



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NUMBER 87 OF 2011**  
**CO-OPERATIVE BANK OF KENYA LTD.....APPELLANT**  
**VERSUS**  
**JOHN MBUTHIA KIBE.....RESPONDENT**

*(Being an appeal from the ruling and orders delivered on*

*10<sup>th</sup> June, 2011 by Ezra Awino Senior Principal Magistrate)*

**J U D G M E N T**

The Appellant, Co-operative Bank Ltd filed a suit in the Magistrate’s Court against the Respondent John Mbuthia Kibe claiming the sum of Ksh.1,108,529/45 together with interest and late payment penalties thereon at the prevailing rate of 35% per annum from 29<sup>th</sup> July, 2002 till payment in full, costs of the suit and any other or further relief the court may deem to grant. The claim arose from monies lent to the Respondent and other financial accommodation accorded to the Respondent upon his request.

The Defendant by amended statement of defence amended on 25<sup>th</sup> March, 2006 denied the claim and averred in paragraph 5: -

***“5. Without prejudice, to the foregoing, the defendant admits having charged his property L.R. No. Kisumu/Manyatta “A”/3698 as a security to secure the borrowings from the loan but pleads that it has been fully secured and/or paid and further pleads this suit is premature and incompetent under the provisions of the Registered Land Act.”***

On 20<sup>th</sup> November, 2009 the Appellants’ witness Theophilus Ken Nzioki a credit officer with the Plaintiff bank gave evidence. He was stood down for cross-examination. Before cross-examination, the Respondent filed application dated 8<sup>th</sup> April, 2010 seeking orders that: -

***“(a) This suit be struck out with costs to the Defendant/Applicant on the basis that it is premature and does to lie in law in so far as the debt herein was secured by a legal charge and the Plaintiff has not exhausted its remedies thereunder.”***

This application was premised on the provisions of the Registered Land Act (now repealed).

The learned trial magistrate in a short ruling ruled that: -

***“I am in agreement with the Applicant that the Plaintiff need to exercise its statutory power of sale to realize the amount of loan and interest accruing therefrom. The Plaintiff should realize the best value in the market or near about and thereafter claim the result if at all.***

***In my view, this suit is premature and an embarrassment to the Defendant. I would strike out this suit as prayed with no order as to costs.”***

It is from this ruling that the Appellant appealed faulting the trial magistrate for finding that the suit was premature and striking it out and in failing to consider the charges, remedies to recovery of money as provided in the Registered Land Act (now repealed).

Mr. Kouko who argued this appeal for the Appellant submitted that it is common ground that the Respondent borrowed money from the Appellant. That the Respondent charged his property Kisumu/Manyatta”A”/3698. He defaulted and as at 29<sup>th</sup> July, 2002 the amount outstanding was Ksh.1,108,529.45. The Appellant tried to sell the security but would not raise the reserve price. They then elected to sue which is a remedy available to them under Section 74 (3) 4 of the Registered Land Act (now repealed).

Mr. Yogo for the Respondent submitted that this appeal revolves around the interpretation of Section 74 of the Registered Land Act. He submits that as at the time of filing this suit the Appellant still held the security deposited and that being unable to sell the property is not a ground upon which they can sue for the recovery of the loan.

Section 74 of the Registered Land Act (now repealed) provided that:-

***“74(1) If default is made in payment of the Principal sum or of any interest or any other periodical payment or any part thereof or in the performance or observance of any agreement expressed or implied in any charge and continues for one month, the chargee may serve on the charger notice in writing to pay the money owing or to perform and observe the agreement as the case may be.***

***2) if the charger does not comply within three months on the date of notice served upon him under Sub-section (1) the chargee may: -***

***a) Appoint a receiver of the income of the charged property or***

***b) Sell the property.***

***Provided that a charge who has appointed a receiver may not exercise the power of sale unless the charger fails to comply within three months of the date of service with a further notice served on him under that sub-section.***

***3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only.***

***a) where the chargee is bound to pay the same.***

***b) Whereby any cause other than the wrongful act of the chargor or chargee the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient and the chargor has failed to provide such security.***

***c) Where the chargee is deprived of the whole or part of the property by or in consequence of the wrongful act or default of the chargor.***

**Provided that:**

**1) In the case specified in paragraph (a).**

**a. a transferee from the charger shall not to be sued for the monie unless he has agreed with the chargee to pay the sum and**

**b) no action shall be commenced until a notice served in accordance with sub-section (1) has expired.**

**iii) The court may at its discretion stay a` such brought under paragraph (a) or (b) notwithstanding any agreement to the controlling until the charge has exhausted all his remedies against the charged property unless the charge agree to discharge the charge.”**

From the submissions by the parties to this appeal the issue for determination is whether the Appellants suit was pre-maturely filed, and if so, what are the consequences. The replying affidavit (now repealed) which was the operational law on the charges singed provides under Section 74 the steps the charge his to take in the event of the default.

The charge under Section 74 in case of the default could in order to recover the loaned funds: -

**a. Appoint a receiver or**

**b. Sell property.**

He would only file a suit for recovery of the same where: -

**a. the charger is bound to pay the same.**

**b. Where the secured security has been destroyed or devalued**

**c. Where the charger has been deprived of the property.**

These are conditions precedent before the chargee files a suit for recovery. The Appellant must, therefore, demonstrate and satisfy the court that he has fulfilled the conditional procedures. There was no material placed before the trial magistrate to show compliance or attempts made to comply with the conditions precedent.

In the absence of such material before him, I agree with the trial magistrate that the filing of the suit was premature. The effect of such non-compliance would result in a suit being struck out.

I find that the decision of the trial magistrate to strike out the suit was based on a clear appreciation of Section 74 of the Registered Land Act (now Repealed). I, therefore, do not find merit in this appeal which is hereby dismissed with costs.

Dated, signed and delivered at Kisumu this 4<sup>th</sup> day of April, 2017.

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**S N RIECHI**

**JUDGE**