1861/1 by the 1st Defendant is unlawful, inequitable and unconscionable.



- b. The 1st Defendant is hereby directed to hand over to the Plaintiffs an appropriate instrument of discharge of charge on the land reference number 126 Section I Mainland North CR No. 1861/1.
- . In default of execution of the instrument in (b) above, the Deputy Registrar of Court shall execute the discharge of charge discharging the charge registered on land reference No.126 Section I Mainland North CR No. 1861/1 on the 30th September 1994.
- d. Each parties shall bear its costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024.
JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian

