



Muvake & another (Both Suing as Personal Representatives of the Estate of Peter Nyaga Muvake - Deceased) v Co-operative Bank of Kenya Limited (Civil Case 16 of 2020) [2024] KEHC 9666 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 16 OF 2020
SN MUTUKU, J
JULY 25, 2024**

BETWEEN

SARAH MUMO MUVAKE 1ST PLAINTIFF

VADAME GITONGA MUVAKE 2ND PLAINTIFF

**BOTH SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF
PETER NYAGA MUVAKE - DECEASED**

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

JUDGMENT

The Plaintiff

1. The Plaintiffs, suing as personal representatives of Peter Nyaga Muvake deceased, filed Plaintiff 17th August 2020 in which they have stated that through a letter of offer dated 10th June 2009, the deceased and the Defendant entered into an agreement in which the Defendant agreed to advance to the deceased a loan facility amounting to Kshs 3,000,000. This facility was restructured through another letter dated 25th August 2014 to Kshs 7,512,455.70. The said loan was to be repaid in 60 monthly instalments of Kshs 125,207.60. To secure the loan, two legal charges were registered over Kajiado/Kaputiei-North/19453 and Machakos/ULU/530, both registered in the name of the deceased.
2. It is claimed that the deceased fell ill and was admitted to various hospitals and that his illness took a financial toll on the family and the business; that following his demise, the 1st Plaintiff contacted the Defendant seeking information in regard to bank statements covering the entire period of the loan, arrears/default of payment at the time of death of the deceased; among payable by the deceased's insurer; statutory notices under sections 90 and 96 of the Land Act and Auctioneers Rules 1997 and copies of Charges.



3. It is claimed that the Defendant did not provide the information sought; that the Plaintiff has never been served with the mandatory statutory notices and that the Defendant's Statutory Power of Sale is premature and has not crystalized for failure to serve the Plaintiffs with the mandatory statutory notices.
4. The Plaintiffs claim that it amounts to unjust enrichment for the Defendant to purport to foreclose on the suit premises whilst knowing that the suit properties were comprehensively insured against all risks including the demise of the deceased.
5. The Plaintiffs claim that this Honourable Court should re-open and revise the terms of the Charge instruments by substituting the Defendant's statutory power of sale with financial compensation due from the insurance policies referred to in Clause 14 (d) and (e) of the letter of offer dated 25th August 2014.
6. They claim that no demand letter was served on them or on the estate of the deceased; that should foreclosure be allowed to proceed, it would be premised on an illegal, invalid and patently defective exercise of the Defendant's purported statutory power of sale and that the Plaintiff's right to property under Article 40 of the Constitution and due process under Section 90 and 96 of the Land Act are under threat of denial, violation and/or infringement.
7. It is also claimed that Kajiado/Kaputiei-North/19453 comprises matrimonial home and any unlawful foreclosure would expose the Plaintiffs to irreparable loss incapable of compensation by damages.
8. The Plaintiffs are seeking the following reliefs:
 - a. A declaration that the Defendant's purported exercise of statutory power of sale over the parcels of land known as Kajiado/Kaputiei-North/19453 and Machakos/ULU/530 registered in the name of Oeter Nyaga Muvake (deceased) amounts to undue and unjust enrichment.
 - b. A declaration to the extent that the loan facility advanced by the Defendant to Peter Nyaga Muvake (deceased) was insured, the estate of Peter Nyaga Muvake (deceased) is not liable to the Defendant for the outstanding loan balance, if any.
 - c. A declaration that to the extent that the suit premises were comprehensively insured against all risks and other perils, the Defendant is not entitled to exercise its statutory power of sale under the instruments of charge.
 - d. A permanent injunction restraining the Defendant by itself, its proxies, servants, agents or otherwise whomsoever from selling, advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty over the parcels of land known as Kajiado/Kaputiei-North/19453 and Machakos/ULU/530 registered in the name of Peter Nyaga Muvake (deceased).
 - e. In the alternative to prayer (d) above, a permanent injunction restraining the Defendant by itself, its proxies, servants, agents or otherwise whomsoever from selling, advertising for sale and/or alienating and/or disposing off, selling by public auction or completing any conveyance or transfer of any sale concluded by auction or private treaty over the parcels of land known as Kajiado/Kaputiei-North/19453 and Machakos/ULU/530 registered in the name of Peter Nyaga Muvake (deceased) unless and until it issues valid statutory notices to the estate of Peter Nyaga Muvake (deceased).
 - f. An order directing the Defendant to render a complete, true and accurate statement of accounts of Peter Nyaga Muvake's (deceased) purported loan account showing the exact



indebtedness, if any, to date and the charge instrument relied upon to exercise the purported statutory power of sale.

- g. General damages for breach of contract.
- h. Costs of the suit.
- i. Any other remedy this Honourable Court may deem fit to grant in the circumstances.

The Defence

9. The Defence is dated 12th January 2021. Other than admitting that the deceased is the registered owner of the parcels of land mentioned in the Plaint and that he was their customer who, through a letters of offer dated 10th June 2009 and 25th August 2014 for a loan facility of Kshs 3,000,000 which was restructured to Kshs 7,512, 455.70 as pleaded in paragraphs 5, 6, 7 and 8 of the Plaint, the Defendant has denied the allegations contained in the Plaint and puts the Plaintiffs to strict proof of the same.
10. The Defendant has stated that if at all it took out a comprehensive insurance cover as alleged in the Plaint, the same was only to cover the suit property against damage within the term of the loan facility and not after and that it was the duty of the deceased to take out a life insurance cover which was to be applied only within the term of the loan facility.
11. The Defendant has stated that it has not kicked off the process of realization of the security and therefore the prayer for the injunction is premature; that even though the right to exercise its statutory power of sale has crystallized, the Defendant has not taken any action to exercise the same; that it has not benefited from any insurance policy either from life insurance cover of the deceased or any comprehensive cover against the suit property; that without prejudice, the comprehensive insurance covers the suit property only and not the death of the deceased; that the tenure of the loan expired on 31st December 2019 and the deceased passed on in June 2020 and as such, the claim for life insurance is not applicable and that without prejudice, the existence or non-existence of an insurance cover does not vitiate the Defendant's redemptive rights, the Defendant is entitled to exercise its statutory power of sale as and when the borrower fails to pay the loan within the term of the facility.
12. The Defendant has stated that this Court does not have jurisdiction to reopen a charge instrument and revise the terms thereon; that although the right of redemption has crystallized, the Defendant has not initiated any process to exercise its statutory power of sale and therefore the Plaintiffs' action is premature and ill-conceived meant to forestall the Defendant from initiating the process; that the Plaintiffs have not demonstrated why this Court should grant an injunction; the claim that the suit property is matrimonial property does not deny the Defendant the right to exercise its statutory power of sale as the suit property is considered as a commercial commodity and therefore the Plaintiffs have failed to meet the requisite criteria to warrant the exercise of this court's discretion to grant the equitable remedies sought.
13. The Defendant questions this court's jurisdiction to hear and determine this matter by dint of Article 162 (2) and (3) of the Constitution and section 13 (2) (d) of the ELC Act and that this suit contravenes the well-known doctrine of exhaustion of statutory provisions on dispute resolution and therefore it is an abuse of court process, is vexatious, and frivolous and ought to be dismissed with costs.

Evidence

14. The matter proceeded on trial on 24th July 2023. The 1st Plaintiff relied on her witness statement dated 17th August 2020. This statement is not among the Plaintiffs' bundle of documents or in the court records.



