



**I & M Bank Limited v Omolo (Civil Case (Originating Summons)
11 of 2020) [2023] KEHC 3149 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE (ORIGINATING SUMMONS) 11 OF 2020**

RE ABURILI, J

APRIL 17, 2023

BETWEEN

I & M BANK LIMITED APPLICANT

AND

NELSON ASINO OMOLO RESPONDENT

JUDGMENT

Introduction

1. This Judgment determines Originating Summons dated August 25, 2021, brought under the provisions of Order 37 Rule 4 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) and Section 79 (6) of the [Land Act 2012](#). The Applicant/plaintiff I &M Bank, a financial institution regulated by Central and established under the [Banking Act](#) seek the following orders:
 - a. An order granting leave to the Chargee/Applicant to sell the immovable property, Kisumu/Dago/1104 to recover the outstanding balances on the account of the borrower.
 - b. That the Chargee/Applicant is entitled to vacant possession of immovable property, Kisumu/Dago/1104 to facilitate the exercise of its statutory power of sale.
 - c. That the chargor/respondent by himself, tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession of immovable property, Kisumu/Dago/1104 to the chargee/applicant and/or its appointed agent/s.
 - d. The chargor /respondent do bear the costs of this application.
2. The Originating Summons is supported by the affidavit of Andrew Muchina, the legal manager of the chargee/applicant sworn on the August 25, 2020.



3. It was the applicant's case that the respondent applied for credit facilities from the applicant Bank and vide a letter of offer dated November 22, 2006, the applicant approved the application and advanced the respondent Kshs 4,000,000 on the strength of an informal charge over property title No LR No Kisumu/Dago/1104 that was registered in the respondent's name.
4. The applicant asserted in deposition that the respondent had defaulted in his repayments forcing the applicant to issue a 14 days' notice on February 4, 2020 but that the said notice did not elicit any response from the respondent.
5. The applicant states that it is desirous of disposing of the property by public auction/private treaty to recover the outstanding debt that amounts to Kshs 1,601,625.70 as at August 19, 2020 and further that it is apprehensive that continued non-payment of the loan will result in the debt outstripping the value of the security.
6. The applicant's case was further supported by the testimony of PW1, Doreen Otieno, the applicant's legal officer who adopted her witness statement dated December 2, 2022 and filed in court on the January 11, 2023, substituting the statement of the initial witness who had since left the applicant's employment, but reiterating the depositions of Andrew Muchina.
7. In cross-examination, PW1 restated her testimony and further stated that she was not an employee of Giro Bank when it issued the facility to the respondent. She stated that at the time of offer, the outstanding amount was Kshs 4,776,676.01 though the offer letter did not state that the overdraft was part of the Kshs 4,776,676.01.
8. PW1 further stated that when one takes an overdraft facility, one is given a loan account number that is the link to the overdraft facility. She stated that this account was opened on 1/1/2013 from Giro Bank and taken over by the applicant Bank on the 1/4/2017 after the applicant Bank acquiring the Giro Bank.
9. In re-examination, PW1 reiterated that the bank statements reflected the true position from the takeover of Giro Bank by the applicant Bank.
10. Opposing the Originating Summons, the respondent Nelson Asino Omolo filed a statement of defence dated March 18, 2021 denying the claim against him and the contents of the charge regarding the alleged debt and put the applicant Bank to strict proof of the same.
11. The respondent stated in his defence that through his company Fairsure Insurance Brokers Limited, he had obtained an overdraft facility of Kshs 4,000,000 million from Giro Commercial Bank Limited secured with various securities including cash deposits, motor vehicle titles deeds and a charge to be registered over the suit property.
12. The respondent further stated that by the time Giro Commercial Bank Limited was acquired by the applicant herein in 2017, the debt of the company was Kshs 549,350.66 and that in February 2020, without any prior notice, the applicant demanded payment from the respondent of the sum of Kshs 804,919.50 with no explanation as to how the debt had increased by 146.5% in 3 years, a breach of Section 44 of the *Banking Act*.
13. It was the respondent's contention that bona fide efforts to service the debt were frustrated by the vagaries of the Covid 19 pandemic that affected the national economy and hurt small and medium enterprises like the respondent's company.



14. The respondent stated that the suit was premature and brought in bad faith and that the orders sought ought to be refused or suspended for a period of 6 months to enable the respondent effect the payment without allowing the applicant to recover an exaggerated debt.
15. Parties were to file written submissions but as at the time that I am writing this judgment, no such submissions have been availed for consideration.

Analysis & Determination

16. I have considered the pleadings herein and I observe that there is the question of issuance of vesting order on land hence it is necessary to establish whether this court has jurisdiction to hear and determine this Originating Summons. This is because jurisdiction is everything, without which the court can do nothing else and must down its tools. See *Owners of the Motor Vessel MV Lillian S v Caltex Oil (K) Limited* [1989] KLR 1.
17. The Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* [2017] eKLR held that the High Court is well vested with jurisdiction to entertain issues arising out of contractual disputes such as those raised herein. The Court of Appeal expressed itself as follows:

“...However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court...”

18. The Court went further to state that:

“While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, Section 13 of the ELC Act and Section 150 of the Land Act; none of which concern the determination of accounting questions. Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides inter alia, that;

1. subject to clause (5), the High Court shall have-
 - a. unlimited original jurisdiction in criminal and civil matters.”

19. I therefore find that this Court is vested with jurisdiction to determine the issues arising in the instant suit which are whether the applicant merits grant of the orders sought.



