



REPUBLIC OF KENYA



**Progressive Credit Limited v Lusala (Civil Suit E082 of 2022)
[2024] KEMC 142 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEMC 142 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E082 OF 2022
PA NDEGE, SPM
MARCH 14, 2024**

BETWEEN

PROGRESSIVE CREDIT LIMITED PLAINTIFF

AND

GILBERT GAMALI LUSALA DEFENDANT

JUDGMENT

1. Before this Court is the Plaint dated 01st February, 2022 by which Progressive Credit Limited (the Chargee/Lender/ Plaintiff) seeks for judgment for: -
 - a. Kshs. 510,300 as at 09/12/2021 and further interest at 9% and penalties thereon until payment in full
 - b. A declaration that there exists an informal charge over the security being Naivasha/oljorai Phase 11/2798 which is valid and binding
 - c. An order directing the Land Registrar to effect registration of the informal charge over the subject property being Title Number Naivasha/oljorai Phase 11/2798
 - d. An order of vacant possession over the subject property being Title Number Naivasha/oljorai Phase 11/2798 to facilitate the sale of the security
 - e. An order for leave to the Plaintiff to exercise its statutory power of sale over the subject property Title Number Naivasha/oljorai Phase 11/2798 to recover the loan
 - f. Cost and interest
 - g. Any other order or relief that the court may deem fit and just to award
2. The Defendant, Gilbert Gamali Lusala, despite having been duly served with the Plaint failed to file any defense thereto and on such the same remained unopposed. Judgment has already been entered against



him on 15/03/2022. That judgment is final as relates to the claim for special damages of Kshs. 510,300 as at 09/12/2021 and further interest at 9% and penalties thereon until payment in full. Hearing with respect to all the other claims or prayers proceeded ex parte.

3. During the hearing, the plaintiff called one witness, PW1, Winnie Odongo, it's legal officer. She basically relied on her witness statement, which was dated 9th of October 2023 and produced herein as PEXH. NO. 1. She stated that the defendant approached the plaintiff and intimated his interest for a loan facility of Kenya shillings 37,217. That it was agreed that the loan would be repaid in 4 monthly installments comprising of both the principal and interests commencing eighth of every month starting 8th of October 2016 and ending on the 8th January 2017. That they said advance was secured by deposit of title or informal charge over the defendants title deed number Naivasha/oljorai/2798. That the defendant sought a further advance of Kshs. 70,000 and the said loan facility was secured by the same title deed and Chattel Mortgage over the defendant's households. That the plaintiff and defendant enter into a further agreement and the loan was to be repaid in six months monthly installments comprising of both the principal and interest of Kshs 15,868 commencing 14th of every month, starting 14th February 2017 and ending on 14th July 2017. That the defendant breached the learning agreement by failing to remit the monthly payment and interests thereon and the outstanding balance at 9th December 2021 was Kshs. 510,300 prompting the plaintiff to issue demand notices to the defendant. That the defendant is therefore in default and despite numerous reminders, he has failed to settle the outstanding amount. That the defendant has not denied the debt but have failed to make good the payment. The witness produced several exhibits as evidence in this case, first is the loan application form, produce as a PEXH. NO. 2. Then the letter of offer dated 8th September 2017 as PEXH. NO. 3, Mobile Disbursement Authorization form dated 8 September 2016 as PEXH. NO. 4, Loan cash disbursement receipt dated 9th September 2016 as Plaintiff Exhibit No.5, the title deed herein as Plaintiff exhibit No.6, Business Loan Application form dated 12 January 2017 as Plaintiff Exhibit No.7, Loan cash disbursement receipt dated 14th January 2017 as Plaintiff's Exhibit No. 8, another mobile disbursement authorization form dated 714th January 2017 as Plaintiff's Exhibit No. 9, Customer statement as Plaintiff's Exhibit No. 10, another Loan offer letter as Plaintiff's exhibit No. 11 and a demand letter as PEXH. NO. 12.
4. Written submissions were filed at the close of hearing. Learned counsel for the plaintiff, Emma Faith Mbugua, for Matiri Mburu & Chepkemai advocates, have referred the court to the [Law of Contract Act](#), Section 3(1), which stipulates that certain contracts should be in writing as follows: -

No suit shall be brought, whereby to charge the Defendant upon any special promise to answer for the debt, default, or miscarriages of another person, unless the agreement upon which such suit is brought, or some memorandum, or note thereof, is in writing and signed by the Party, to be charged therewith, or some other person thereunto by him lawfully authorized.
5. Counsel further referred the court to the Case of National Bank Of Kenya Limited Vrs Pipeplastic Somkolet (k) Ltd & Another [2001] e KLR where the Court of Appeal underscored that:-

This, in our view, is a serious misdirection on the part of the judge. A court of law cannot rewrite a contract between parties. The parties are bound by their terms of the contract, unless coercion, fraud or undue influence be pleaded and proved.
6. Thus, it is unchallenged herein that the defendant herein, the borrower, defaulted on the terms of the loan agreements and on 22nd May 2017 the Plaintiff served him with a demand notice for the outstanding amount due and owing as at that date. The defendant persisted in failing to pay the



amount demanded which led to the filing of the present suit. As stated earlier the defendant did not enter appearance and therefore filed no response or defense at all to the suit herein.