15. The 1st Plaintiff's evidence was brief and centred on her claim that the Defendant never served her with any notices. She told the court in her evidence in chief that she was not aware there was a loan and that her letter to the Defendant asking them to give her all the documents relating to the loan facility went unanswered. She testified that after the burial of the deceased some people went to her home and said they had been sent by the Defendant and that they valued the house and left. She also stated that the deceased had told her that he had taken a loan from the Defendant but she should not worry about it because it was insured.
16. On cross examination, she admitted that her late husband had taken a loan but she did not know when he did it. She admitted signing the contract for Kshs 7,512,455.70. Although she denied giving the postal address in the document she signed, she admitted that the address belonged to the deceased. She stated further that her late husband was paying for the insurance of the loan but stated that she did not have any documents to prove that payment.
17. The Defendant called Rachael Mativo, a relationship banker at the Defendant's Athi River Branch to testify. Rachael relied on her witness statement dated 10th November 2021. Her evidence reiterates the Statement of Defence. It is her evidence that the deceased failed to honour his contractual obligations and defaulted in servicing the loan and that at the time of making her statement, the outstanding principal balance and accrued interest stood at Kshs 10,954,433.66.
18. It was her evidence that the bank wrote to the deceased and 1st Plaintiff on 25th February 2015 demanding payment but the letter went unanswered; that the Defendant sent 90 days and 40 days notices through letters dated 13th April 2015 and 29th July 2015 respectively through registered post but those notices elicited no action from the deceased and the 1st Plaintiff.
19. It was her evidence that notwithstanding the issuance of the notices, the Defendant has not kicked off the process of the realization of the security even though the right to do so had crystalized; that the suit was filed prematurely; that it is inconceivable that the 1st Plaintiff claims that she has not been served with notices when the same were served to her through registered post and that the Defendant has not benefited from the life insurance cover or any comprehensive insurance cover because the same were only applicable within the term of the loan which had expired on 31st December 2019 before the deceased passed on in June 2020.
20. She denied that the Defendant carried out any valuation of the property as alleged and asked this court to dismiss the Plaintiff.

Submissions

21. The Plaintiffs raised three issues:
 - a. whether the defendant failed to serve proper statutory notice, failed to follow due process provided by the law and was in breach of the contract.
 - b. Whether it was the duty of the Defendant to procure insurance for the loan.
 - c. Who should bear the costs of the suit.
22. In respect to the first issue, it was submitted that the Defendant used postal address 24152 Nairobi which does not belong to the Plaintiffs yet they knew the physical address where the home is situated; that the burden is on the Defendant to demonstrate that it has served the notices and relied on *Nyangilo Ochieng & another v. Fanuel Ochieng & 2 others* [1995-1998] 2 E.A at pages 3 & 4 to support that



- submission; that it is a mandatory requirement to comply with section 96 of the Land Act and that the proposed sale of the suit property cannot stand.
23. On the second issue it was submitted that it was the duty of the Defendant to procure a comprehensive insurance policy for the loan, which the Defendant failed to do.
 24. On the issue of costs, it was submitted that costs of the suit ought to be paid to the Plaintiffs if the court grants the prayers sought in the Plaintiff.
 25. The Defendant, likewise, raised three issues:
 - a. Whether there has been a breach of contract on the part of the Defendant and/or has failed to follow due process in exercising its statutory power of sale.
 - b. Whether the Plaintiffs are entitled to an order of permanent injunction.
 - c. costs
 26. The Defendant reiterated its evidence and submitted that all charges for the annual comprehensive insurance policy covering all risks and other perils for the assets used as security for the loan the Defendant was required to obtain was supposed to be debited from the borrower's account; that comprehensive cover only covered the properties of the Borrower and preserves the pecuniary interests that the Defendant holds over the charged properties; that the risks covered include fire and natural calamities that would lead to dissipation of the charged assets and did not include the death of the Borrower and that the deceased and the 1st Plaintiff signed the letter of offer and indicated their postal address for future service of official communication from the Defendant; that paragraph 14(b) of the offer letter required the 1st Plaintiff to immediately advise the Defendant of any changes in address or business location.
 27. It was submitted that the burden of proof lies on the Plaintiff to demonstrate that the Borrower took out a life insurance cover and that the same was utilized to pay off the outstanding loan; that the Defendant has produced the Borrower's loan statement which indicates that the last payment on the loan, for Kshs 79,599.27, was on 4th May 2018; that the term loan as per the offer letter dated 25th August 2014 was for 60 months (5 years) and any claim under life insurance policy, assuming one was taken, would only succeed if the Borrower has been paying the requisite annual premiums as well as if he had passed on before 26th August 2019 but he passed on 3rd June 2020.
 28. It was submitted that the allegations of breach of contract are unsubstantiated; that the Borrower did not have funds in his account that would facilitate the payment of annual premiums of the comprehensive insurance cover; that the cover would have only been available for the limited term of 60 months and that the insurance only covers the charged assets and not death of the Borrower.
 29. It was submitted that the Defendant has complied with section 90 of the Land Act and issued the statutory notices. The Defendant relied on Muga Developers Limited v. Equity Bank of Kenya Limited & 4 others [2020] eKLR where the court stated that where the chargor alleges non-receipt of statutory notices, it is for the charge to prove that such notices were in fact served. It was submitted that the Defendant has offered such proof.
 30. On the second issue, it was submitted that the 1st Plaintiff acknowledges that the Borrower took a loan facility with the Defendant and she signed the offer letter acknowledging the same; that she has confirmed that the Borrower defaulted on the loan and that she is aware that there is an outstanding loan owed to the Defendant, as such there is a breach of the terms of the offer letter as the term of the facility has since lapsed. It was submitted that the 1st Plaintiff has not made any efforts to make any



