



**Mhasibu Sacco Society Limited v Mnene (Civil Suit 5 of 2021)
[2026] KEHC 108 (KLR) (14 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 5 OF 2021
RC RUTTO, J
JANUARY 14, 2026**

BETWEEN

MHASIBU SACCO SOCIETY LIMITED APPLICANT

AND

CLEOFA MARIA MNENE RESPONDENT

JUDGMENT

1. This suit was instituted by way of an Originating Summons dated 24th August 2021, supported by an affidavit, sworn on even date by Judith Achieng. The applicant seeks declaration that an informal charge was created by depositing with the applicant, the Certificate of Title to the property known as Land Reference No. 12715/4058 (IR. 98968) (suit property) as security for a loan of Kshs.19,268,652. In addition, the applicant seeks an order authorizing the sale of the suit property to recover the loan amount of Kshs.19,268,652 together with accrued interest. The applicant further seeks vacant possession of the suit property.
2. This suit is opposed by the respondent through a Replying Affidavit sworn on the 16th September 2021 and a Further Affidavit sworn on the 2nd September 2024 in which the respondent maintains that the orders sought herein are unmerited and unjustified.

The Applicant's Case

3. It is deponed that on 3rd October 2017, the respondent applied for a loan facility of Kshs.19,431,000. Upon appraisal of the loan application, the applicant approved a loan of Kshs.19,268,652 repayable in 60 monthly instalments Kshs.448,347.83. It is further averred that the loan facility was secured by the respondent's deposits, guarantor deposits and a charge over the suit property.
4. It is deponed that on 9th July 2018, the respondent applied for an additional loan facility and on 12th July 2018, she was advanced a loan facility of Kshs.4,726,479 repayable in 51 monthly instalments of Kshs.123,489 each.



5. It is further averred that on 3rd August 2018, the respondent applied for yet another facility and on 30th August 2018, she was advanced a loan facility of Kshs.6,000,000 repayable in 50 monthly instalments of Kshs.121,912.18 each.
6. It is deponed that the respondent subsequently defaulted in repayment of instalments thereby leaving the facilities in arrears. It is further, averred that her blatant disregard of the obligations under the loan facility agreement has caused the guarantors to suffer loss, as their deposits have been deducted and applied towards repayment of the respondent's outstanding loan balances.
7. The applicant contends that recoveries from the respondent and her guarantor's deposits have been insufficient to settle the outstanding loan balance, leaving the facilities in arrears. As at 30th April 2021, the outstanding loan balance stood at Kshs.553,594.58.
8. The applicant is therefore desirous to sell the suit property in order to recover the outstanding amount.

The Respondents Case.

9. The respondent depones that Judith Achieng has not produced any evidence expressly authorizing her to act, swear documents or give evidence on behalf of the applicant in the present matter.
10. It is deponed that the main application was filed before this court on 27th August 2021 and subsequently upon the respondent through her Advocates on record on 1st September 2021.
11. The respondent avers that upon service she proceeded to file her Replying Affidavit sworn on 16th September 2021 which was served upon the applicant on the 29th September 2021.
12. It is deponed that thereafter, the applicant went into slumber for over five months without making attempts to prosecute this matter.
13. It is averred that after defaulting in the repayment of the loan amounts, the applicant proceeded to recover the bulk of the loan from the respondent's guarantors. As at 30th April 2021, the outstanding loan balance stood at Kshs.553,594 which including some disputed and unexplained legal fees.
14. The respondent depones that by a letter dated 6th October 2021, she requested the applicant to allow her to sell her share capital of Ksh.1,800,000 in an effort to settle the said outstanding debt of Kshs.553,594.58 notwithstanding that the amount remained disputed. This request was, however denied.
15. It is deponed that the applicant has failed to establish a prima facie case demonstrating the existence an informal charge or any intention by the parties to use the respondent's matrimonial property as security.
16. It is averred that the applicant holds the respondent's her share capital of Kshs.1,800,000.00 which could comfortably be applied to recover the outstanding amount.
17. It is further deponed that even without resorting to the respondent's share capital, the applicant could recover the outstanding loan amount, from the respondent's payable dividends, as it has done in previous years.
18. the court directed that the application be canvassed by way of written submissions. The applicant filed written submissions dated 20th September 2024 in support of its application while the respondent filed written submissions dated 13th June 2025. I have summarised these submissions below.



