



REPUBLIC OF KENYA



**Springboard Capital Limited v Njenga & another (Civil Appeal
14 of 2024) [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 14 OF 2024
FN MUCHEMI, J
JUNE 14, 2024**

BETWEEN

SPRINGBOARD CAPITAL LIMITED APPELLANT

AND

JAMES NJIHIA NJENGA 1ST RESPONDENT

TABITHA WAHU NJIHIA 2ND RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. M. W. Wanjala
(SRM) delivered on 4th July 2019 in Thika CMCC No. 120 of 2018)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Senior Resident Magistrate in CMCC No 120 of 2018, in a claim that arose from a loan agreement between the appellant and the 2nd respondent. The court below found that the 1st respondent proved his case to the effect that charge in respect of his land LR Kiambu/Gatuanyaga/1131 was obtained illegally and fraudulently by the 1st respondent.
2. Dissatisfied with the court's decision, the appellant who was the chargee lodged this appeal citing 22 grounds summarized herein as follows:-
 - a. The learned trial magistrate erred in fact and law in failing to find that there was privity of contract between the appellant and the respondents;
 - b. The learned trial magistrate erred in law and in fact by failing to find that the loan was properly acquired and the same was not obtained by an illegally acquired title deed;
 - c. The learned trial magistrate erred in law and in fact in failing to consider that the respondents are still husband and wife and acted in collusion to defraud the appellant;



- d. The learned trial magistrate erred in law and in fact in failing to consider that the appellant had a registered interest on the suit property and therefore had the right to exercise its statutory power of sale;
 - e. The learned trial magistrate erred in fact and in law in taking into account extraneous factors in arriving at his decision;
 - f. The learned trial magistrate erred in fact and in law in disregarding the evidence presented by the appellant.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the 2nd respondent obtained a loan from the appellant company for a sum of Kshs 500,000/- repayable within 24 months with interest at the rate of 3.5% per annum. The said loan was secured by a legal charge over LR No Kiambu/Gatwanyaga/1131 vide a charge dated 7th November 2016. The 1st respondent proceeded to voluntarily append his signature on the Guarantee Form and provided accurate details of his residence. The 2nd respondent was unable to repay the loan and the appellant exercised its statutory power of sale and sought to sell the property via public auction.
5. The appellant cites the cases of *Price v Easton* (1833) 4b & Ad 433; *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR and *Gitobu M'buutu Karutho v Christopher Muriithi Kubai* High Court Meru Civil Appeal No 78 of 2006 and submits that the charge instrument formed a valid contract between the parties thus giving rise to privity of contract. As such, the 2nd respondent had a contractual obligation to make monthly instalments towards the repayment of the loan which obligation they cannot wish away as no evidence of fraud or undue influence was produced in court. Furthermore, the appellant submits that the 1st respondent guaranteed the repayment of the loan through executing the guarantee and the charge instrument as the guarantor.
6. The appellant submits that the issuance of the loan facility to the 2nd respondent was properly done and the same was not obtained by an illegally acquired title deed. Prior to the loan advancement, the appellant states that it conducted its due diligence to confirm the registered owner of the suit property and confirmed that the title document was valid and unchallenged.
7. The appellant further submits that it confirmed that the 1st respondent was the absolute and registered proprietor of the suit property which was a matrimonial property thus requiring him to present his passport size photos, copies of his identification card and PIN certificate so as to facilitate the process. The appellant states that the 1st respondent visited its advocates' offices and voluntarily, without any undue influence or coercion tendered the said documents to them. Furthermore, the 1st respondent executed the charge instrument and delivered the suit property's title deed to the advocates offices. To support its contentions the appellant relies on the case of *Patricia Bini v Melina Investment Limited & others* ELC No 11 of 2012.
8. The appellant argues that since the suit property was a matrimonial one and that there was need for a spousal consent to be given by the 1st respondent, the 2nd respondent visited the appellant's advocates' offices and executed a spousal consent giving consent to the 1st respondent to offer property No LR Kiambu/Gatwanyaga/1131 as security for the loan. It is further stated that the 1st respondent personally attended the Land Control Board, applied for a consent to charge and delivered the consent to the appellant's advocates' offices. Thus, the appellant argues that the fact that the 1st respondent was able to obtain the Land Control Board consent and deliver it to the advocates offices is proof that he was



well aware of the transaction. Furthermore, the fact that the 1st respondent failed to demonstrate that the consents were irregularly obtained and were illegal, he ought to be estopped from claiming that the loan was illegally obtained.

