# National Housing Corporation v Wetangula (Civil Appeal 78 of 2020) [2023] KEHC 17546 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17546 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL 78 OF 2020**

**DK KEMEI, J**

**MAY 22, 2023**

**BETWEEN**

**NATIONAL HOUSING CORPORATION ......................................... APPELLANT**

**AND**

**JOSEPH WEKESA WETANGULA ..................................................... RESPONDENT**

***(Being an appeal against the judgement delivered by Hon S.O. Githogori (RM) on 18th May 2020 in Bungoma CMCC No. 305 of 2010)***

## JUDGMENT

1. By a Plaint dated April 26, 2010, the Respondent sued the Appellant claiming permanent injunction restraining the Appellant whether by themselves, servants and/or any other persons acting on their authority and/or direction from selling whether by public auction and/or private treaty the Respondent's land parcel No East Bukusu/North Kanduyi/3078 and a declaration that the statutory power of sale by the Appellant as premature, null and void for all purposes in view of the repayments being made by the Respondent.

### Respondent's case

2. It was the Respondent's case that, vide a charge document registered in the land registry at Bungoma on October 5, 2007, the Respondent had secured a loan of Kshs350,000/= from the Appellant using his title deed for land parcel No East Bukusu/North Kanduyi/3078. He was to pay the loan through a check off system depositing a monthly remittance of Kshs7, 964.00/=per month for a period of five years and that there was also an express term of agreement that the Respondent's employer was to make the monthly deductions.

3. The Respondent wrote to his employer instructing the deduction of Kshs7, 964/= for remittance to the Appellant from October 2008 and he produced in Court the requisite pay slip and letter from his employer confirming the same.

4. The cause of action, according to the Plaint, arose on March 18, 2020 when the Respondent was served with a notification of sale and redemption notice from Auctioneers indicating that the Appellant's loan was in arrears of Kshs370,231/=.

5. The Respondent's employer did a letter to the Appellant stating that all payments sent to Appellant on behalf of the Respondent had cleared save for one cheque.

6. The Respondent told the Court that at the time of his testimony he had cleared all the loan and he produced an analysis from his employer to support his averments. He gave a breakdown of the money remitted by his employer and the Appellant stated that they only received one cheque from his employer.

7. On cross examination, he told the Court that even though the payment voucher indicates the loan was advanced to him on October 24, 2007 the money reflected in his account at the end of November 2007 and he was granted a grace period of 60 days before he could begin his loan repayment. He further testified that he never received a letter dated April 8, 2009 communicating that his loan was in arrears.

**Appellant's case**

8. The Appellant's defence was that it denied all the contents of paragraph 3, 4 and 5 of the Plaint and contended that the monthly installments repayments of Kshs7, 964/= were to commence on 1st December 2007and that the agreement was in case of default by the Respondent, the Appellant was to recover the total outstanding loan. It was pleaded that the Respondent's employer was not a party to the agreement that it was to deduct the amount of the instalment payable from the Respondent's salary and then remit the same to the Appellant by the due date. It was pleaded that it was the duty of the Respondent to ensure that the sum(s) were deducted from his salary and that the money was duly remitted to the Appellant. The Appellant pleaded that the statutory power sale crystalized when the notice period expired without any payment being made.

9. Vide the Appellant witness DW1, Erastus Mbabu, the Credit Control Manager, testified that the Respondent was advanced a loan of Kshs 350,000/= to be paid in five years. He availed in Court the loan agreement. The amount was dispersed on October 26, 2007 as a payment voucher and the Respondent was to begin payments in December 2007 as per clause three of the loan agreement which he failed to do. According to him, he only made payments from February to March 2008 but did not make any payments from April to December 2008. The Appellant sent a letter to the Respondent on April 8, 2009 informing him that there was some default. In response, the Respondent's employer wrote to the Appellant confirming that payment was made on behalf of the Respondent and that in August 2008 TSC sent a cheque for Kshs 79,000/= which did not clear the arrears.

10. On July 6, 2009 the Appellant sent a statutory notice via registered mail to the Respondent using the address the Respondent used when he was applying for the loan and that the loan had not been repaid and that the same was standing at Kshs 841, 306 as at July 8, 2019. He told the Court that several letters were sent to the Respondent but they were informed that the post office box was no longer in use.

11. On cross-examination, he told the Court that the loan was to repaid through a check off system and that it was the role of the Respondent to instruct his employer to send money to the Appellant. He further testified that they received a letter from the Respondent's employer showing that money was remitted to the Appellant and that the same was noted in the Respondent's statement but the Appellant failed

to show vide evidence that statement indicating the current standing of the loan. It was his evidence that the Respondent's employer confirmed it made 20 payments from July 2009 to April 2011 and that statements were shared with borrowers of the money received but he did not avail any evidence to show a statement was ever shared with the Respondent.

