



**Langat v Bank of Africa Kenya Ltd & another (Civil Case E007 of 2022)
[2024] KEHC 13842 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL CASE E007 OF 2022
JK SERGON, J
NOVEMBER 7, 2024**

BETWEEN

CHARLES KIPNGENO LANGAT PLAINTIFF

AND

BANK OF AFRICA KENYA LTD 1ST DEFENDANT

PHILLIPS INTERNATIONAL AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 17th October, 2022 seeking for judgement against the defendants plus the following reliefs;
 - (i) A mandatory prohibition order by way of temporary injunction, restraining the 1st and 2nd defendants through their employees, agents, servants, workers or any other person from auctioning, selling, disposing and transferring the subject matter of the suit.
 - (ii) Comprehensive account statements showing repayment from the year 2012 and 2016
 - (iii) Costs of the suit
 - (iv) Interests accruing on the above from the date of filing the suit.
 - (v) Any other relief the Court may deem fit to grant in the circumstances.
2. The background leading to the instant suit is as follows; On or about 2012 and 2016 the plaintiff obtained two loan facilities from the 1st defendant herein in respect of properties described as LR No. 631/1668 (I.R 69070) and Kericho Municipality Block 4/457 and 458 Tabsview Apartments within Kericho County.
3. The plaintiff is the registered proprietor on the said properties which include a matrimonial home and real estate buildings which the plaintiff charged to secure the loan facilities in the sum of Kshs.



- 22,500,000/= and Kshs. 65, 850, 000/= over the said properties. The plaintiff serviced the outstanding debt over the years and used the proceeds from the apartment buildings to repay the debt until on or about 9th June, 2020 when the apartment building on Kericho Municipality Block 4/457 and 458 collapsed due to heavy rainfall in the area, leaving the apartments fully vacant.
4. That before disbursing the loan, the 1st defendant advised the applicant to insure the real estate investment and the plaintiff complied. Consequently, the plaintiff engaged the Insurance Company known as ICEA LION GROUP which he had insured the said property with for indemnification for losses incurred in order to repair the said property and continue earning the rental income. That the insurer denied liability and declined to pay out the claim forcing the plaintiff to refer the matter for arbitration to demand the said sums from the insurer. This notwithstanding the plaintiff continued to repay the loan making payments of over Kshs. 200, 000/= each month.
 5. The plaintiff states that the 1st defendant alleges that the plaintiff's outstanding debt stands at Kshs. 48,984,772.6 but declines and/or refuses to furnish the plaintiff with the correct statement of accounts detailing the outstanding loan vis-a-vis the repayments. The plaintiff stated that he was constrained to sell off work machineries, tractors and/or caterpillar rollers to offset the outstanding debt to a tune of Kshs. 13, 535,086/= on diverse dates between 1st January, 2022 and 5th October, 2022.
 6. The plaintiff states that the 1st defendant proceeded to instruct the 2nd defendant to proceed and auction the above properties in recovery of the outstanding debt.
 7. The plaintiff stated that the 2nd defendant failed to personally serve him with the notification of sale and the 45 day redemption notice in respect to both properties, yet he is the registered proprietor. The plaintiff stated that the notification of sale and 45 day redemption notice in respect to LR No. 631/1668 (I.R 69070) was served upon his advocate who is not a party to the contract and that the notification of sale and 45 day redemption notice in respect to Kericho Municipality Block 4/457 and 458 have not been served upon the plaintiff which is in contravention to the law.
 8. The plaintiff states that the subject properties are at risk of being auctioned at throw away prices using the defendant valuation reports which greatly undervalue the properties, yet the market value of the said properties is Kshs. 125,000,000/=.
 9. The plaintiff states that LR No. 631/1668 (I.R 69070) is the matrimonial home which faces the threat of being unlawfully sold off to settle an outstanding debt, which one property is enough security for.
 10. The plaintiff states that despite many demands made and notice of intention to sue the defendants have ignored and refused to stop the intended auction thereby necessitating the instant suit.
 11. The 1st defendant filed a statement of defence and counterclaim dated 29th February, 2024 and avers that they were not privy to any interactions and/or engagements between the plaintiff and ICEA Lion and that it was a separate contractual engagement entered into by two parties, which it was not privy to.
 12. The 1st defendant avers that had the plaintiff been paying the loan as alleged, it would not have set in motion the recovery process and in any event the charge is a binding contract between the parties and this court should not be invited to interfere with the contractual obligations of the parties.
 13. The 1st defendant avers that the plaintiff offered two properties as security for the loan facilities on the understanding that both risked being sold by the 1st defendant to recover its monies.
 14. The 1st defendant avers that it has always been available to share the account statement upon request and pursuant to the mediation agreement dated 11th July, 2023 it was agreed that the outstanding amount as at then stood as Kshs. 53, 276, 416/= and continuously attracted interest and as at 26th February, 2024 stood as Kshs. 57, 605, 234/=.



15. The 1st defendant avers that if at all any machineries were sold, the proceeds were not applied towards reducing the loan exposure towards it.
16. The 1st defendant aver that it complied with all the statutory steps in the process leading to the exercise of its statutory power of sale as follows;
 - (i) Served the plaintiff with a statutory demand notice pursuant to section 90 of the Land Act dated 7th and 19th October, 2021 respectively by way of registered post.
 - (ii) Served the plaintiff with a 40 days statutory demand notice pursuant to section 96 (2) of the Land Act dated 4th March, 2022 by way of registered post.
 - (iii) Valuation report was conducted by Hillscape Valuers Limited pursuant to section 97 (2) of the Land Act.
 - (iv) Instructed the 2nd respondent to issue the plaintiff with a 45 day redemption notice and notification of sale dated 4th August, 2022 and caused the suit properties to be advertised in the dailies in readiness for sale.
17. The 1st defendant avers that that notification of sale and 45 days redemption notices were served by way of registered post through the last known address and personally served upon the plaintiff who refused to acknowledge them and that the valuation report of May 2022 reflect the true market and forced value of the suit properties.
18. The 1st defendant filed a counterclaim and states that in the year 2012 it advanced the (borrower) a loan facility to the tune of Kshs. 22, 500,000/= secured by a legal charge over LR No. 631/1668 in the name of Charles Kipngeno Langat the 2nd defendant in the counterclaim and Tecla Chepkorir the 3rd defendants in the counterclaim being directors of the borrower offered personal guarantees pursuant to clause 9.1.2 of the letter of offer.
19. The borrower sought for an additional facility in the sum of Kshs. 65,850,000/= from the 1st defendant and the same was to be secured by a legal charge over Kericho Municipality Block 4/457 and 458 in the name of the 2nd defendant and the 2nd and 3rd defendants being directors of the borrower offered personal guarantees pursuant to clause 9.1.2 of the letter of offer.
20. The charge instrument stipulated that the borrower would pay the 1st defendant the principal sum and interest secured under the charge upon demand and the 2nd and 3rd defendants having provided a personal guarantee in respect of the facility on behalf of the borrower was required to settle the outstanding facility upon demand by the plaintiff.
21. The borrower fell in breach of the obligations under the charge and letter of offer and failed and/or ignored to settle the total outstanding amount which as at 26th February, 2024 stood at Kshs. 57, 605, 234/= and continues to attract interest. The 1st defendant further averred that the 2nd and 3rd defendants breached the terms and conditions contained in the guarantee and indemnity upon failing to pay the total outstanding balance due and owing upon demand.
22. The 1st defendant also stated that it is not in dispute that the borrower is in breach of its contractual obligations on repayment of the loan facilities issued to it and in seeking to exercise its statutory power of sale, they issued the borrower with the statutory notices as envisaged under the Land Act, 2012.
23. The 1st defendant in its counterclaim prays for that the counterclaim to be allowed and judgement to be entered against the plaintiff jointly and severally for;
 - (i) The total outstanding balance in the sum of Kshs. 57, 605, 234/= as at 26th February, 2024;



- (ii) Costs of the counterclaim;
 - (iii) Interests until payment in full and
 - (iv) Any such other relief as this Court may deem fit.
24. The matter proceeded viva voce evidence. Charles Kipngeno Langat (Pw 1) testified that he executed his witness statement dated 17th October, 2022 and wished to adopt the same as evidence in chief and the list of documents marked as PExh. 1-12. He stated that he borrowed a sum of Kshs. 22,500,000/= and Kshs. 65, 850, 000/= from the defendant and has repaid Kshs. 36, 656, 987/= , however, the outstanding amount is not known to him. He stated that the bank merely gave him a document showing that the outstanding amount is over 53 million. He stated that he has been repaying Kshs. 200,000/= per month and that the last payment was in March, 2024 due to ongoing renovation on the suit property.
25. On cross examination, Pw. 1 confirmed that he took out two loan facilities with the bank and provided the following titles as security LR No. 631/1668 (I.R 69070) and Kericho Municipality Block 4/457 and 458. He confirmed that he fell into arrears prompting the bank to institute recovery proceedings. He confirmed that he was served with the statutory notice via registered post. He confirmed that he was aware that the suit properties were subjected to valuation. Pw. 1 confirmed that the auctioneer served him with the 45 day redemption notice and the properties advertised in the newspaper for sale by auction, on cross examination, Pw. 1 confirmed that he attended a mediation meeting which gave rise to a partial settlement agreement. Pw. 1 confirmed that the outstanding sum at the time was Kshs. 53,276, 416/= and the same was accruing interest. Pw. 1 stated that the repayment was to be done through rental income, however, the building collapsed forcing him to source funds for renovations.
26. On reexamination Pw. 1 stated that he was served with the requisite demands and notices by the bank and that the bank refused to restructure the loan and that the only means to repay the loan is through rental income.
27. Victor Kipruto Keitany (Dw. 1) stated that he is a senior recoveries officer at the Bank of Africa Ltd and that he executed a witness statement dated 29th February, 2024 and wished to adopt the same as his evidence in chief and would be relying on the list of documents and produced the same as DExh. 1-17. He stated that the plaintiff was advanced with two loan facilities and that he defaulted on the monthly repayment. He stated that the bank has filed a counterclaim for Kshs. 57, 605, 234/= and urged this court to allow the counterclaim plus interest and costs.
28. On cross examination (Dw.1) confirmed that they instructed the 2nd defendant to carry out the public auction. He confirmed that the plaintiff was paying diligently, however, he fell into arrears. Dw. 1 stated that he was not in a position to confirm the amount paid so far and that as per the account statement on 26th February, 2024 the outstanding amount was Kshs. 57, 605, 234/=. Dw. 1 stated that he is aware that the plaintiff had sold some of his property under private treaty to settle the bank debt. Dw. 1 confirmed that they complied with the requirements for spousal consent and that they served the spouse.
29. On reexamination (Dw.1) stated that the loan statement is provided upon request by the customer and that to date they have not received a request for the loan statement. He stated that the plaintiff has not approached the bank to restructure the loan. Dw. 1 reiterated that the suit property was charged to secure the loan facilities and therefore in the event of default the bank is at liberty to sell the suit property.



30. The court directed the parties to file written submissions, however, at the time of writing this judgement the parties had not filed their written submissions on the Case Tracking System. This court has considered the material on record to wit the pleadings, state of defence and counterclaim and the viva voce evidence by the parties in coming to a fair and just determination of the dispute between the parties.
31. I have considered the pleadings and viva voce evidence by the parties and find that the following issue (s) is ripe for determination; whether the claim is merited and the plaintiff is deserving of the relief sought in his claim.
32. On the issue as to whether the claim has merit and whether the plaintiff is deserving of the reliefs sought thereon, this court finds that the answer is in the negative. It is not in dispute that the plaintiff obtained two loan facilities in the sum of Kshs. 22,500,000/= and Kshs. 65, 850, 000/= from the 1st defendant and charged properties described as LR No. 631/1668 (I.R 69070) and Kericho Municipality Block 4/457 and 458 Tabsvie Apartments consisting of a matrimonial property and real estate buildings within Kericho County to secure the loans. It is the plaintiff's case he serviced the outstanding debt over the years and used the proceeds from the apartment buildings to repay the debt until on or about 9th June, 2020 when the apartment building on Kericho Municipality Block 4/457 and 458 collapsed due to heavy rainfall in the area, leaving the apartments fully vacant and he fell into arrears. It is the 1st defendant's case that upon default on the part of the plaintiff, they set in motion the recovery process including instructing the 2nd defendant to proceed and auction the above properties in recovery of the outstanding debt. It is the finding of this court that the 1st defendant complied with all the statutory steps in the process leading to the exercise of its statutory power of sale as follows;
- (i) Served the plaintiff with a statutory demand notice pursuant to section 90 of the Land Act dated 7th and 19th October, 2021 respectively by way of registered post.
 - (ii) Served the plaintiff with a 40 days statutory demand notice pursuant to section 96 (2) of the Land Act dated 4th March, 2022 by way of registered post.
 - (iii) Valuation report was conducted by Hillscape Valuers Limited pursuant to section 97 (2) of the Land Act.
 - (iv) Instructed the 2nd respondent to issue the plaintiff with a 45 day redemption notice and notification of sale dated 4th August, 2022 and caused the suit properties to be advertised in the dailies in readiness for sale.
33. In view of the foregoing, it is the finding of this court that the plaintiff took out two loan facilities, he came into misfortune and thereby fell into loan repayment arrears and the bank instituted the loan recovery process and in doing so complied with all the statutory steps in the process leading to the exercise of its statutory power of sale. This Court finds that the indebtedness on the part of the plaintiff is not contended, Pw. 1 confirmed that he attended a mediation meeting which gave rise to a partial settlement agreement and that the outstanding sum at the time was Kshs. 53,276, 416/= and the same was accruing interest.
34. It is therefore the finding of this court that a charge is a binding contract between the parties, the plaintiff is in breach and therefore this court should not be invited to interfere with the contractual obligations of the parties. The Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR observed as follows; "A Court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."



35. Consequently, suit vide the plaint dated 17th October, 2022 found to be without merit. The suit is ordered dismissed with costs to the Defendant.
36. The counter Claim dated 29/2/2024 is meritorious. It is allowed thus giving rise to issuance of the following orders;
- (i) The plaintiff is liable to pay the 1st defendant the total outstanding balance in the sum of Kshs. 57, 605, 234/= as at 26th February, 2024 and interests thereon at the contractual rate until payment in full.
 - (ii) The plaintiff shall bear the costs of the counterclaim.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

J.K. SERGON

JUDGE

In the presence of

C/Assistant – Rutoh

Lokol holding brief for Ongecho for Plaintiff

Kang'u for 1st Defendant

Kahuthu for the 2nd Defendant

