



Kula & another v Housing Finance Company Limited & another (Civil Case 13 of 2019) [2024] KEHC 9716 (KLR) (1 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 13 OF 2019
SM GITHINJI, J
AUGUST 1, 2024**

BETWEEN

FRED KITHUSI KULA 1ST APPLICANT

KITHUSI KULA TRADING COMPANY LIMITED 2ND APPLICANT

AND

HOUSING FINANCE COMPANY LIMITED 1ST DEFENDANT

THAARA AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. By way of a Plaint dated 9th October 2019 the Plaintiffs instituted this suit seeking the following orders;
 1. A declaration that a custom existed between the 1st Plaintiff and the 1st Defendant between 2011-2019 where the agreed repayment sum was Kshs. 140,000/= per month or such income from the suit premises that the 1st Defendant should have allowed the 1st Plaintiff to continue servicing the loan at Kshs. 140,000/= or such income from the suit premises per month until payment in full.
 2. A declaration that the proposed public auction of Plot No. 263 Watamu by the Defendants is null and void for failure to comply with the Provisions of Section 90-96 of the *land Act* No. 6 of 2012.
 3. A declaration that the value of the Plot L.R No. 263 Watamu and the developments thereon as set out in the Notice by the 2nd Defendant dated 13th august 2019 is oppressive and fraudulent against the Plaintiffs.
 4. A permanent injunction be issued against the Defendants by themselves, their servants or agents from proceeding with the proposed public auction on 31st October 2019, any advertisements or in any way dealing with the suit property; Plot LR No. 263 Watamu.



5. A mandatory order to issue to the 1st defendant to do a fresh valuation of plot LR No. 263 Watamu and the development thereon, issue a fresh statutory notice and the Auctioneer's 45 days' notice in compliance with the law.
 6. Any other order the court may find explanation to issue for the ends of justice to be met.
 7. The costs of the suit.
2. The Plaintiffs' case is that sometime in 2011 the 2nd Plaintiff applied for a loan of Kshs. 20 million from the 1st Defendant which loan was secured through a charge dated 21st November 2011 against Plot LR No. 263 Watamu with the 1st Plaintiff being the charger, the 2nd plaintiff the borrower and the 1st defendant the chargee. It was averred that the loan was subject to valuation of the suit property which valuation was done and a report prepared on 30th June 2011 by Paul Wambua Valuers Limited who were an agent of the 1st defendant. It was further stated that as per the Deed of Assignment of Rental Income dated 21/11/2011 it was agreed that payment of the installment was to be financed through rental income of the premises and thereafter the 1st defendant appointed an agent to collect the rent and pay the same into the mortgage account. It was also averred that as at 13th August 2019 the loan arrears had raised to Kshs. 25,213,389.65/= plus accruing interest. That on the same day the 2nd Defendant served the 1st Plaintiff with a Notification of sale of the suit property which the plaintiffs fault. It was further stated that for the period between 2014 and August 2018 an arrangement had been made in that the plaintiffs were supposed to repay the loan by monthly instalments of Kshs. 140,000/= per month.
 3. The 1st defendant filed a statement of defence wherein it is admitted that the 1st defendant on or about 22nd September 2011, they acceded to the Plaintiffs' request for loan in the sum of Kshs. 20,000,000/= which was disbursed on the strength of a charge dated 21st November 2011. It was stated that the Deed of Assignment dated 21st November 2011 is an addition and not a substitution of any existing security or legal charge.

Evidence at Hearing

4. Pw1 Fred Kithusi Kula adopted his witness statement filed on 14/10/2019 as his evidence in chief. He produced as PEX 1-15 documents as per the list of documents.
5. On cross examination he stated that clause 2 (a) of the charge indicates that interest for the loan facility is at 14%.
6. Pw2 Paul Wambua a valuer testified that he was contacted to do a valuation in the year 2020 by the plaintiffs. He stated that he made a report dated 12/11/2020 and arrived at a value of Kshs. 54,000,000/= with a forced sale of value of Kshs. 40,500,000/=.
7. Dw1 David Juma recovery officer for HFC adopted his witness statement dated 20/12/2022 as his evidence in chief.
8. On cross examination, he stated that they signed a deed to obtain rent to help satisfy part of the facility.