9. The appellant states that the respondents are husband and wife being the guarantor and loan applicant respectively and the fact that the 2nd respondent failed to testify was a clear intention of their collusion to defraud them. The 1st respondent was conveniently always privy to the transactions at every single point yet he claimed in court that he solely relied on information regarding the transaction and loan application from an alleged best couple who were never presented to court as witnesses. Further, the 1st respondent failed to prove that the phone number presented in the loan application form was not his.
10. The appellant submits that it was the 1st respondent's testimony that the signatures used in the entire transaction were not his own and the same were forged yet he did not report the alleged forgeries and have the same investigated. Additionally, he did not file a complaint against the firm of Koceyo & Company Advocates who dealt with the transaction to its completion.
11. The appellant states that during the hearing, PW2 failed to authenticate the 1st respondent's signature with an official document such as an identity card, rather he made an authentication with a signature on a piece of paper. Further, the 1st respondent's allegation on the theft of his title is but an after thought and a desperate attempt to absolve themselves from their obligation as the 1st respondent's report to the police of the missing title was made almost a year after the execution of the charge. Interestingly, the appellant submits that the report was made a few days after the 2nd respondent was issued with the first demand letter to settle the outstanding arrears.
12. Pursuant to Section 96 of the [Land Act](#), the appellant submits that its right to exercise its statutory power of sale crystallized when the respondents failed to settle the loan.
13. The appellant argues that the trial court relied on extraneous factors when rendering judgment in favour of the 1st respondent by taking into account that the 1st respondent's postulation that he was unaware of the existence of the loan until 18th February 2022 when he was contacted by the best couple who informed him that his land was due for sale by public auction. The appellant states that the trial court took into consideration the said averments yet the same was not corroborated by the testimony of the alleged best couple.
14. The appellant submits that the learned trial magistrate failed to take into account its evidence but wholly relied on the 1st respondent's submission. The appellant further submits that the record shows that there was a registered charge between the parties with the 1st respondent as the guarantor. Thus, the said charge imposed a duty upon the respondents to repay the loan advanced, failure to which the appellant would seek to recover the debt. Upon the failure by the respondents to pay back the loan, the appellant issued a demand to settle the outstanding amounts through a statutory notice dated 24th November 2017 but the respondents failed to settle the outstanding arrears.

The 1st Respondent's Submissions

15. The 1st respondent submits that he and the 2nd respondent were formerly married and are currently separated. They owned a matrimonial home which the 2nd respondent currently lives. Upon separation, the 1st respondent states that the 2nd respondent secured a loan using the matrimonial home without his consent. The 1st respondent further states that on one occasion he looked for the certificate of title to the said property and reported its loss to the Thika Police Station under OB No 19/5/11/2017. Additionally, the 1st respondent states that on 18/2/2018, he was contacted by their