Applicant's Submissions

19. The applicant submits that there are four issues for determination namely:
 - i. Whether an informal charge was created over the suit property to secure the loans facility advanced to the respondent.
 - ii. Whether the suit property is a matrimonial home.
 - iii. Whether the applicant should be granted leave to exercise its right of sale of suit property.
 - iv. Who bears the cost of the suit.
20. On the first issue, it is submitted that the respondent obtained a loan facility from the applicant and deposited the certificate of title of the suit property.
21. It is further submitted that the respondent pledged the suit property by way of an informal charge under section 79(6)(b) of the *Land Act* to secure the loan facilities advanced to her. The decisions in Kingdom Bank Ltd (Formerly known as Jamii Bora Bank Ltd) v George Owuor Opany [2021] eKLR, Jamii Bora Bank Limited vs. Wapak Developers [2018] eKLR and Zuricap Limited v Alice Wanjiru Theuri [2020] eKLR are relied on to support this contention.
22. On the second issue, the applicant submits that while the law requires spousal consent for the creation a formal charge over a matrimonial home, such consent is not required for an informal charge over a mere parcel of land. It is the applicant's case that the suit property does not qualify as a matrimonial home within the meaning of Section 79(3) of the *Land Act*.
23. On the third issue, the applicant submits that having demonstrated the existence of a valid informal charge over the suit property to secure the respondent's debts, it is entitled to be granted leave to dispose of the property by way of sale in order to recover the outstanding arrears.
24. The applicant further contends that the respondent cannot be permitted to sell her share capital while she remains indebted to the applicant, unless such sale is approved by the applicant's committee. In support of this position, reliance is placed on Kingdom Bank Limited v Okotsi (Civil Suit E004 of 2021) [2022] KEHC 12771 (KLR) (30 August 2022) (Judgment).
25. The applicant concludes by invoking Section 27 of the *Civil Procedure Act* and relying on the decision in Morgan Air Cargo Limited v Evrest Enterprises Limited (2014) eKLR to urge that costs of the suit be awarded to the applicant.

Respondent's Submissions

26. The respondent submits that the main issues arising for determination are;
 - i. whether an informal charge was created on the suit property,
 - ii. whether an informal charge would be created without spousal consent,
 - iii. whether the applicant is entitled to recover the total amount of Kshs.19,268,652.00 while the outstanding amount is Kshs.553,594.58.00 and
 - iv. whether an account for monies due ought to be carried out.
27. On the first issue, it is the respondents contends that it is important for this court to determine whether there exists any written and duly witnessed undertaking between the parties evidencing a clear intention to charge the suit property



28. It is argued that neither the loan application form nor the Loan Appraisal Form made reference to any charge or demonstrated an intention to create a charge. Accordingly, it is submitted that the Certificate of Title in question was never intended to serve as tsecurity.
29. On the second issue, he respondent submits that she was married to Marshal Kibet Faraj on the 01/01/2010 and that the suit property acquired during the subsistence of this marriage. She asserts that the property constitutes matrimonial property and therefore require her husband's consent for any dealings.
30. It is further submitted that the applicant was aware of the respondent marital status, as this was declared in all the Loan Application Forms she completed. The respondent urges that if indeed a charge- whether informal or formal- was intended to be created over the suit property, the applicant was required to obtain spousal consent.
31. On the third issue, the respondent's maintains that the outstanding loan balance as at 30th April 2021 was Kshs.553,594. She contends that it is unjust for the applicant to put up a claim for the full loan amount, given that substantial recoveries had already been made from the guarantors offered by the respondent. It is argued that the claim amounts to unjust enrichment by the applicant.
32. On the final issue, the respondent submits that although the Affidavit sworn by Judith Achieng confirmed that the outstanding amount is Kshs.553,594, the member Statement, attached marked as Exhibit JM-7, reveals questionable entries. Specifically, on the 6th February 2021, the applicant included a total of Kshs.210,000 allegedly paid to Gitonga Muriuki, Advocate for instituting a suit against the respondent yet no such suit was never filed.
33. It is also submitted that on 13th July 2021, the applicant included a payment of Kshs.150,000 for exercising the statutory power of sale which has never been exercised.
34. The respondent argues that these amounts kshs.210,000 and kshs.150,000 a total of Kshs.360,000. Deducting this figure from the claimed outstanding balance of Kshs.553,594, leaves a net balance of Kshs.193,594. The respondent therefore submits that the applicant's claim is inflated and amounts to unjust enrichment.
35. In conclusion, the respondent urges that in the interests of justice, this suit be dismissed with costs.