Submissions by the Parties

Plaintiff's submissions

9. The plaintiffs framed the following issues for determination;



- a. Exercise of statutory power of sale. On this issue, it was submitted that the court has already pronounced itself in regard to the issuance of statutory notices which decision was not appealed from by the 1st Defendant. In support, they relied on the authorities of *Kenneth Nyaga Mwiye v Austin Kiguta & 2 Others* [2015] eKLR, *Elizabeth Wambui Njuguna V Housing Finance Co. of Kenya* [2006] eKLR and *David Ngugi Ngaari V Kenya Commercial Bank Limited* [2015] eKLR.
- b. Variation of charge. It was submitted that courts cannot vary terms of contracts between parties and the law on variation is clear. Counsel for the plaintiffs submitted that the loan facility was on the suit property as collateral and the plaintiffs disclosed the rental income of the same and as per the deed of assignment the rents monthly payments were made to the bank. It was submitted that the parties varied the facility granted to the 1st Plaintiff as per the deed of assignment and the 1st Defendant's acceptance of the sum of Kshs. 140,000. They cited *Kenya Breweries Ltdv Kiambu General Transport Agency Ltd* [2000] EA 398, *Gakengav Consolidated Bank of Kenya Limited & 2 Others* and *County Government of Migori v Hope Self Help Group* [2020] eKLR.
- c. Valuation of suit property. It was submitted that the valuation relied upon by the bank in 2019 was that of Kshs. 32,000,000 while a joint valuation report of November placed the value of the suit property at Kshs. 54,000,000 and thus the 1st defendant did not adduce evidence to justify valuation as per the notice dated 13/8/2019.

1st Defendant's Submissions

10. The 1st defendant framed the following issues for determination;
 - a. Whether the 1st defendant properly conducted its statutory power of sale. It was submitted that the statutory power of sale arose when the plaintiff's loan account fell due prompting the 1st defendant to invoke Clause 9 of the Charge instrument which outlined the terms and conditions of sale and consequence of default. They relied on the authority of *Godfrey Nguno v Housing Finance Company of Kenya Limited*.
 - b. Whether the deed of assignment dated 21st November 2011 varied the terms of the charge. On this, it was submitted that the Deed of Assignment only acted as an addition to and not Substitution of the Charge instrument. That the variation of a contract allows parties to a contract to change the terms of a contract without redrafting the contract. It was further submitted that the proceeds under the Deed of Assignment cannot override the provisions of the Charge document. They cited the cases of *Wilken Communications Limited v Postal Corporation of Kenya High Court* and *Muriithi Gacugo Ng'ang'a V HFCJ & Anor*.
 - c. The question of the valuation of the suit property. It was submitted that the process preceding the valuation of the property was conducted in accordance with the law and that any valuation would have been conducted after valuation done in the year 2020 was daunted by the plaintiffs' lethargy.
 - d. Whether the plaintiff is in arrears. On this it was submitted that the plaintiffs are in arrears of the loan facility and the same is not denied and thus the 1st Defendant is right in invoking the statutory provisions on sale of security to recover the outstanding loan amounts. They cited the authority of *Kitur v Standard Bank & 2 Others*.



- e. Whether the plaintiff is entitled to the reliefs sought. It was submitted that the plaintiffs have not presented a cogent case to warrant granting of permanent injunctive orders and granting an order of permanent injunction as sought by the plaintiff would be tantamount to condemning the 1st defendant to an enormous loss of money. They cited the authority of *Seikei T/A Masco Interprises v Delphis Bank* [2004] eKLR.

Analysis and Determination

11. I have considered the pleadings before me, the testimony adduced at the hearing, submissions by the parties as well as the authorities relied upon. I make out the following issues for determination;
 1. Whether a permanent injunction may issue in respect of the proposed auction?
 2. Whether the terms of the Charge were varied by the Deed of Assignment dated 21st November 2011.

Whether a permanent injunction may issue in respect of the proposed auction.

12. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunctions are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. A Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the *Civil Procedure Act* if it is satisfied that the right of a Party has been fringed, violated and/or threatened.
13. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR as follows: -

“The test for granting a Mandatory Injunction is different from that enunciated in the “*Giella v Cassman Brown case* which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “*Kenya Breweries Ltd=vs= Washington Okeyo* (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in *Vol. 24 Halsbury Laws of England* 4th Edition Paragraph 948 which states as follows: -

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

14. Further the same Court of Appeal in the case of *Jay Super Power Cash and Carry Ltd v Nairobi City Council and 20 others* CA 111/200 held that: -

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass



are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”.

