



Rafiki Microfinance Bank Ltd v Monetary Dynamics Company Ltd (Commercial Case E008 of 2022) [2024] KEHC 6849 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL CASE E008 OF 2022**

FROO OLEL, J

JUNE 7, 2024

BETWEEN

RAFIKI MICROFINANCE BANK LTD PLAINTIFF

AND

MONETARY DYNAMICS COMPANY LTD DEFENDANT

JUDGMENT

A. Introduction

1. The application (Originating summons) before court for determination is the one dated 27th June 2022 brought pursuant to section 79(6) and (7) of the [land Act](#), 2012, Section 3 & 3A of the [civil procedure Act](#), CAP 21 laws of Kenya and Order 37 rule 4 of the civil procedure Rules, 2010.) The applicant seeks for orders that;
 - a. The Honourable court be pleased to allow the plaintiff to exercise its statutory powers of sale to recover the outstanding balances on account of the Defendant/Respondent.
 - b. That the plaintiff be entitled to vacant possession of the title numbers Mavoko Town Block 12/4328, Mavoko Town Block 12/4329, Mavoko Town Block 12/4330, Mavoko Town Block 12/4331 And Mavoko Town Block 12/4332 to facilitate the exercise of its statutory power of sale.
 - c. That the defendant by himself, tenants/ servants and/or agents or any other occupants do forthwith deliver and give vacant possession of title number Mavoko Town Block 12/4328, Mavoko Town Block 12/4329, Mavoko Town Block 12/4330, Mavoko Town Block 12/4331 And Mavoko Town Block 12/4332 to the plaintiffs and/or the appointed agent to enable sale.



- d. That in the alternative to the above, the respondent, his servants, agents or any other occupants thereof to be forcefully evicted from the subject premises should they fail to deliver vacant possession within 14 days from the date of the order of this Honourable court.
 - e. That the court be pleased to make any further order as it deems fit and just in the circumstances.
2. The summons is supported by the grounds on the face of the said Application and the supporting affidavit of one Jane Warau, who describes herself as the Manager debt recovery of the Applicant company. She did depone that the applicant did apply for a loan of Kshs.1,000,000/= vide its letter dated 7th November 2015 and after conducting a credit evaluation the aforesaid facility was disbursed on 15th November 2015 on terms that the same would be repaid within 36 months in equal installments of Kshs 38,710/= with effect from the first month of drawdown.
 3. To secure this loan facility, the respondent deposited five original title deeds belonging to the company, being properties known as Mavoko Town Block 12/4328- 4332. The respondent had without any justification failed and/or stopped repaying thier loan obligations and made the last payment on 17th July 2018. Despite reminders and demand to settle the same, the respondent had failed to redeem the said debt leaving an outstanding loan balance of Kshs 2,339,827.15/= as 28th February 2022 and it continues to attract interest at 23% PA until settlement in full.
 4. The applicant further deponed that the act of depositing the original title deeds with the plaintiff, amounted to the creation of a informal charge under section 79(6) of the *land Act*, No 6 of 2012 and it was therefore necessary under section 79(7) of the *land Act*, No 6 of 2012 for them to obtain an order from this court to commence security realization as the defendant/respondent had abandoned its loan obligations and they had no choice but to resort to court action to be granted leave to exercise their statutory power of sale.
 5. Despite being served, the defendant/respondent did not enter Appearance in this matter nor did they file any response to the Originating summons.

Analysis & Determination

6. I have carefully considered the Application, Supporting Affidavit, and the only issues which arise for determination is whether leave should be granted to the applicant to exercise their statutory power of sale and whether or not to also grant them orders of vacant possession.
7. Section 79 (1) of the *land Act*, No 6 of 2012 provides that;

An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.

Section 79 (5) of the said *land Act*, further provides that;

A formal charge shall take effect only when it is registered in a prescribed register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.

Section 76 (6) of the *land Act* provides 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;
- 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

Finally, section 79(7) of the [land Act](#), No 6 of 2012 provides;

A chargee an informal charge may only take possession of or sell the land which Is subject of an informal charge, on obtaining an order of the court to that effect.

8. The plaintiff averments have not been traversed in this matter. The plaintiff holds various titles registered in the names of the defendant, which were deposited with them to secure a loan advanced. The defendant has failed to settle the loan so advanced and therefore there is no reason as to why prayer (1) one of the originating summons should not be allowed. Leave is thus so granted; allowing the plaintiff to exercise its statutory power of sale over parcels Mavoko Town Block 12/4328 to 4332 allowing them to recover the outstanding balances on account the unpaid loan.
9. The plaintiff further seeks vacant possession of parcel's L.R Mavoko Town Block 12/4328 to 4332 and in the alternative for the court to issue an order, forcefully evicting the respondent his servants' agents from the said parcels of land, should they fail to deliver vacant possession within 14 days.
10. There is a thin line when it comes to the High court handling and determining commercial matters where the chargee seeks to enforce contractual rights provided for under the charge document/ exercising their statutory power of sale and extending their jurisdiction to related matters dealing with use and or occupation of land, which jurisdiction lies exclusively with the with the Environment and land court as mandated under Article 162(2)(b) of [the constitution](#) 2010 as read with Section 13 of the [Environment and land court Act](#), 2012.
11. In Mombasa court of Appeal civil Appeal No E055 OF 2022 Bank of Africa ltd & Another Vrs TSS Investments Limited & 2 others (Murgor(JA), Dr Liabuta(JA) and Odunga(JA) rendered their opinion on this issue giving clarity over the question of Jurisdiction. Relying on Cooperative Bank limited Vrs Patrick Kangethe Njuguna & 5 others (2017) eklr and Joel Kyatha Mbaluka T/A Mbaluka & Associates Advocates Vs Daniel Ochieng Ogola T/A Ogola Okello & Co Advocates (2019) eklr, the appellate court noted that the " ELC has jurisdiction to deal with disputes connected to "use" of land and the contracts incidental to the "use of land", which do not include mortgages, charges, collection of dues, and rent which fall within the civil jurisdiction of the High court."
12. This court's jurisdiction does not extend to issues relating to "use and occupation of land," and therefore cannot grant the orders sought for vacant possession and/or eviction of the occupants of parcel L.R Mavoko Town Block 12/4328 to 4332. The said orders are best canvassed in the Environment and land court, which has the ultimate jurisdiction to handle the same



Disposition

13. Taking all relevant factors into consideration, I do grant prayer (1) of the originating summons and allow the plaintiff to exercise its statutory power of sale to dispose off/sell land parcels Mavoko Town Block 12/4328 to 4332 to recover the outstanding balance/debt owed by the Defendant/Respondent.
14. The plaintiff will have half costs of this suit assessed at Kshs.150,000/= all inclusive.
15. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 7TH DAY OF JUNE 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

