



**Guardian Bank Limited v Maganlal (Civil Suit 1 of 2021)
[2023] KEHC 535 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 1 OF 2021
TM MATHEKA, J
FEBRUARY 2, 2023**

BETWEEN

GUARDIAN BANK LIMITED PLAINTIFF

AND

DAVE KANAKKUMAR MAGANLAL DEFENDANT

RULING

1. By Originating Summons dated August 30, 2021 brought pursuant to Section 94 of the [Land Act](#), 2012 and Order 37 Rules 4 and 14 of the [Civil Procedure Rules](#) the Applicant seeks for:-
 1. That the Plaintiff herein be and is hereby granted leave to, by itself and/or authorized agents or court bailiff, enter into and take physical possession of all that of the Defendant's property known as Apartment No A3 erected on Title Number Nakuru Municipality Block 5/A3/240-Nakuru in exercise of a chargee's statutory power to take possession of charged property.
 2. That for purposes of execution/enforcement of Order (1) above, the Officer Commanding Station (OCS), Central Police Station- Nakuru does provide security on all that of the Defendant's property known as Apartment No A3 erected on Title Number Nakuru Municipality Block 5/A3/240-Nakuru to ensure that there is no breach of the peace.
 3. That the costs of these proceedings and of execution/enforcement of Orders (1) and (2) above be borne by the Defendant.
2. The Summons is supported by grounds on its face and supporting an Affidavit of Mary Omullo the Legal officer of the Plaintiff sworn on August 30 2021. She deponed that her duties with the plaintiff entail legal support to the bank's debt recovery unit tasked with pursuing recovery of outstanding facilities due and owing from its customers. She confirmed that she had access to the records of the Plaintiff bank in relation to such of its customers with outstanding banking facilities.



3. She stated that she was aware that in the ordinary course of the Plaintiff's business the plaintiff from time to time granted one of its customers Chamunda Spin Limited Banking Facilities in the form of overdraft for purposes of meeting its working capital requirements on the terms and conditions set out in duly accepted letters of offer dated December 23, 2017 as varied by the letter dated January 9, 2018 and March 12, 2019.
4. She deposed that as is apparent from the said accepted letters of offer, the banking facilities granted to the said Chamunda Spin Limited were to be secured by among others a legal charge for the principal sum of Kshs 10,000,000.00/= exclusive of interest and other bank charges over all that property known as Apartment Number A3 erected on Title Number Nakuru Municipality Block 5/A3/240(hereinafter the "Suit Property") registered in the name of the Defendant herein being one of the Directors of the said borrower company as well as a further charge for the principal sum of Kshs 5,000,000.00/= exclusive of interest and other bank charges over the same property.
5. She deposed further that, pursuant to the terms of the said accepted letters of offer, the defendant created and registered in favour of the plaintiff two legal charges over the suit property in favour of the plaintiff and exclusive of interest and other bank charges; the first one dated January 26, 2018 to secure the repayment of a principal sum of Kshs 10,000,000.00 and a further legal charge dated March 27, 2019 securing repayment of a principal sum of Kshs 5,000,000.00, both in respect of banking facilities granted by the plaintiff to the said Chamunda Spin Limited.
6. That upon creation of the said security the borrower company utilized the secured overdraft facilities granted to it by the plaintiff in the manner demonstrated herein above and in the ordinary course of its business.
7. She deposed that from the express terms of the said legal charges the defendant as the chargor expressly covenanted with the plaintiff to pay the sums secured thereunder together with interest and other bank charges to accrue thereon.
8. Further the legal charges constituted continuing security for the repayment of the ultimate balance due and owing from the plaintiff from time to time in respect of the financial accommodation granted the said Chamunda Spin Limited and secured thereunder.
9. She deposed that she was aware that in breach of the covenants on his part as the chargor, the defendant had failed to repay the banking facilities secured under the legal charges over the suit property and the account of the said borrower company held with the plaintiff being account number 0101000045 and under which the secured overdraft facilities aforesaid were utilized by it was overdrawn and reflected an outstanding balance in the sum of Kshs 10,431,385.35 as at August 17, 2021 which continues to escalate on account of the application of contractual interest with effect from January 1, 2021 until full and final settlement .
10. She stated that she was aware that even though the plaintiff had caused the suit property to be advertised for sale in a public auction on November 23, 2020 in exercise of its chargee's statutory of power of sale to recover the then outstanding balance secured under the legal charges, the same was unsuccessful as no bids were received. That the auctioneer attributed this to the fact that potential bidders who had expressed interest in the suit property could not view it as it was unoccupied and therefore inaccessible for purposes of any meaningful viewing before they could firm up their bids.
11. She stated that the suit property to date remains locked up and unoccupied and the defendant is believed to no longer be in the country.