- pastor that the matrimonial property was scheduled for sale by the appellant under a loan facility by the 2nd respondent.
16. The 1st respondent relies on Section 6 of the *Matrimonial Property Act*, Article 45 (3) of the *Constitution* and the case of *UMM v IMM* [2014] eKLR and submits that both parties had equal rights to the matrimonial property upon the breakdown of their marriage. Further, the 1st respondent submits that the appellant and 2nd respondent forged his signature on the spousal consent and guarantor forms which he proved by calling PW2, Chief Inspector Daniel Guto. As per the report, the opinion confirmed that the 1st respondent did not sign the documents.
 17. The 1st respondent further submits that the 2nd respondent acquired copies of his ID, KRA PIN and passport photos which were in their matrimonial home to obtain the loan. Further, the 2nd respondent used the wrong phone number to fill in the guarantor's form which illustrates ill intent from her. The 1st respondent argues that the appellant before handing out the loan should have exercised due diligence by confirming that indeed that he agreed to the loan and for the property to be charged.
 18. Relying on Section 79(3) of the *Land Act* and the cases of *Julius Mainye Anyega v Eco Bank Limited* [2014] eKLR and *Margaret Muthoni Njoroge v Housing Finance Company Limited & another* [2020] eKLR, the 1st respondent argues that a spouse must consent to a charge especially if it affects their matrimonial property, which the 2nd respondent failed to acquire and obtained the same through fraudulent means.
 19. The 1st respondent further relies on Section 96 of the *Land Act* and the case of *Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited* [2017] eKLR and submits that the appellant ought to have served him with an intention to sell because he had an interest in the property. However, the 1st respondent states that he came to learn of the sale through a close friend that his property had been advertised for sale by public auction. Thus, the actions by the appellant in failing to serve him with the requisite notices and disposing the property hastily shows that the appellant was being mischievous and fraudulent.
 20. The 1st respondent states that he proved to the standards required of the land that the sale was fraudulent and by the appellant arguing that there was no fraud perpetrated by the appellant without any notice to him as the registered proprietor. The 1st respondent further states that the ends do not justify the means as the means used by both the appellant and 2nd respondent was not in compliance with the law relating to charges.
 21. Relying on the case of *PA v Stima Sacco Society Limited & 2 others* (Civil Case 199 of 2018) [2022] KEHC 294 (KLR), the 1st respondent submits that since the entire process of charging the property was filled with illegality the charge should be regarded null and void.
 22. The 1st respondent further relies on the case of *Levben Products v Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 and urges the court to award him costs.

Issue for determination

23. The main issue for determination is whether the 1st respondent proved his case on a balance of probabilities.



The Law

24. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

25. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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.

26. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the 1st respondent proved his case on a balance of probabilities.

27. This degree of proof is well enunciated in the case of *Miller v Minister of Pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati* [2014] eKLR where the court stated:-

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained.



28. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

29. In *Anne Wambui Ndiritu v 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. The appellant argues that the 1st respondent did not prove his case on a balance of probabilities in that the 2nd respondents took out a loan facility and charged their land LR No Kiambu/Gatuanyaga/1131 whereby the 1st respondent was the guarantor of the said loan. The 1st respondent argues that he never consented to the charge over their matrimonial property and neither did he give spousal consent.

31. It is not in dispute that the 1st and 2nd respondents were husband and wife who were at the material time separated pending hearing and determination of divorce proceedings in Thika Divorce Cause No 50 of 2018. It is also not in dispute that LR No Kiambu/Gatuanyaga/1131 was registered in the name of the 1st respondent and that the matrimonial home of the respondents sit on the said land.

32. From the record, it is the 1st respondent's case that in February 2018 he was called by his best man and informed that the 2nd respondent had taken a loan facility of Kshs 500,000/- from the appellant. The 1st respondent produced a loan application form dated 24/8/2016 indicating that the loan was for agribusiness and the next of kin was the 2nd respondent's brother one Paul Kibiru Njoroge. The referees were listed as Paul Kibiru Njoroge, David Njoroge and Simon Koge The 1st respondent's name who are the brothers of the 2nd respondent did not feature anywhere in the loan application form. The 1st respondent further testified that the details in the guarantor form dated 21/8/2016 contained his ID number while the phone number belonged to one of the referees David Njoroge. The postal address used in the loan application was not that of the 1st respondent. He further stated that his name had initially been misspelt but was corrected by canceling and substituting it with the correct one. The 1st respondent pointed out that the loan application was dated 24/8/2016 and the guarantor form was dated 21/8/2016 respectively.