Analysis And Determination

7. The legality of an informal charge is recognized by Section 79(6) of the Land Act. In the case of Jamii Bora Bank Limited –vs- Wapak Developers [2018] eKLR the Court held as follows: -

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 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-
 - a. a certificate of title to the land;
 - b. a document of lease of land;
 - c. 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.
8. 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....
 - 1. As regards creation of an Informal Charge I wish to place reliance on TAssia Coffee Estate Limited & Another Vrs Milele Ventures Limited (2014) eKLR in which the court stated that by depositing the title deed with the Plaintiff, the Defendant created an informal charge in favor of the Plaintiff over the suit property as security for payment of the balance of purchase 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.

2. That the defendant herein approached the plaintiff and intimated his interest for a loan facility for Kshs 40,000 to boost his business at the applicable rate of interest at the plaintiff request is not challenged. This is confirmed by the Business Loan Application Forms produced as exhibits Numbers 2 and 7. Upon the plaintiff assessing the defendants ability to repay the loan, the plaintiff proceeded to enter into a loan lending agreement, the first one dated 8th of September 2016 after the letter of offer dated 8th of September 2016 produced as P. Exhibit No. 3 at the defendant request and the plaintiff was offered a loan of initially 40,000 which facility was secured by Chattel Mortgage over the defendants household and the title deed produced as P. exhibit No. 6. The loan was to be repaid in four monthly installments, comprising of both principal and interest, amounting to Kshs. 12,400/=, commencing 8th of every month starting from 8 October 2016 and ending on or before 8th January 2017. The plaintiff accepted the securities offered by the defendant and advanced a net of Kshs. 37,217 after the ordinary loan deductions as per the defendant's instruction. This is confirmed by the Mobile Authorization form dated 8th September 2016, Cash disbursements dated 9 September 2016 and loan cash advancement receipt dated 9th September 2016 all produced as exhibits herein. I do confirm that all the documents produced herein and the evidence therein prove the plaintiff's case against the defendant on a balance of probability. The copy of the Title Deed produced herein indicates the Defendant as the registered proprietor. In this way I find that an informal charge was created.
3. The Plaintiff has proved that loan facility fell into arrears and that despite notice/ demands issued to the Defendant the default persisted. PEXH NO. 10 is a copy of the Statement of Account indicating the total amount due whilst by a letter dated 22nd May 2017 the Plaintiff made a demand for the sum due and owing to them as at the time. It is trite law that an Agreement voluntarily executed will bind the parties.
4. The Plaintiff has also prayed to be granted vacant possession of the collateral property to enable it sell the same in order to recover the monies due to it. In the Jamii Bora Bank case (supra), the Court further held as follows: -

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 Plaintiff 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.

The charger deposited title documents with the Chargee which will be held by the Chargee as a lien for security. That in case there is a default in the repayment of the loan amounts, the Chargor may move to Section 90 of the *Land Act* with the consent of the Court. It is trite that a contract that the parties have agreed to perform, the Court will not interfere unless that contract is tainted with illegalities, fraud, is against public policy, misrepresentation etcetera. In that respect, the parties are expected by the Court to be able to perform their part of the bargain.

Its indeed trite law for this Court to uphold the sanctity of lawful commercial transactions to give effect to the intentions of the parties. I consider the effect of a contract of a mortgagor and mortgagee to be of such a nature that it is protected under the nuances of constructive trust. The mortgagors interest in the



land is acquired upon the contract formation by signing of legal or informal charge enforceable as equitable mortgage. In the instant case the defendant action of conveyance and deposit of titles to the suit land retained the legal title while the Plaintiff obtained equitable beneficial title to the properties.

The question at stake can be succinctly answered by the dictum in the case of Ibrahim Seikei T/A Masco Enterprises V Delphis Bank (2004) eKLR where the Court held “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. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute.” With the leave of the Court the plaintiff has the backing of the law to proceed accordingly to enforce the mortgage contract.

13. Accordingly, I find and hold that the Plaintiff is entitled to realize the security offered to guarantee payment of the debt due to it. I find that the present suit is merited and I do grant prayers (b) (c) (d) (e) and (f) of the Plaint dated 1st February 2022. It is so ordered.

DATED IN NAKURU THIS 14TH DAY OF MARCH, 2024.

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ALOYCE PETER NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's Counsel: Kimathi

Kimathi: Praying for a copy of the judgment

CT: Certified copy of the judgement be issued, upon payment.