12. She was aware that the possibility of the defendant's unavailability in the country was confirmed by his co-director's undated communication which he made on the borrower company's letterhead addressed to the plaintiff's counsel on record herein as well as the plaintiff indicating inter alia that the defendant was then in India and was not expected to back.
13. She stated that in the foregoing circumstances that unless the plaintiff was enabled to access and gain possession of the suit property it would never be possible to have it sold in exercise of its chargee's statutory power of sale. .
14. That it is within her knowledge that the plaintiff is entitled in terms of the stipulations of clause 5.2 of the duly registered legal charge dated October 26, 2018 as well as clause 10.1 of the further legal charge dated March 27, 2019 to enter into and take physical possession of the suit property as a remedy for the defendant's breach of his obligations and/or covenants as a chargor to repay the amounts advanced to the borrower company and secured thereunder.
15. She stated that the said remedy to enter into and take physical possession of the charged property is also conferred upon the plaintiff as a chargee by virtue of the provisions of section 90(3) (d) of the Land Act, 2012.
16. She averred that in accordance with Section 90 and 94 of the Land Act, 2012, the plaintiff bank caused to be served upon the defendant a statutory notice dated January 25 2021 to enter and take possession of the suit property which was dispatched to him by registered post, email, as well as by affixing of the same on the suit property.
17. She stated that the totality of the obtaining circumstances the intended entering into and taking possession of the suit property by the plaintiff is the most efficacious and cost effective statutory remedy that would ensure that the plaintiff is able to expeditiously realize the security comprised in the legal charges and recover the outstanding secured debt which as disclosed in the statement of account has already surpassed the forced sale value of the suit property last determined to be Kshs 9,000,000.00 placing the plaintiff and its customers whose money it lent in the underlying transaction in grave jeopardy and prejudice.
18. She deposed that the plaintiff's statutory remedy to enter and take physical possession of the suit property in terms of provisions of Sections 94 of the Land Act, 2012 may only be exercised on the strength of a court order as sought herein. That, the interest of justice would be best served if the plaintiff was granted the reliefs sought in the proceedings herein in order to secure the opportunity to recover a part of the outstanding secured amounts as demonstrated herein above.
19. It was her deposition that the charged property is situated within Nakuru City which is within the jurisdiction of the central police station- Nakuru and that in order to ensure that there is no breach of the peace during the entry and taking of physical possession of the suit property in exercise of the plaintiff's charge power in that regard.
20. The application is unopposed.

Submissions

21. The plaintiff submitted its deposition is uncontroverted and should be taken as true. For this proposition, it relied on *Mohammed & Another vs Haidara* [1972] E A 166 & *Kenya Reinsurance Corporation vs R.M. Mutiso* [2009] eKLR where the courts concurred that the Appellants' allegations were uncontroverted since there were no response filed by the Respondents.



22. The plaintiff urged this court to find that it has proved its case against the defendant. In support of their submissions the Plaintiff further relied on *Birmingham Citizens Permanent Building Society vs Caunt & Another* [1962] 1 ALL ER 163 for the proposition that where it is demonstrated that the chargor has defaulted on his payment obligations and the secured amount has become due and payable, the chargee would be entitled to an order for possession unless the charger is able to demonstrate a reasonable prospect of the ability to satisfy the mortgage debt.
23. The plaintiff submitted that in this matter, there is no suggestion that the defendant is willing and able to pay the secured and outstanding debt.
24. It further placed reliance on *Bank of Scotland PLC vs Zinda* [2011]2 All ER (Comm) 839 in which the Court of Appeal of England and Wales approved the statement in *Birmingham Citizens Permanent Building Society vs Caunt & Another*(*supra*).
25. The Plaintiff urged the court to adopt the reasoning of the above cases and grant it the reliefs sought.

Analysis & Determination

26. The only issue for determination is whether this court should grant the orders sought.
27. The plaintiff has demonstrated through acceptance letters of offer annexed to the supporting affidavit and marked as “MO 1a,b & c that it granted Chamunda Spin Limited banking facilities in the form of overdraft for purposes of meeting its working capital requirements on the terms and conditions set out therein that was to be secured by two legal charges for the principal sum of Kshs 10,000,000.00 and Kshs.5,000,000.00 exclusive of interest and other bank charges over property known as Apartment Number A3 erected on title Number Nakuru Municipality Block 5/A3/240 registered in the name of the Defendant as one of the directors of the said borrower. The plaintiff attached both legal charges as evidence thereof.
28. The plaintiff also attached a complete statement of account showing that the defendant has failed to repay the banking facilities secured under the legal charges over the suit property of Kshs 10, 431,385.35 as at August 17, 2021 and which continues to escalate on account of contractual interest with effect from January 1, 2021 until full and final settlement.
29. There is evidence that the plaintiff served the defendant with a statutory notice to enter and take possession of the suit property dated January 25, 2021 by registered post, email as well as by affixing the same on the suit property.
30. It is imperative to note that the defendant was duly served but did not to respond to the same. There is an affidavit of service on record filed on November 10th November, 2021 confirming this position.
31. The Plaintiff’s case therefore is uncontroverted. The court in *Peter O. Nyakundi & 68 others vs Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR held that Failure to file a Replying Affidavit can only mean that those facts are admitted.
32. There is therefore an assumption that what is averred in the affidavit as factual evidence is admitted.
33. The plaintiff averred that its statutory remedy to enter and take physical possession of the suit property may only be exercised on the strength of the court order sought herein. Section 90(1) – (3) of the [Land Act](#) states as follows:-

