



REPUBLIC OF KENYA



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**Speed Capital Limited v Ngani & another (Civil Appeal 20A of 2021)
[2023] KEHC 1824 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1824 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 20A OF 2021
RPV WENDOH, J
MARCH 14, 2023**

BETWEEN

SPEED CAPITAL LIMITED APPELLANT

AND

JOSEPH ONGONDO NGANI 1ST RESPONDENT

MARGARET ANYANGO ONGONDO 2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of Hon. R. Odenyo Senior
Principal Magistrate (SPM) dated and delivered on 9/5/2017 in Migori CMCC
No. 706 of 2016 – Joseph Ongondo Ngani & Another v Speed Capital Limited)*

JUDGMENT

1. Joseph Ongondo Ngani and Margaret Anyango Ongondo (respondents) filed Migori CMCC No. 706 of 2016 (suit) against Speed Capital Limited (appellant).
2. The suit was commenced via a plaint dated 22/7/2016. The respondents' case was premised on a loan agreement between the 1st respondent and the appellant. The respondents pleaded that on or about 28/1/2015, the 1st respondent obtained a loan of Kshs. 5,000,000/= from the appellant. The loan was repayable within a year at an interest rate of 24% per annum on a reducing balance with an agreed monthly repayment of Kshs. 275,000/=; that the respondents released to the appellant title deeds L.R. Kamagambo/Kameji/621, 623,625,627 and 663, L.R. Kamagambo/Kamwango/1289 and L.R. Kanyamkago/Kawere/1009 to hold as security; that the respondents made the final payment of the loan advanced to them on 16/3/2016.
3. It was further pleaded that on March 2016, they received a call from the appellant alleging that their account was in arrears of Kshs. 2,824,548; that the respondents carried out a search on their titles and discovered that the appellant had registered charges against their titles amounting to



Kshs. 5,500,000/=; that the appellant through its agent Regent Auctioneers placed an advertisement in the newspapers for sale by public auction for the properties being held as securities including Kanyamkago/Kawere/1/1009 which actions the respondents stated was irregular, unlawful, null and void.

4. The respondents further particularized the alleged fraudulent actions of the appellant and claimed loss and damages for the injuries suffered as a result of an unlawful publication by the appellants. The respondents sought a declaration that the intended sale of the suit properties was null and void, a permanent injunction restraining the appellant, its servants, and /or agents from proceedings with the sale, an order of discharge of charge and for release of titles of the suit properties, general damages, costs and any other relief the court may deem fit and appropriate to grant.
5. The appellant entered appearance and filed a statement of defence dated 5/8/2016. The appellant averred that the loan of Kshs. 5,000,000/= was advanced at interest of 5.5% per month flat rate; that the 1st respondent offered the title deeds as security for the loans obtained and consented to charge them; that the appellant proceeded to register the charges against the properties offered as security. The appellant denied paragraphs 6,7,8,9,10,11,12,13,14,15,16,17,19,20,21,22,23, and 24 and it put the respondents to strict proof. The appellant stated that it complied with all the statutory requirements and its right of sale crystallized; that the respondents were in material breach of the loan agreement and they are underserving of the remedies sought. The appellant further averred that it will raise a counterclaim if the securities depreciate below the amount of the loan and interest outstanding and will raise a preliminary objection to the jurisdiction of the court. The appellant asked the court to dismiss the plaintiffs' claim.
6. The suit proceeded for hearing. The 1st respondent testified as PW1 while Mr. James Ouma the Chief Executive Officer of the appellant testified as DW1. Both witnesses adopted their various witness statements and produced their respective documents in support of their case. The trial court rendered its judgement in favour of the respondents as prayed at prayers (a), (b), (c) of the respondents' plaint and cost of the suit.
7. Being aggrieved by the judgement and decree passed by the trial court, the appellant lodged the Memorandum of Appeal dated 27/9/2018 and preferred five (5) grounds of appeal as follows:-
 - a. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that the plaintiff had a binding contract with the defendant and was in breach of the same;
 - b. That the trial court erred in failing to give effect to a duly registered charge;
 - c. The trial court erred in law and in fact in failing to take into consideration the weighty evidence adduced by the defendant in the proceedings;
 - d. That the trial court erred in law and in fact by ignoring and/or disregarding the High Court's decision and general legal principles as developed over time in respect of contracts and charge document;
 - e. That the trial court erred in law and in fact by dismissing the defendant's arguments.Thus, the appellant prayed: -
 - i. The appeal be allowed.
 - ii. The judgement delivered on 9/5/2018 in Migori CMCC 706 of 2016 be set aside and dismissed with costs.
 - iii. Costs of the appeal be awarded to the appellant.