payments even after the court granted her interim injunctive orders and therefore the Plaintiffs have come to court with unclean hands and that this Plaint ought to be dismissed.

Analysis and determination

31. To my mind, the following 2 issues require my intervention and determination:
 - a. Whether the Defendant served statutory notices as required under the law.
 - b. Whether the reliefs sought by the Plaintiffs are available to them.
32. I have read and understood the pleadings of the parties, their evidence in court and their submissions and the documents they have attached. It is not disputed that Peter Nyaga Muvake (deceased) and the 1st Plaintiff entered into an agreement with the Defendant. They wanted to get a loan facility from the Defendant. Through an offer letter dated 25th August 2014, the Defendant agreed to offer a term loan facility in the sum of Kshs 7,512,455.70 to be repaid in 60 consecutive monthly instalments of Kshs 125,207.60 excluding interest and other charges as set out in that letter.
33. That facility was secured through the properties named in this judgment being Kajiado/Kaputei-North/19453 and Machakos/ULU/530 both registered in the name of the deceased. Some of the conditions of that contract as can be seen under paragraph 14 (d) and (e) of the offer letter is that:
 - (a) 14 (d) The Borrower acknowledges that the Bank shall obtain a comprehensive Insurance Policy covering all risks and other perils for all the Borrower's assets and properties, renewable annually, from one of the Bank's approved insurance companies and with the Bank's interest notes on the Policy and shall debit the relevant charges to the Borrower's account, and
 - (b) 14 (e) the Borrower shall take a life insurance cover through an Insurance Company approved by the Bank (where applicable). Details of the amount insured, the annual premium and the monthly repayment in respect of the annual premium will be advised to the Borrower upon written request.
34. The evidence I have is that the Borrower defaulted in repayments. The Plaintiffs did not come out clearly on this issue even in their Plaint. The 1st Plaintiff claimed that she was in the dark as regards the loan facility as she did not know that her late husband had taken a loan from the Defendant. This Court did not believe her. She admitted signing the offer letter and she must have noted and understood its contents.
35. The claim by the Plaintiffs centred on failure by the Defendant to serve them with statutory notices as required by the law. The Defendant maintains that it served the statutory notices and presented evidence to that fact. The 1st Plaintiff claims that the address used to send the notices is not hers and that the Defendant knew where she lives.
36. From the evidence adduced by both parties, I am persuaded that the Borrower defaulted in repaying the loan. The Defendant presented evidence that the last repayment by the Borrower was on 4th May 2018. Given that the deceased died on 3rd June 2020, the default in repayments occurred before the Borrower died. I do not have any evidence from the Plaintiffs to the contrary. Going by the date of the letter dated 13th April 2015, the account was floundering. That letter gives the Borrower a 90 days (3 Months) notice in compliance with section 90 (1) of the [Land Act](#), which provides that:
 - (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may



serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

37. The Borrower having not taken any action after the service of the notice stated above, the Defendant sent another letter after the expiry of three months. The letter is dated 29th July 2015 and gives the Borrower 40 days' notice as required under section 96 (2) of the Land Act, which provides as follows:
- (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
38. Both these notices are addressed to the deceased through P.O Box 24152-00100, Nairobi. The Plaintiffs have contested that address and claimed non-service. As submitted above and going by the authorities, where non-receipt of the statutory notices is claimed, the burden of proof lies with the charge to prove service. The Defendant has asserted that they have tendered proof of service.
39. The offer letter bears the postal address of the Borrower and the 1st Plaintiff as P.O Box 24152-00100 Nairobi which address is appended next to the names of the Borrower and the 1st Plaintiff, below which are their respective signatures. The said offer letter provides under paragraph 14 (b) that "The Borrower shall advise the Bank immediately in writing of any change in address or business location." The Bank claims that they were not advised of any change in address by the Borrower or the Plaintiffs. I have not seen any evidence from the Plaintiffs giving such advice.
40. I have seen evidence that the stated letters (Notices) were posted to the Borrower and 1st Plaintiff. The documents, certificates of postage, to that effect are found on pages 61 and 62 of the Defendant's bundle of documents. This is sufficient evidence that the Notices were served on the Plaintiffs. I have no evidence showing that the postal address of the Borrower and 1st Plaintiff had changed. I am therefore satisfied on a balance of probabilities that the Borrower and the 1st Plaintiff were served with the two statutory notices by the Defendant.
41. I am alive to the evidence by the Defendant that even though they were within the law to proceed to exercise its right of sale because that right has crystallized after the Borrower failed to rectify the default, it did not do so. The Defendant issued the two notices and did not proceed to the next steps in actualizing their rights.
42. I have considered the evidence that the Defendant was required to take out a comprehensive insurance policy covering the assets of the Borrower as required under paragraph 14 (d). This requirement is not disputed. But the Plaintiffs seem to have misunderstood the contractual requirements that the Defendant 'shall debit the relevant charges to the Borrower's account'. Besides, it is argued by the Defendant that this policy was tied to the term of the loan which was to expire on 31st December 2019. I have not seen evidence controverting that position from the Plaintiffs. The Defendant has stated further that the Borrower's account had no funds to service the Insurance Policy.
43. Further, there is the issue of life insurance. This was a requirement under the contract as shown under paragraph 14 (e) of the offer letter. As argued by the Defendant, there is no evidence from the Plaintiffs that this policy existed and/or any documents to that effect. In her evidence in court, the 1st Plaintiff stated in cross examination that "I do not have any documents about the payment of the insurance" in reference to the life insurance policy.
44. On whether the Plaintiffs are entitled to the orders they are seeking, I have considered the evidence by the Defendant that they have not pursued their right of sale despite this right having crystallized.



Indeed, going by the evidence on record, it is clear to this court that other than the two statutory notices served on the Borrower and the 1st Plaintiff, the Defendant has not taken any further action, hence their asking this court to find that the suit against them is premature.

45. Among the orders sought by the Plaintiffs is an order for permanent injunction to restrain the Defendant from doing the acts specified in the payer including selling by public auction the properties charged and general damages for breach of contract. The Defendant has submitted that the Plaintiffs do not deserve the order they are seeking and have relied on *Heshimart Enterprises v. Kenya Women Microfinance Bank Limited* (2021).
46. I have considered the evidence placed before me by both parties to this case. The Plaintiff has not taken any steps to make payments towards the unpaid loan arrears despite having an interim injunction in their favour. They are admittedly in arrears. The Defendant has served them with two statutory notices but has not proceeded to exercise its power of sale. It is therefore not true, as claimed by the Plaintiffs, that the Defendant has acted as alleged in the Plaint.
47. The law is clear that he who alleges must prove. The Plaintiffs have failed to place evidence before the court to support their claim. They have failed to meet the threshold of proof on a balance of probabilities. They have failed to persuade the court that they deserve the reliefs sought in their Plaint.
48. Consequently, the Plaint dated 17th August 2020 and filed in court on 18th August 2020 is hereby dismissed with costs to the Defendant.
49. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH JULY 2024.

S. N. MUTUKU

JUDGE

In the presence of:

Mr. Jaoko for the Plaintiff

Mr. Kagicha for the Defendant.