Analysis and Determination

36. I have carefully considered the pleadings, affidavits and submissions filed by both parties. The issues that arise for determination are twofold; first, whether an informal charge was created over the suit property and second, whether circumstances exist that would entitle the applicant to realize the alleged security by way of sale of the suit property. The applicant urges that an informal charge was created over the suit property to secure the loan facilities advanced to the respondent. The respondent, however disputes this assertion and maintains that no such charge was ever created.
37. The Land Act in section 79 provides for informal charges as follows:

“79(6) An informal charge may be created where—

- (a) 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 plus interest as agreed by the chargor and the chargee”;



- (b) the chargor deposits any of the following—
 - (i) a certificate of title to the land;
 - (ii) a document of lease of land;
 - (iii) 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.”

38. The critical question, therefore, is whether the applicant has demonstrated that it accepted a written and witnessed undertaking from the respondent, clearly expressing her intention to charge the suit property or whether the respondent deposited the title deed in circumstances amounting to an informal charge under the law.
39. The applicant relies on Exhibit JM-1, the first Loan Application Form, to argue that the suit property was intended to be used as security. However, upon close examination of this document, the section titled “security offered for the loan” expressly indicates “deposit” and makes no reference whatsoever to a certificate of title or to the creation of a charge. This undermines the applicant’s contention that the title deed was offered as security.
40. The applicant further relies on Exhibit JM-2, a Loan Appraisal Analysis. Part 6 of this Loan Appraisal Analysis refers to ‘Loan Collaterals’ and mentions a Title Deed whose value is Kshs. 5,500,000. However, this document does not meet the statutory requirement for an informal charge for several reasons; First, the respondent did not execute this document, and therefore it cannot be said to represent her written undertaking; secondly the document does not specify with clarity which title deed is being referred to and thirdly the document is not witnessed as required by section 79(6) a of the *Land Act*. In addition, the respondent has consistently deponed that the loan amount was secured through guarantors who were members of the applicant, and not through the deposits of the title to the suit property. She maintains that the title deed was never intended to serve as security for the loan.
41. Section 109 and 112 of the *Evidence Act* provides:-
- 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 that 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 that fact is upon him.
42. The two sections capture the well-known maxim, “he who asserts must prove.” This point was restated by the Court of Appeal in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013]eKLR as follows:-

“We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court



to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

43. In this case, the applicant bore the obligation to adduce sufficient evidence to establish that an informal charge was indeed created over the suit property. Having scrutinized the documents relied upon, I find that the applicant has failed to discharge this burden. The evidence presented does not demonstrate a clear, written, and witnessed undertaking by the respondent to charge the suit property, nor does it establish that the title deed was deposited in circumstances amounting to an informal charge under the law.
44. Consequently, I find that no informal charge was created over the suit property. Without proof of such a charge, the applicant cannot be granted leave to sell the property in purported realization of security.
45. Having found that no informal charge was created over the suit property, it necessarily follows that the applicant has not acquired any enforceable rights that would entitle it to realize the alleged security by way of sale of the property. In the absence of such a charge, the applicant cannot invoke the remedies available to a chargee under the *Land Act*. The second issue, namely whether circumstances exist to warrant the realization of the security, is therefore rendered moot and does not fall for further deliberation by this Court.
46. In light of the foregoing analysis, I hold that the applicant has failed to establish the existence of an informal charge over the suit property. The application is therefore devoid of merit.
47. The upshot is that the application is dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF JANUARY 2026.

RHODA RUTTO

JUDGE

In the presence of;

.....for Appellant

.....for Respondent

Selina Court Assistant