8. The court directed that the appeal be canvassed by way of written submissions and both parties duly complied.
9. The appellant filed its written submissions dated 24/6/2022. The appellant submitted that the trial court failed to appreciate that there was a binding contract with the respondents and they were in breach of the same; that Kshs. 5,000,000/= was advanced to the 1st respondent and he was bound by the contract; that the trial court locked out the appellant's evidence of the money lending agreement and the charge documents which showed the amounts secured and the rate of interest; that the respondents acknowledged receiving the loan and repaying the same and therefore the court could not have feigned ignorance that there was no document to get the rate of interest or amount loaned. The appellant relied on the findings in the case of *Abdul Jalil Yafai vs Farid Jalil Mohammed* (2015) eKLR.
10. The appellant also submitted that the trial court failed to give effect to a duly registered charge; that the appellant gave evidence on how the 1st respondent furnished security with the consent of his wife; that there is no report of forgery or complaint made against the land registrar regarding unlawful registration of charges; that the respondents did not call the Land Registrar as a witness and thus the respondents did not discharge their burden of proof; that the 1st respondent is a learned person and a politician and therefore cannot claim that he did not know what he was signing. The appellant submitted that the court process cannot be used to aid a party who wants to escape binding financial obligations. In support of this position, the appellant relied on the case of *Ben Murumba Nakitare vs Speed Capital Limited & Another* (2020) eKLR.
11. Further to the foregoing, it was submitted that the appellant produced a statement which shows a balance of over Kshs. 10 million which continues to accrue interest which statement was not challenged. The appellant submitted that its witness explained the different figures on the loan balance which was Kshs. 2.8 million as at 29/3/2016 which had grown to Kshs. 3.6 million by 29/7/2022 due to penalties and interest which was compounded. It was submitted that there was no prayer by the respondents that they had cleared their loan payment and therefore it was wrong for the trial Magistrate to grant such a prayer in his judgement.
12. The appellant further submitted that it notified the 1st respondent of the default and served various notices as required by law; that the power of sale had lawfully accrued having met all the legal requirements. It was submitted that there was no denial by the 1st respondent that the notices were issued and if the court's view was that the same was not done, the equitable order would have been to order proper issuance of notices. The appellant relied on the case of *Housing Finance Company Limited vs Mary Wambui Muturi* (2018) eKLR on the lender's right to exercise statutory power of sale.
13. In conclusion, the appellant faulted the trial Magistrate for disregarding the superior court's decision and general legal principles in respect to contracts and charge documents; that the court cannot rewrite contracts between parties as was held in *National Bank of Kenya vs Pipleplastic Samkolit (K) Ltd & Another* (2002) EA 503 cited in Abdul Jalili Yafai (supra). The appellant asked the court to allow the appeal as prayed.
14. The respondents filed their submissions dated 1/9/2022. The respondents submitted that the trial Magistrate found that he could not conclusively state the interest rate for failure to produce the contract; that the suit property was irregularly offered for public auction and therefore there were no sufficient reasons to overturn the judgement as was held in *Kamau vs Mungai & Another Civil Appeal No. 59 of 2001*. The respondents also submitted that they produced a statement for the loan which varied the rate of interest, the burden shifted to the appellant to prove that the varied interest was not 24% as claimed; that the appellant did not comply with the requirements of Section 90, 96 and 97 of



the Land Act 2012, the Land Control Act, consent to charge and valuation of the suit property thereby making the sale irregular.