33. The 1st respondent further stated that the 2nd respondent gave away his copy of his ID, PIN and passport photos but the signatures on the loan documents were not his own. The application for consent indicated that consent was given on 27/10/2016 and that his signature in the document had been forged. Additionally, the consent letter showed that it was approved even before it was applied for.

34. The 1st respondent called PW2, Chief Inspector Daniel Gutu as a witness. PW2 testified that he was a qualified forensic document examiner of more than 10 years experience and works at Directorate of Criminal Investigations headquarters. It was his testimony that on 18th January 2019, he received four documents namely, a guarantor form, a charge, an application for consent form and specimen signatures of the 1st respondent. PW2 stated that his task was to ascertain whether the signatures on the guarantor form the, charge and the consent form were made by the same person compared to the specimen signatures of the 1st respondent. The witness stated that he examined the documents and,



in his opinion, the signatures on the three first documents were made by different hands as compared with the specimen signatures of the 1st respondent. PW2 further stated that he based his opinion on a number of writing characteristics including the signatures initialization and their terminal strokes, the signatures construction and their arrangements and the pen lifts, variations, pressure and ink flow. He produced his report as an exhibit in support of the 1st respondent's case.

35. It has been noted that earlier in this judgement that the appellant and the 2nd respondent did not call any evidence during the hearing of the case. The 1st respondent's evidence was supported by the document examiner and remained uncontroverted. The evidence was to the effect that the 1st respondent was not a party to the loan agreement. The 1st respondent told the court that he was not aware that the appellant and the 2nd respondent had entered into a fraudulent agreement to charge the his property as security for a loan until a friend informed him. The appellant failed to prove that the 1st respondent was aware of the loan application and process that followed. The allegation that the 1st respondent went to the 2nd respondent's advocates offices to execute the documents was proved untrue. The appellant did not adduce any evidence to prove any of the allegations it made in his defence.
36. The appellant further argues that the trial court did not consider its submissions but solely relied on the evidence by the 1st respondent. I have perused the judgment which states that the magistrate perused the submissions of the appellant which appeared to be more of evidence than submissions. The trial magistrate went on to say that the role of submissions is to grant an opportunity to the advocates to elaborate and expand the legal position of their clients' case and not a panacea for an advocate to adduce evidence on behalf of their client. The submissions of the appellant in my view largely consist of evidence which the appellant would have adduced during the hearing of the case. For unknown reasons, the appellant lost the golden chance to give his evidence. The purpose of submissions, in my view, is to ventilate the arguments of party's case as well as to expound on the law and on the caselaw applicable. It is noted that the appellant in his submissions in this appeal has given evidence just as he did in the submissions in the court below. Such submissions which were not founded on any evidence serve no useful purpose in this appeal.
37. The evidence of the 1st respondent was supported by that of PW2, the document examiner to the effect that he never executed the loan application form, the charge or the application for consent. The signatures of the 1st respondent were forged in all the relevant documents as confirmed by the document examiner. As such, the said loan transaction between the 2nd respondent and the appellant was indeed fraudulent. In order to avoid embarrassment during the hearing, the appellant and the 1st respondent avoided giving evidence before the court.
38. It is important to note that the divorce proceedings between the respondents was still pending in court at the material time. As such, the so-called matrimonial property had not been so declared to be so in law. The divorce proceedings had to be first determined before the parties could file division of property proceedings for declaration of the status of the property acquired during marriage under the *Matrimonial Property Act*, 2013. The arrangement between the appellant and the 2nd respondent was not only fraudulent but illegal and as such the loan agreement was unenforceable as against the 1st respondent.

Conclusion

39. I have considered the respondent's evidence and submissions in the court below and come to the conclusion that he proved his case on the balance of probabilities. The appellant has not established any of his grounds of appeal.



40. I find no merit in this appeal and it is hereby dismissed with costs.

41. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