“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.

- 2 The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - a the nature and extent of the default by the chargor;
 - b if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e the right of the chargor in respect of certain remedies to apply to the Court for relief against those remedies.
 - 3 If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
 - a sue the chargor for any money due and owing under the charge;
 - b appoint a receiver of the income of the charged land;
 - c lease the charged land, or if the charge is of a lease, sublease the land;
 - d enter into possession of the charged land; or
 - e sell the charged land;”
34. Section 94 (1)(2)(a) of the [Land Act](#) provides that;
- “(1) Upon expiry of the period specified in section 90(2) (b) and (c), a chargee may serve on the chargor a notice of intention to enter, in the prescribed form, notifying the chargor that the chargee intends to enter into possession of the whole or a part of the charged land at a date that is at least one month from the date of the service of the notice.
- 2 A chargee may exercise the power of entry peaceably and or by use of reasonable force—
 - a entering into and taking physical possession of the land or a part of it peaceably and without committing any forcible entry;”

n this matter the nature of the relationship between the Plaintiff and the Defendant is contractual.
35. The Court of Appeal in the case of; *National Bank Kenya Limited vs Pipeplastic Samsolit (K) Limited and Another* [2002] 2 EA 503 held that a court of law cannot re-write a contract between the parties



and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.

36. In the *Jamii Bora Bank Limited vs Wapak Developers* [2018] eKLR the Court held as follows:-

“...The charger deposited title documents with the Chargee which will be held by the Chargee as a lien for security. That in case there is a default in the repayment of the loan amounts, the Chargor may move to Section 90 of the *Land Act* with the consent of the Court. It is trite that a contract that the parties have agreed to perform, the Court will not interfere unless that contract is tainted with illegalities, fraud, is against public policy, misrepresentation etcetera. In that respect, the parties are expected by the Court to be able to perform their part of the bargain.

Its indeed trite law for this Court to uphold the sanctity of lawful commercial transactions to give effect to the intentions of the parties. I consider the effect of a contract of a mortgagor and mortgagee to be of such a nature that it is protected under the nuances of constructive trust. The mortgagors interest in the land is acquired upon the contract formation by signing of legal or informal charge enforceable as equitable mortgage. In the instant case the defendant action of conveyance and deposit of titles to the suit land retained the legal title while the Plaintiff obtained equitable beneficial title to the properties.

The question at stake can be succinctly answered by the dictum in the case of *Ibrahim Seikei T/A Masco Enterprises V Delphis Bank* (2004)eKLR where the Court held “we must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the bank and had an obligation to repay the monies under the terms agreed. Banks do not give monies as gratuity or love for human kind. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute.” With the leave of the Court the plaintiff has the backing of the law to proceed accordingly to enforce the mortgage contract.”

37. Evidently the Respondent has complied fully with the statutory procedure provided by the law.

38. The Defendant is clearly in default and has not made any efforts to repay the loan or make any proposals to the Plaintiff.

39. In the circumstances the following orders issue.

- a. The Plaintiff be and is hereby granted leave to, by itself and/or authorized agents or court bailiff, enter into and take physical possession of all that of the Defendant’s property known as Apartment No. A3 erected on Title Number Nakuru Municipality Block 5/A3/240-Nakuru in exercise of a chargee’s statutory power to take possession of charged property.
- b. The Officer Commanding Station (OCS), Central Police Station- Nakuru is hereby directed to provide security on all that of the Defendant’s property known as Apartment No. A3 erected on Title Number Nakuru Municipality Block 5/A3/240-Nakuru to enable order (a) above and to ensure that there is no breach of the peace.
- c. The costs of these proceedings and the execution/enforcement of Orders (a) and (b) above be borne by the Defendant.
- d. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY, 2023.



MUMBUA T MATHEKA

JUDGE

CA Jennifer

Mutua Waweru & Company Advocates

Dave Kanakkumar Maganlal