12. In her judgement, the learned trial Magistrate found that from the evidence the Respondent discharged his burden of proof on a balance of probabilities to be granted a permanent injunction restraining the Appellant whether by themselves, servants and/or any other persons acting on their authority and/or direction from selling whether by public auction and/or private treaty the Respondent's land parcel No East Bukusu/North Kanduyi/3078; the purported exercise of statutory power of sale by the Appellant was declared premature, null and void in view of the fact that the Plaintiff completed repayment of his loan. The Respondent was awarded costs.

13. Dissatisfied with the judgment and decree, the appellant filed this appeal on the following grounds: -

    i. That the learned trial Magistrate failed to appreciate the case of the parties as pleaded

    ii. That the learned trial Magistrate failed to appreciate that the TSC was not a party to the contract between the parties and that loan deductions by the TSC from the Respondent's salary would only become loan repayments once remitted to the Appellant.

    iii. That the learned trial Magistrate failed to appreciate that it was the Respondent's responsibility to ensure that TSC remitted the monthly deductions to the Appellant.

    iv. That the learned trial Magistrate erred when she held that the statutory power of sale and which was properly served upon the Respondent had not crystalized for there was ample evidence to the contrary.

    v. That the learned trial Magistrate erred in law and fact when she failed to appreciate that the Court was to only consider payments prior to July 6, 2009 when the notice of statutory power of sale was served, otherwise payments after that date were immaterial to the issue before Court.

    vi. That the learned trial Magistrate erred in failing to appreciate the law on burden of proof and she wrongfully shifted the burden of proof to the Appellant.

    vii. That the learned trial Magistrate erred in law when she held that the loan had been fully repaid, for indeed that was not an issue for determination in the pleadings and in doing so she barred the Appellant from pursing the unpaid loan which according the Appellant stood at Kshs 841,306/= as at July 8, 2019.

    viii. That the learned trial Magistrate erred in law when she issued a permanent injunction retraining the Appellant from ever taking action to recover any outstanding loan.

    ix. That the learned trial Magistrate failed to appreciate that deductions from the Respondent's pay slips after July 6, 2009 were not material in determining the right issue in Court.

    x. That the findings of the learned trial Magistrate were against the weight of the available evidence.

    With costs.

14. The Appellant prayed for this Court to allow this appeal; set aside the decision of the lower Court delivered on May 18, 2020 and in its place an order be made dismissing the Respondent's suit in the lower Court; the Appellant be awarded costs for the appeal and the lower Court matter.

15. The appeal was canvassed by way of written submissions. On perusal of the Court record, only the Respondent filed his submissions. He submitted that the Appellant failed to prove on a balance of probability that the Respondent was in default of any obligation under the loan agreement thus the statutory power of sale had not crystalized at the time the notice was served. Counsel urged this Court to dismiss the appeal with costs.

16. Having considered the submissions of the parties in this appeal, this is the view I form of this matter. This is a first appeal. The duty of the first appellant Court was well stated in *Selle and another v Association Motor Boat Co. Ltd and Other* 1968 EA 123 where the Court of Appeal stated: -

> " Briefly put this court must consider the evidence evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect."

17. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

18. However, as was appreciated in *Peter v Sunday Post Ltd* (1958) EA 424 the Court stated: -

> " While an appellate court has jurisdiction to review the evidence, to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or it's shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, the appellant court will not hesitate to decide...."

19. The principles guiding the grant of orders for injunction are well settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 358. These are that the applicant has to demonstrate that it has a prima facie case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt, then it shall decide the application on a balance of convenience.

20. In order to determine whether there exists a prima facie case, the Court needs to determine whether the Appellant failed to comply with their statutory obligations with regard to the notice of sale under section 90 and 96 of the *Land Act* and the auctioneer's rules. The issue of the existence of debt is not denied.

21. Doubtlessly, in civil cases, the onus is on the Plaintiff or any other Claimant to prove the position he or she claims on a balance of probabilities. This position is anchored in the *Evidence Act* under sections 107,108 and 109 which provide as follows:-

> " Section 107: Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person."

22. On the issue of service of statutory notices on the Respondent, the Appellant argued that they sent notification to the Respondent on the loan arrears and they received communication from the Post office box address given by the respondent in the loan agreement up but they failed to avail proof of certificate of postage. In the case of *Moses Kibiego Yator v Eco Bank Kenya Limited* [2014] eKLR Munyao J stated at follows: -

> " ... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served..."