15. The respondents asked this court to dismiss the appeal for reasons that there is no sufficient ground to interfere with the judgement of the lower court, lack of compliance with Section 96 (2), 90 and 97 (2) of the Land Act and non-compliance with Section 26 of the Land Control Board.
16. This being the first appellate court, this court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motorboat Co. Ltd* (1968) EA 123.
17. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & Another* (1988) eKLR.
18. Guided by the above decisions, I have carefully considered the memorandum of appeal, the record of appeal, the proceedings in the trial court and the respective parties' submissions. The issues for determination arising therefrom are:-
 - i. Whether there was a loan agreement.
 - ii. What was the agreed interest rate.
 - iii. Whether the titles were properly charged over the loan amount.
 - iv. Whether the appellant followed the right procedure before exercising its statutory power of sale.
19. It is not in dispute that the 1st respondent took a loan from the appellant for Kshs. 5,000,000/=. This is evidenced by the loan application form and the money lending agreement (agreement) both dated 21/1/2020. There is also a loan application form dated 21/1/2020 which indicates that the repayment period was 6 months although the same is not expressly indicated in the agreement. The agreement further showed that the interest rate at which the loan was being disbursed was 5.5% flat rate per month.
20. It is also not in dispute that to secure the loan, the respondents offered various title deeds as collateral, being Kamagambo/Kameji/621, 623, 625, 627, 663, Kanyamkago/Kawere 1/1009 and Kamagambo/Kamwango/1289. The charge instruments over the title deeds are all dated 16/2/2015. It should also be noted that the 2nd respondent being the spouse of the 1st respondent gave consent to have the legal charge created over the title deeds. By the charge instruments, the respondents created a legal charge over the said title deeds which had different amounts as follows:-
 - a. L.R. Kamagambo/Kameji/621 - Kshs. 2,000,000/=
 - b. L.R. Kamagambo/Kameji/623 - Kshs. 700,000/=
 - c. L.R. Kamagambo/Kameji/625 - Kshs. 700,000/=
 - d. L.R. Kamagambo/Kameji/627 - Kshs. 700,000/=
 - e. L.R. Kamagambo/Kameji/663 - Kshs. 700,000/=
 - f. L.R. Kanyamkago/Kawere 1/1009 - Kshs. 800,000/=
 - g. L.R. Kamagambo/Kamwango/1289 - Kshs. 700,000/=



21. It appears that the 1st respondent was unable to meet his obligations and repay the debts when they fell due. As a consequence, the appellant served the 1st respondent with several demand letters dated 10/2/2016, 27/5/2016 and 12/8/2016. As of 12/8/2016, the letter issued to the 1st respondent as the notice to sell, indicated that the 1st respondent was in arrears of Kshs. 2,834,253.92 which continued to accrue interest and penalty charges. However, the debt was not paid and the appellant through Regent Auctioneers, commenced the process of realizing the securities by putting up a notice in one of the newspapers advertising for a public auction for the sale of the charged properties which was to take place on 8/8/2016.
22. On the other hand, the 1st respondent contended that he had finished repaying the loan within a year amounting to Kshs. 7, 285, 000/=.
23. The trial Magistrate found that the appellant did not produce a contract. DW1 produced the loan application form - "DEXH1." In the documents which form part of this record of appeal, at page 180 and 181 there is a money lending agreement dated 21/1/2020. I have perused the original file and there is no indication that the loan agreement dated 21/1/2020 formed part of the list of documents filed before the trial court. The loan agreement would have guided the court on the further terms of the agreement especially the contentious issue of the interest rate, the total interest and principal instalment that was payable. The trial Magistrate made a proper finding that there was no contract before him to guide the court on the issue of the applicable interest rate.
24. Be that as it may, the 1st respondent was advanced a loan which needed to be repaid and therefore he cannot run away from it. In paragraph 4 of its defence, the appellant averred that the interest rate charged was 5.5% per month at flat rate. The respondents did not file a response to the defence to deny this allegation. On cross examination, PW1 testified that he was told that the rate of interest was 24% but he was not given any document but when he was shown the loan statement, it showed that the interest rate was 66%. It was also his testimony that the loan repayment was Kshs. 275,000/= per month payable within 12 months.
25. DW1 testified that they agreed on a rate of 10% per month but after discussions, they agreed a rate of 5.5% on flat rate. He further testified that the rate of 5.5% per month translates to 66% per year. It was also DW1's testimony that the 1st respondent was to repay the loan within 6 months. It was his testimony that since the 1st respondent failed to pay within time the money due, the balance and the interest kept going up. DW1 further testified that Kshs. 2,700,000/= was the money to be paid by the 1st respondent at that time in settlement of the account.
26. Be that as it may, the respondents did sign a loan application form and they were advanced a loan of Kshs. 5,000,000/=. At page 2 of the loan application form, the 2nd respondent who is the guarantor pledged titles as security and undertook to repay the loan fully (principle, interest and penalties) in case of default by the applicant who is the 1st respondent.
27. The statement of the loan printed on 5/8/2016, shows that the annual interest rate is 66%. This translates to a monthly interest rate of 5.5% per month. The same information on the interest payable reflects on the statement which was printed on 2/3/2018. The loan application form shows that the loan was to be repaid within 6 months. It is therefore the conclusion of this court that the loan advanced was Kshs. 5,000,000/= and the interest rate was of Kshs. 5.5% per month and it was payable within 6 months.
28. From the reading of the statements, it is seems that the interest payable per month was Kshs. 275,000/= which translates to 5.5% of the advanced loan. It is not clear what amount the 1st respondent was liable to pay as the principal together with the interest. It is also not clear how the penalties were calculated.