20. Back to the merits of the suit, it is without doubt that the transaction between the parties herein was secured on the strength of an informal charge through simple deposit of title over property, LR No Kisumu/Dago/1104.
21. As regards the validity of the informal charge herein, this Court is well aware of the fact that section 79(6) recognizes an informal charge which may be created where a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land with the repayment of money or monies worth obtained from the charge. Section 2 of the *land Act* envisages the definition of an Informal Charge. The legality of such agreements is clearly spelt out in section 79 of the *Land Act* which provides as under:

“Informal charges.

79(6) An informal charge may be created where –

- (a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee;
- (b) the chargor deposits any of the following-
 - (i) a certificate of title to the land;
 - (ii) a document of lease of land;
 - (iii) any other document which it is agreed evidences ownership of land or a right to interest in land.
- (7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.
- (8) An arrangement contemplated in subsection (6) (a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a "lien by deposit of documents."
- (9) A chargee shall not possess or sell land whose title document have been deposited with the chargor under an informal charge without an order of the Court.”

22. Section 2 of the *Land Act* further defines a charge as follows:

“Charge” means an interest in land securing the payment of money or money's worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –

- (a) an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor's land with the repayment of money or money's worth obtained from the chargee....”

23. As regards creation of an Informal Charge, in the case of *Tassia Coffee Estate Limited and Another v Milele Ventures Limited* (2014) eKLR, the court stated that by depositing the title deed with the



Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase price and other parcels of land. That the Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.

24. A similar position was taken in the case of *Lincoln Kivuti Njeru v Insurance Company of East Africa* [2017] eKLR where Nyamweya J held that informal charges must be by way of instruments and evidenced in writing and that the Defendant must enter into further charges or agreements in the event that they want security provided for other monies found to be owed.
25. In light of the above, it is evident from the applicable provisions of the law that informal charges must be by way of an instrument and it must be reduced into writing, and the Chargee must enter into further charges or agreements in the event that they want security provided for any other monies that maybe found to be owed by the Chargor.
26. In this case, it is clear from the terms of the agreement between the applicant and the respondent that the parties herein created an informal charge under the loan facility and I have taken note of the fact that by the letter of offer dated November 22, 2006, an informal charge instrument was duly executed by the respondent. Thus the parties herein duly executed a lien by the deposit of title with the applicant's predecessor, Giro Commercial Bank Limited, which was eventually acquired by the applicant herein.
27. Accordingly, the respondent having deposited his title deed in respect of the suit property with the applicant, they created an informal charge in favour of the applicant over the suit property as security for the overdraft/loan facility. The applicants therefore became the chargees of an informal charge over the suit property and enjoy a lien by deposit of documents.
28. The Chargee/Applicant in the present case is seeking a vesting order pursuant to section 79(9) of the *Land Act* since the informal charge need not be registered. As a result, the applicant cannot exercise its statutory power of sale on its own motion and requires the consent of the court. Thus, had the instrument been registered, the chargee would move according to the terms of the instrument without seeking consent of the court. Under Section 79(9) above, a chargee holding an informal charge may only take possession or sell the land which is the subject of the informal charge on obtaining an order of the court. The applicant herein is seeking consent of the court to proceed to exercise the remedies envisaged under section 90 of the *Land Act*, No 6 of 2012.

In addition, under section 79(7) of the *Land Act*, (7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.

29. In *Prime Bank Limited v Porsche Center Nairobi Limited* [2021] eKLR, M Muigai J had the opportunity to deal with a similar issue as is the case herein. The learned Judge stated as follows:

“Considering the application of the above provisions of the Land Act it is clear that an informal charge was created when the Plaintiff who is the chargee accepted a written and witnessed undertaking from the Defendant who is the chargor, the intention of which was to charge Land Reference Number 209/14070 IR Number 147263 to secure the loan sum of Kshs 250, 000, 000 lent to the borrower by the Plaintiff. The Plaintiff also sought leave of this Court pursuant to Section 79 of the Land Act to sell the property secured by the informal charge.”



30. This Court, just like all other courts, is bound by law to uphold the sanctity of lawful commercial transactions to give effect to the intentions of the parties. In the case of *Ibrahim Seikei T/A Masco Enterprises v Delphis Bank* 2004 eKLR the court stated that:

“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.”

31. In this case, I find that the applicant is by law entitled to the leave of court in order to proceed and enforce the informal charge. I therefore find no reason to refuse to grant the leave sought and the vesting order sought herein, upon which the Applicant shall be required to comply with the provisions of section 90 of the *Land Act* to issue the relevant statutory notice of sale in respect of the informal securities deposited by the respondent.

32. I therefore find that the applicant has proved its case against the Respondent on a balance of probabilities. I allow the claim by the applicant Bank against the Respondent and make the following orders:

- a. I grant leave to the Chargee/Applicant herein I&M Bank to put in motion the legal process of selling the immovable property, Kisumu/Dago/1104 to recover the outstanding balances on the account of the borrower/ respondent herein.
- b. I order that the Chargee/Applicant is entitled to vacant possession of immovable property, Kisumu/Dago/1104 to facilitate the exercise of its statutory power of sale.
- c. I order the chargor/respondent by himself, tenants/servants and/or agents or any other occupants do forthwith deliver and give vacant possession of immovable property, Kisumu/Dago/1104 to the chargee/applicant and/or its appointed agent/s.
- d. As the suit herein was for this court to pronounce itself on the law as it is, I order that each party shall bear their own costs of this suit.
- e. Decree to issue.
- f. This file is accordingly closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF APRIL, 2023

R.E. ABURILI

JUDGE