15. Moreover, based on a passage from 24 *Halsbury Laws of England*, Page 248, the case of *Locabail International Finance Limited v Agro Export and others* (1986) All ER 906, the court held thus: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedied, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.”

16. The reason for this rule on granting of Mandatory Injunction is plain. Megarry, J put it succinctly in a subsequent passage in the case of *Shepard Homes Case* (Supra) as follows: -

“.....if mandatory injunction is granted on motion, there will be normally no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or contained”

17. The basis for the prayer of a permanent injunction is that the statutory power of sale was in contravention of Section 90-96 of the *Land Act* No. 6 of 2012. Having perused through the file, I note that vide the Ruling dated 29th October 2019, my brother Hon. Justice R. Nyakundi observed as follows;

“... in my view, there are varied serious and arguable issues on the mode of service of the statutory notice which in the instant case is indicated to have alleged to have been effected on or around 2012. The time and when the service was effected on the said applicant is therefore a moot question. Whether or not the service of statutory notice effected more than 3 years ago will still be considered to be valid in terms of the Section 90 of the *Land Act*.

The position of the Applicants which has not been controverted by the defendants is that the whole process culminating with the recall of the loan amount is tainted with irregularity and illegality hence the need to grant an injunction.”

18. It is clear that it is the very same statutory notice that has been impugned. There is no evidence that the circumstances have changed at all thus the same as pointed out in the above excerpt is irregular and illegal deserving protection through grant of a permanent injunction. The upshot is that, a permanent injunction be and is hereby issued against the defendants from proceeding with the proposed auction. This is also informed on the strength of order no. 2 of the ruling that the statutory demand notice and notification in respect of the suit property be withdrawn noting that the said ruling was not varied and/or set aside nor appealed against.

Whether the terms of the Charge were varied by the Deed of Assignment dated 21st November 2011.

19. The Plaintiff seeks that the court does make a finding that a custom for payment of the sum of Kshs. 140, 000/= existed between the 1st Plaintiff and the 1st Defendant. This was arrived at upon parties signing the Deed of Assignment dated 21st November 2011. It is admitted by both parties that such an arrangement existed and that the 1st Defendant appointed an agent who collected the rental income. It



has been further admitted that the 1st Defendant received the sum of Kshs. 140,000/= towards servicing of the loan per month and sometimes even less.

20. It is common ground that there was a contract between the parties. What is however not agreed upon is whether the Deed of assignment varied the terms of the charge.
21. It is trite that the court cannot rewrite or vary contracts between parties. By dint of the execution of the Deed of assignment between parties and the continued payment of Kshs. 140,000/= by the 1st plaintiff from the rental income, I am of the view that the terms of the charge had been varied. The Court of Appeal in Nairobi Civil Appeal 155 of 1992 *Kukul Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR had occasion to consider the effect of variation of contract both prior to reducing to writing and after. It observed;

“Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase “priority negotiations” because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the written contract if it is clear from the correspondence that the parties intended to vary the contract. (emphasis mine).”

22. The author of *Hudson’s Building and Engineering Contracts*, 10th Edition, at page 22 postulates: -

“A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If, however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain.....”.

23. In the case at bar, the Deed of Assignment has not been disowned by either party. It is my finding therefore that the said Deed varied the terms of the contract. Consequently, I issue orders that the 1st Plaintiff shall continue servicing the loan at the sum of Kshs. 140,000/= as per the Deed of Assignment which amount shall be payable on or before 5th of every month.
24. Be it as it may, it is not lost on me that this suit was set on the Plaintiffs falling into arrears thus an impeding auction. Though it has already been established that the statutory power of sale was irregular and illegal, this does not mean that the plaintiffs are discharged from their obligations of the loan facility. In the circumstance, I direct that the parties reconcile their statements of account to establish the amount in arrears and work out a scheme of payment which shall be filed in court. For avoidance of doubt, the 1st plaintiff shall continue paying the sum of Kshs. 140,000/= per month.
25. In sum therefore, judgment is entered in the following terms;



1. A permanent injunction be and is hereby issued against the defendants from proceeding with the proposed auction.
2. The 1st plaintiff shall pay the sum of Kshs. 140,000 per month in service of the loan facility on or before 5th of every month.
3. Parties to reconcile their statement of account to establish the amount in arrears and file in court an agreed scheme of payment.
4. No orders as to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 1ST DAY OF AUGUST, 2024.

.....

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Mukoba for the Plaintiff

Mr Mkongo for the Respondent – absent

.....

S.M. GITHINJI

JUDGE

1/8/2024