- The 1st respondent's position is that the loan had a monthly repayment of Kshs. 275,000/=. There is no express agreement between the parties on what amount would be the monthly repayment on the principal amount. What the 1st respondent refers to the principal amount is in fact the interest payable per month. The principal amount and any other accrued penalties had to be repaid. The appellant through its witness did not attempt to take the court through the calculations it did to justify the outstanding payments.
29. The 1st respondent cannot bear the blame of failing to make payments as and when they were due, since there was no clear direction on what he was supposed to pay as at the time of signing the loan application form. This court reiterates that it is not an opportunity for the 1st respondent to run away from its obligations.
30. Section 90 (2) (a) and (b) of the Land Act which is relevant to this scenario provides:-
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;
31. Therefore, the appellant was required to issue a notice to the 1st respondent notifying him of the default. From the documents on record, the first letter addressed to the 1st respondent was dated 10/2/2016. In the said letter, the 1st respondent was given the details of the outstanding loan balance which stood at Kshs. 4,646,544 inclusive of arrears of Kshs. 4,260,908 together with interest. The 1st respondent was given 3 months to pay the outstanding amounts. There is no evidence that the letter was received by the 1st respondent either by him appending his signature or it was sent by registered post to the 1st respondent's address.
32. At the expiry of the 3 months, the 1st respondent was sent another letter dated 27/5/2016 through the firm of Kinyanjui, Kirimi & Co. Advocates. In this letter the outstanding loan amount was Kshs. 3,446,519.88. Although the letter is written that it was delivered by hand, there is no evidence that it was signed by the 1st respondent. The last letter was sent via registered mail and it is dated 12/8/2016. The letter of 12/8/2016 was a notice to the 1st respondent informing him of the Chargee's power of sale. In this letter, the outstanding loan amount is Kshs. 2, 834,253.92 as of 12/8/2016. This letter was sent via registered post and there is evidence to that effect.
33. I have found it necessary to highlight the mode of service of each letter to the 1st respondent. The letter of 10/2/2016 was written to the 1st respondent pursuant to Section 90 (2) (b) of the Land Act (supra). It is the most important letter as the Chargor can decide whether to make good the demands and halt the sale process. It is this court's considered view that the statutory notice required under Section 90 (2) (b) was not properly served upon the 1st respondent. This court also observes that the outstanding loan amount on all the three letters differs. The outstanding loan amount together with interest and penalties in the letter of 10/2/2016 comes to about Kshs. 8,907,452, in the second letter of 27/5/2016, the outstanding amount comes to Kshs. 3,446,519.88 while in the third letter of 12/8/2016 the outstanding amount comes to Kshs. 2, 834,253.92. There are no steady figures being issued to the 1st respondent. The appellant through its witness stated that the 1st respondent owe it around 10 million. This begs a pertinent question, If at all the sale of the charged properties would have proceeded, which amount was the appellant seeking from the 1st respondent?
34. It is important that a borrower is informed in detail and precisely what their outstanding debts are for proper planning and commitment to pay the outstanding loan and arrears if any. The importance of



clear statements and/or accounts in money lending agreements was emphasized in Civil Appeal No. 282 of 2004 *Margaret Njeri Muiruri Versus Bank of Baroda (Kenya) Limited* (2014) eKLR where the learned Judges at the Court of Appeal as they were determining the issue of accounts stated that;

“... Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance.”

