



Ngondi v Thabiti Finance Company (in Liquidation) & another (Civil Case E007 of 2021) [2023] KEHC 17694 (KLR) (23 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL CASE E007 OF 2021**

RK LIMO, J

MAY 23, 2023

BETWEEN

JACQUELINE MWIKALI NGONDI PLAINTIFF

AND

THABITI FINANCE COMPANY (IN LIQUIDATION) 1ST DEFENDANT

REGEN AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. Jacqueline Mwikali Ngondi, the Plaintiff herein, has brought this suit against the Defendants herein, accusing them of exercising their statutory power to sale that property known as Kyangwithya/ Misewani/150 (hereinafter, to be referred to as suit property for ease of reference). Properly registered in her late husband Joel Kivisu Ngondi (deceased). She claims that the Defendants have refused to avail her bank statements showing tabulations on how a loan of Kshs. 100,0000 taken in 1983 rose to Kshs. 12,976,380
2. The Plaintiff pleads that the suit property used as collateral by her late husband was an ancestral rural home and that although her late husband defaulted, she was unaware of the arrangements made by her husband and how the loan accumulated arrears to the tune of Kshs. 12,976,380 as at June 2021.
3. The Plaintiff pleads that the 1st Defendant instructed the 2nd Defendant, to advertise the suit property on 12th July 2021 and undertake a public auction on 30th July 2021 in a bid to exercise its statutory power of sale but maintains that she was unaware of the outstanding balance.
4. The particulars of malicious, illegal and unlawful computation of interest by the 1st Defendant are pleaded under paragraph 11 of the Amended Plaintiff and the plaintiff is praying for judgment against the defendants jointly and severally for;



- i. A declaration be issued to the effect that the inflated amount of Kshs 12,976,380/- is not payable or any other amount at all.
 - ii. A permanent injunction directed at the Defendants, their agents, servants or employees restraining them from conducting the sale of Land Reference No. Kyangwithya/Misewani/150 Nyakine village kwa Ngindu Kyangwithya East Ward Kitui County (suit property) by public auction or in any other way dealing with or interfering with the Plaintiff's possession of Land Reference No. Kyangwithya/Misewani/150 Nyakine village kwa Ngindu Kyangwithya East Ward Kitui County (suit property)
 - iii. The original title in respect of Land Reference No. Kyangwithya/Misewani/150 Nyakine village kwa Ngindu Kyangwithya East Ward Kitui County to be released by the 1st Defendant to the Plaintiff and in default the court to direct the Registrar of lands to nullify and issue a new one
 - iv. That the 1st Defendant does sign a discharge of charge in respect of Land Reference No. Kyangwithya/Misewani/150 Nyakine village kwa Ngindu Kyangwithya East Ward Kitui County and in default the court to sign the same.
 - v. Costs of the suit
 - vi. Interest
 - vii. Any other relief that this Honourable Court may deem fit to grant.
5. In its defence dated 10th August 2021, the 1st Defendant denied the averments in the plaint. It has pleaded that the plaintiff's husband applied and was granted a loan of Kshs 100,000/- and charged the suit property which is under his name as security for the said loan. That the 1st Defendant sent several reminders and demand letters to the deceased notifying him of the increase in interest due to default in repayment of the loan. The 1st Defendant avers that it instructed Kenstate Valuers to value the suit property and that it followed all the legal procedures in exercise of its statutory power of sale.
 6. The 1st Defendant pleads that under the old land regime, there was no legal requirement for spousal consent before one could offer land as a collateral.

Evidence

7. In her evidence before this Court, the Plaintiff reiterated that he recieved a notification of sale of the suit property on 19th May, 2021 indicating that the property would be sold on 30th July, through a Public Auction.
8. She stated that her late husband took a loan with the 1st Defendant in 1983 and passed on in 2014. She pleads ignorance of the financial transaction and in particular how the loan accumulated interests to reach Kshs. 12,976,380.
9. She claims that some people visited her home in 2020 informing her that the property was to be auctioned due to some loan taken by her late husband and that another auctioneer went back in 2021 in an attempt to auction the said property.
10. She conceded that she was yet to file succession proceeding with respect to the estate of her deceased husband but insisted that the suit properly is an ancestral land where she lives with her parents.
11. She pleaded with this Court stating that the amount demanded by the bank is too huge making it unpayable.