23. In the case of *Elizabeth Wanjiku Kariungi v Equity Bank (Kenya) Limited* [2017] eKLR the Court held;

> " 20. Whilst I do share the view expressed by my learned brother concerning the fact that service of a valid statutory notice of sale on the chargor is a condition precedent to the exercise of the chargee's statutory power of sale, I am unable to find the legal basis for the contention that the chargee has an obligation of ensuring that the chargor collected or received the notice which was sent by registered post.
>
> 21. In my considered view, when the court imposes upon the chargee the obligation of demonstrating knowledge of when the chargor received or collected the notice which had been dispatched by registered post, that constitutes an extra burden, which was not anchored in statute.
>
> 22. The chargee has an obligation to dispatch the notice to the correct postal address.
>
> 23. The chargee's other duty is to ensure that the contents of the notice meet the requirements set out in the *Land Act*.
>
> 24. My considered opinion is that the chargee does not have any control over the chargor, so as to be able to ensure that the chargor collects or receives the notice."

24. The upshot of the foregoing is that the chargee only has to prove that the notices were sent by registered post to the correct postal address to prove service was effected and that the said notice met the requirements set out in the *Land Act*. Such has been well established.

25. It is clear that the Respondent was not served with the statutory notice as required under Sections 90(1) and 90(2)(b) of the *Land Act* *2012*. The onus was upon the Appellant to prove service of the

said notices. I wish to rely on the case of *Nyangilo Ochieng' & Another v Kenya Commercial Bank* to buttress this point.

26. Rule 15 of the *Auctioneer's rules* states;

> " Upon receipt of a court warrant of letter of instruction the auctioneer shall in the case of immovable property-
>
> Give in writing to the owner of the property a notice not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

27. On perusal of the Court record, I did not see any certificate of postage to prove that the Appellant had served the notices and reminders to the Respondent with regard to his loan status and what was in arrears. The only notification, I note, that seemed to have been properly served on the Respondent was the statutory notice which was sent via registered post and the Appellant did produce a list of registered parcels sent by the official postal corporation and the Respondent's name was there as was the Appellant's postal address. No contrary evidence was availed by the Respondent to prove otherwise. In this premise, I hold that all the relevant statutory notices in contention were not duly served upon the Respondent.

28. The Respondent demonstrated that he duly paid his loan and cleared his arrears as at July 2012. He produced cogent evidence in form of pay slips and an analysis from his employer, Teachers Service Commission, which demonstrated to this Court that his last payment was effected in June 2012. The Appellant failed to avail before the Court evidence to dispute that of the Respondent but simply alleged that at the time of service of the statutory notice to the Respondent, the Respondent's loan was in arears of Kshs 390, 147/=. According to DW1, Erastus Mbaabu, the loan amount of the Respondent as at the time of the trial was Kshs 841, 306/= with no evidence in terms of official records showing the performance of the Respondent's loan account. The evidential burden of proof which is captured in Sections 109 and 112 of the *Evidence Act* states as follows:

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."

29. In this respect, the court had due regard to the case of *Mrao Ltd v First American Bank of Kenya and 2 Others* [2003] KLR 125, in which the Court of Appeal rendered itself as follows:-

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"

30. It is true that the remedy sought by the Respondent was an equitable one and I concur with the sentiments of the learned Magistrate that indeed the Respondent approached the Court of equity with clean hands. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No 77 of 2012; [2014] eKLR,

the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> a. establish his case only at a prima facie level,
>
> b. demonstrate irreparable injury if a temporary injunction is not granted, and
>
> c. alley any doubts as to (b) by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

31. In this respect, this Court is persuaded that the Respondent had demonstrated that he would suffer irreparable loss in the event the Appellant exercised its statutory power of sale. It is clear that the Respondent proved that he cleared his loan as at June 2012, he availed the requisite bundles of pay slips showing deductions and an analysis from his employer, TSC, which showed that his last payment was made in June 2012. The Appellant on the other hand, submitted and testified that the loan was last repaid in the year 2009 and since then no amount had been remitted to it and that the current loan arrears stood at 841, 306/= No evidence was availed to substantiate this claim and this Court is not convinced about the same. DW1 at the time of his testimony failed to demonstrate to the Court the exact amount that was remitted by TSC and how much was owed to dispute the evidence as availed by the Respondent.

32. With the evidence that was placed before the Court by the Appellant, the only remedy that could be visited upon the Respondent's case was grant of the orders sought. The Appellant could not substantiate it's allegations. The rights of a chargee cannot be said to be breached when a chargor proves that it has paid all its dues as owed and has evidence to support the claim.

33. In the case at hand, the Respondent did establish a prima facie case and/or demonstrated the likelihood of irreparable damage to warrant the grant of injunctive orders. In essence, the Respondent did establish rights that required protection by the court. The trial court's finding was thus proper and ought to be upheld. The learned trial magistrate considered relevant factors and principles and came to a logical conclusion.

34. In view of the foregoing observations, it is my finding that the appeal is devoid of any merit. The same is dismissed with costs to the Respondent.

    It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023**

**D.K. Kemei**

**Judge**

**In the presence of:**

No appearance for Appellant

Wekesa for Makokha for Respondent

Kizito Court Assistant