35. The appellant does not seem to be acting in good faith by giving vague statements on what the outstanding loan amount is. This is a clear indication that it is after unjustly enriching itself through issuing uncertain figures to the detriment of the 1st respondent.
36. The letter of 12/8/2016 being the notice to sell was issued pursuant to Section 96 of the *Land Act*. Section 96 (1) of the *Land Act* gives the Chargee the right to exercise its statutory power of sale if the Chargor does not fulfil its obligations under Section 90 of the *Land Act*. However, there are certain conditions preceding the sale which must be fulfilled. Sections 96 (2), (3) (c) and 97 (2) of the *Land Act* and rule 15 (d) of the *Auctioneer Rules* provide for these conditions being:-
 - No contract of sale shall be complete for the sale of the charged land until at least forty days have lapsed from the date of service;
 - A copy of the notice should be served on a spouse of the chargor who has given consent;
 - A Chargee should ensure that a forced valuation is undertaken by a valuer.
 - Before sale of immovable property, the auctioneer shall give in writing to the owner of the property, notice of not less than 45 days within which to redeem the property.
36. The newspaper advertisement of the intended sale by Regent Auctioneers stated that the sale of the charged properties was to be done on 8/8/2016. The letter which informed the 1st respondent of the intention to sell was dated 12/8/2016. It was not proper procedure to have the letter of the intention to sell sent after the date when the charged properties were to be sold was already set. The preceding conditions must be fulfilled first before any action is taken. In addition, there is also no evidence that valuation took place and a copy of the notice to sell sent to the 2nd respondent who gave the spousal consent for the properties to be charged.
37. The appellant fell short of following the procedure under the law and therefore, it cannot be said that the right to exercise its statutory power of sale had crystalized.
38. Be that as it may, the 1st respondent being guaranteed by the 2nd respondent did take a loan from the appellant. The loan application form can be construed to be an agreement between the parties. The 1st respondent cannot run away from it. It is trite and well settled law that the court cannot interfere or rewrite contracts between parties unless it was entered through fraud, coercion or it is against public



policy. In *Jopa Villas v Private Investment Corporation & 2 others* (2009) eKLR Lenaola J (as he was then) held:-

“I am clear in my mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced....Our courts must uphold the sanctity of lawful commercial transactions.”

39. Flowing from the above, the appeal dated 12/6/2018 partly succeeds as follows:-

- a. The interest charged on the loan advanced to the 1st respondent of Kshs. 5,000,000/= was Kshs. 5.5% per month as flat rate;
- b. The securities for the loan were title numbers:-
 - a. L.R. Kamagambo/Kameji/621 - Kshs. 2,000,000/=
 - b. L.R. Kamagambo/Kameji/623 - Kshs. 700,000/=
 - c. L.R. Kamagambo/Kameji/625 - Kshs. 700,000/=
 - d. L.R. Kamagambo/Kameji/627 - Kshs. 700,000/=
 - e. L.R. Kamagambo/Kameji/663 - Kshs. 700,000/=
 - f. L.R. Kanyamkago/Kawere 1/1009 - Kshs. 800,000/=
 - g. L.R. Kamagambo/Kamwango/1289 - Kshs. 700,000/=
- c. The Appellant is hereby directed to issue a comprehensive statement of the outstanding loan balance, penalties if any to the respondents within 14 days of this judgement;
- d. In tandem with the statement, the Appellant should issue the statutory notices as required under the law;
- e. Parties are at liberty to negotiate and enter a further agreement on the terms of repayment of the outstanding loan balance within 30 days of service of the statements and issuance of the statutory notices;
- f. In default of abiding by the terms of the further agreement if any, the Appellant be at liberty to proceed with its Chargee's Power of Sale as prescribed under the law.
- g. Each party to bear its own costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 14TH DAY OF MARCH, 2023.

R. WENDOH

JUDGE

Judgment delivered in the presence of;

Mr. Tuwei for the Appellant.

No appearance for the Respondents.

Nyauke Court Assistant.