12. She doubted if her late husband ever got statutory notices or any communication pointing out that the Postal Address used to send letters by the Defendants was wrong and denied ever receiving any communication from them regarding the suit property.
13. The Plaintiff submits that the 1st Defendant is in violation of the In Duplum Rule contemplated under Section 44 A of the [Banking Act](#) as the loan is said to have accrued an interest to the tune of Kshs 12,976,380/- The plaintiff has cited the case of [Ann Mugure & 2 Others vs Higher Education Loans Board](#) (2022) Where the Court declared that the in duplum rule was applicable to HELB in relation to payment of loans advanced by the institution and that the institution was not entitled to recover from the petitioners or its loanees an amount exceeding double the amount advanced to them.
14. With regards to the application of the rule, the Plaintiff has cited the cases of [Kenya Hotels Limited vs Oriental Commercial Bank Limited \(formerly known as Depphis Bank Limited\)](#) (2019) eKLR and [Housing Finance Company of Kenya Limited vs Scholastica Nyaguthii Muturi & Anor](#) (2020) eKLR where it was reiterated that an institution is limited in what it may recover with respect to a non performing loan, the principal owing when the loan becomes non-performing; interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non performing; and expenses incurred in the recovery of any amounts owed by the debtor.
15. The Plaintiff also submits that the 1st Defendant is in violation of legal procedure in recovery of the security as she did not receive statutory notices from the institution. That the deceased provided the institution with his postal address as being P.O Box number 716-Kitui in 1983 but the notices exhibited by the 1st Defendant showed that the notices were sent to an incorrect postal address of P.O Box 335-Kitui.
16. The defence on their part called one Dr. Peter Kitonyo who testified on behalf of the 1st Defendant. He stated that he worked with the Central Bank and that he was the 1st Defendant's liquidator agent. He adopted his witness statement and list of documents as his evidence in chief. He also stated that the plaintiff's husband applied for a loan of Kshs 100,000/- which was granted by the 1st Defendant in 1983. That the loan was to be repaid in twelve months but he defaulted in repayment and the deceased explained the default by stating that thieves that broken into his shop and stole his stock which affected his business. That the deceased charged the suit property as security for his loan. He also stated that there was a time when the Plaintiff approached the bank and requested to repay the Kshs 100,000/- which the bank refused. That she later proposed making a payment of Kshs 140,000/- which was also declined. He also stated that the 1st Defendant bank collapsed in 1984, two years after the deceased took the loan and that it is currently on liquidation. In cross examination, he testified that they issued statutory notices dated 25th March 2019 and 23rd September 2019 to the deceased as well as demand letters dated 23rd October 1984 and 20th March 1987 to the advocate of the deceased, Malonza & Company Advocates. The witness acknowledged that the postal address on the statutory notices cited as to belong to the deceased was incorrect but stated that they communicated with his advocate. He also stated that the liquidator had attempted to exercise its statutory power of sale but the Plaintiff obtained court orders restricting the same in 1992.
17. The liquidator added that the Security given for the loan was in the name of the borrower adding that the lender had no information that the parcel was a fairly land. He testified that the borrower never made any repayment adding that, the loan was to be repaid in 12 months' time from the date of disbursement which he stated was 11th October, 1983.

According to him, the loan was to be repaid in full by October, 1984.



- He stated that their attempt to sell the suit property was stopped when the Plaintiff moved to Court.
18. The 1st Defendant submits that the Plaintiff lacks locus standi to bring this suit as she has not taken out a limited grant to enable her file the suit as such, it should be struck out. The 1st Defendant has cited the case of *Hawo Shanko vs Mohamed Uta Shanko* (2018) eKLR where the court held that party needed to take out a limited grant to appear in cases involving a deceased person's estate.
 19. The 1st Defendant further submits that the suit is defective as the Plaintiff failed to seek leave prior to filing knowing that the 1st Defendant was under liquidation. The 1st Defendant submits that this was in violation of Section 56(2) of the *Kenya Deposit Insurance Act*. The 1st Defendant has cited the cases of *Bisai & Another vs Kenya Commercial Bank Ltd & Others 2* (EA) where it was held as follows;

“In order to commence any action or proceedings against the 3rd defendant which was in liquidation, the plaintiffs were obliged, mandatorily, by the *Companies Act* to first obtain leave from the court.

That the leave ought to be sought before bringing an action or proceedings, and not after, and cannot operate retrospectively. That non obtaining of the said leave is of a very fundamental nature, and not merely procedural. It went to the jurisdiction of the court”
 20. The 1st Defendant has also relied on the case of *Joseph Kaara Mwethaga vs Thabiti Finance Company Limited & Others* (1998) eKLR where the court held that leave before instituting a suit against a company undergoing involuntary liquidation was mandatory.
 21. It also submits that the Plaintiff's husband took out a loan which he was obligated to pay adding that spousal consent was not required at the time of taking the loan as the loan was taken before Enactment of the *Land Act* 2012. In this regard, 1st Defendant has cited the case of *Stella Mokeira Matara vs Thaddeus Mose Mangenya & Anor* (2016) eKLR where the Court of Appeal had been asked to determine spousal rights over matrimonial property, specially, the requirement of spousal consent on a charge over matrimonial property. The issue in contention was that the charge in issue was drawn and executed before the *Land Act* 2012 and the *Land Registration Act*, 2012 which provided for spousal consent. The Appeal was on at an interlocutory stage and but even then the Court of Appeal held that it could not fault the decision of the Learned Judge who held that parties executing charges prior to the commencement of the Act could not be expected to comply with nonexistence requirement of law.
 22. On issuance of notices, the 1st Defendant submits that it sent all statutory notices to the deceased through his advocate. It has cited the case of *Beatrice Atieno Onyango v Housing Finance Company Limited & 3 others* [2020] eKLR where the court found that statutory notices had been serve particularly because the Plaintiff made an admission of receiving the same in an email sent to the financial institution.
 23. This case revolves around a loan of Kshs 100,000/- issued to the husband of the Plaintiff (now deceased) by the 1st Defendant in 1983. The repayment period for the loan was 12 months and the suit property was charged as a security of the loan. The Plaintiff has not disputed the existence of the loan. Her contention lies on the interest amount being claimed by the 1st Defendant of Kshs 12,976,380/-. It has also been brought to the attention of the court that the Plaintiff's husband died 2014 while the 1st Defendant went into liquidation in 1984. The Plaintiff's case is that the 1st Defendant is in violation of the in duplum rule and further, that they were not issued with statutory notices prior to the 1st Defendant exercising its statutory power of sale because the letters or notices went to the wrong address.



24. The 1st Defendant's case is that the suit should be struck out because firstly, the Plaintiff lacks locus standi to institute it, secondly that leave was not sought before it was instituted, that the Plaintiff has failed to establish a prima facie case and that the institution issued the requisite statutory notices to the Plaintiff's husband. The issue of the in duplum rule was not pleaded by the Plaintiff in her plaint and was only brought out in her submissions.
25. The issues for determination in my opinion are therefore;
- i. Whether the Plaintiff has locus standi to institute the suit
 - ii. Whether leave was required before institution of the suit.
 - iii. Whether the statutory notices were issued
26. Whether the Plaintiff has locus standi or capacity to institute this suit
- It is undisputed fact that the loan agreement that gave rise to the attempts by the Defendants to exercise their statutory power of sale was between the Plaintiff deceased husband and the 1st Defendant. It is also not disputed that the suit properly is registered in the name of a deceased person whose estate remains un-administered because no one has applied for letters of administration through a Succession Cause.
27. The loan application form exhibited by the 1st Defendant is clear on the party's being the deceased, Joel Kivisu Ngondi and the 1st Defendant. A charge dated 27th February 1985 has also been exhibited a charge registered in favour of the 1st Defendant against Land Reference No. Kyangwithya/Misewani/150, a title deed of the land property which lists the deceased as the proprietor has also been exhibited.
28. The issue of capacity by the Plaintiff to lodge this case though raised at submissions stage by the Defendant is a point of Law which can be raised at any stage of proceedings.
29. The Plaintiff made an admission during trial that she had no letters of administration and that no one in the family had applied for it posing the question as whether she had legal capacity or locus standi to file this suit on behalf of the estate of her husband.
30. What is locus standi? In the case of *Alfred Njau -Vs- City Council of Nairobi* [1983] KLR 625 the Court of Appeal, held that;
- “Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
31. In the case of *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR, the court discussed the question of Locus Standi as follows;
- “In Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that :-
- “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.



Further in the case of *Alfred Njau and Others ..Vs.. City Council of Nairobi* (1982) KAR 229, the Court also held that;-

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit.”

32. The Law required the Plaintiff to take out letters of administration first to enable her institute a suit to protect the suit property. Section 82 of the *Law of Succession Act* provides as follows: -

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers;

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative
- b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.”

33. *In re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR, (Musyoka J) held as follows;

“The property of a dead person vests in the persons that the court appoints as personal representatives, be they executors of a will or administrators. It is in such persons that the rights of proprietorship of estate assets inure. It is them that can sue or be sued over the property. It is them who can enter into contracts of various shades over the property, of sale or disposal or lease, among others. In the case of intestacy, by virtue of section 80 of the Act, the grant of representation becomes effective only from the date the same is made....”

34. The Plaintiff or anyone claiming an interest on the suit property could only challenge the Defendants’ attempt to sale the suit property by first obtaining letters of administration in respect to the estate of the deceased. In the absence of the letters of administration, the Plaintiff’s lacked capacity to institute a competent suit.

35. In *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a



serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

36. Whether leave was required before filing this suit

Counsel for the Plaintiff while listing parties to the suit indicated the 1st Defendant as being under liquidation. In his written submissions, Counsel for the 1st Defendant submitted that the 1st Defendant was under liquidation as such, the Plaintiff required leave prior to filing of this suit and failure to seek said leave rendered the Plaintiff’s suit defective.

37. Section 56 of the *Kenya Deposit Insurance Act* on stay of proceedings provides as follows;

- a. No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator
- b. No injunction may be brought or any other proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court
- c. No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue

38. The legal requirement for leave before instituting a suit against a party under liquidation was aimed at protecting companies under liquidation to manage liabilities in an orderly manner.

39. In the case of *Bougainville Estate Limited v Kenya Deposit Insurance Corporation (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 others* [2019] eKLR, the held as follows on the purpose of getting leave before filing a suit against an institution under liquidation;

The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a floodgate of actions which may involve some of the matters placed under supervision.....”

40. The requirement of leave was mandatory before the Plaintiff instituted the suit and there is no evidence that such leave was sought in the first place. That in my view also renders this suit fatally defective and incompetent.

41. Whether the statutory notices were issued procedurally

The *Land Act* 2012, requires three notices to be issued before exercising the statutory power of sale. These notices include;

- a. The Statutory Notice Under Section 90 of the *Land Act*
- b. Notice to sell under Section 96 (2) of the *Land Act*
- c. Redemption Notice under Rule 15 (b) of the *Auctioneers Rules*, 1997

42. After the 90-day notice, the 1st Defendant was required to issue a 40 days’ notice as prescribed under 96 (2) of the *Land Act* while Rule 15 of the Auctioneers Rules describes a redemption notice of at least 45 days. The redemption notice is in line with Section 89 of the *Land Act* on the equity of redemption. At the same time the notice under Section 96 (2) gives the charger at least 40 days to remedy the default or else the Chargee will proceed to sale. The Notice to sell was in form of a letter dated 23rd September 2019. There is no evidence that the 45 days’ redemption notice was issued.



There is also no evidence that the deceased ever got any notice given that the Defendants acknowledges that the notices were sent to the wrong address.

So while I have found the suit herein incompetent, this court cannot disregard the legal requirements of due process.

For the aforestated reasons, this suit is unsustainable by reasons that it is incompetent and defective. The same is struck out with costs but I direct the Defendants to fully comply with legal requirements by issuing fresh notices to deceased family before exercising their statutory power of sale.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

