

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 55 OF 2017

CHRISTINE MUTILE MWANGI.....1ST
PLAINTIFF
CRISSAM ACRES LIMITED.....2ND
PLAINTIFF
STEVEN KATULA
MWANGI.....3RD PLAINTIFF

VERSUS

RAFIKI MICROFINANCE BANK LIMITED.....
.....DEFENDANT

JUDGMENT

1. Vide the Amended Plaint dated 05/05/2023, the Plaintiffs are seeking interalia, that the Defendant be restrained by way of permanent injunction either by itself, its servants, employees and or its agents from selling, auctioning, alienating, transferring, dealing and or interfering in any manner with land parcel No. Mbeti/Gachuriri/430; a declaration that the actions in the transaction involved in charging the suit property in favour of the Defendant were unlawful, illegal, irregular, null and void; that the 1st Plaintiff be granted three months to conclude the

sale transaction of L.R No. Mavoko Town Block 3/4415 for the purposes of settling the loan advanced by the Defendant; that upon settlement of the loan, the title to the suit property be released to the 1st Plaintiff.

2. The Plaintiffs' case is that, on or about 01/08/2014, the 2nd Plaintiff entered into a revolving LPO/invoice discounting facility with the Defendant, which facility was guaranteed by the 1st Plaintiff using land parcel Mbeti/Gachuriri/430 (the suit property) as collateral, which she held in trust for the 3rd Plaintiff who is her son. The Defendant allegedly rescheduled the facility from time to time but failed to provide a repayment schedule, thereby making it difficult for the Plaintiffs to service the loan despite the 1st Plaintiff's willingness and proposals to settle the same.
3. The 1st Plaintiff contends that she lacked the legal capacity to charge the suit property, as she held it in trust for the 3rd Plaintiff and his siblings pursuant to a confirmed grant issued in Succession Cause No. 1464 of 2007 in the estate of Samuel Mutua Mwangi. She asserts that the charge was therefore illegal and irregular for want of consent from the beneficiaries. It is further alleged that the Defendant failed to conduct due diligence and negligently accepted the property as collateral despite existing encumbrances.
4. The Plaintiffs also aver that attempts to resolve the matter through meetings and repayment proposals were unsuccessful, as the Defendant declined to commit to any arrangements in

writing and failed to halt a threatened auction, despite her indicating willingness to facilitate the sale of a different property to offset the loan. The 1st Plaintiff has proposed to sell an alternative property, Mavoko Town Block 3/4415, to settle the facility. They maintain that the Defendant has acted in bad faith, including issuing notices without providing them with a repayment schedule, despite them having made partial payment of Kshs. 1.2 million.

5. The Defendants filed an amended Defence and Counterclaim and averred that, following a request by the 2nd Plaintiff on 07/07/2014, it issued a Letter of Offer dated 01/08/2014 granting a revolving LPO/invoice discounting facility of Kshs. 10,000,000, repayable within 12 months to the 2nd Plaintiff. It is said that it was understood that the facility was payable on demand in full at the option of the Defendant. The facility was secured by a charge over Title No. Mbeti/Gachuriri/430, duly executed by the 1st Plaintiff as chargor, and further supported by directors' guarantees and indemnities from the 1st Plaintiff and Timothy M. Mwangi, the Directors of the 2nd Plaintiff, as well as a personal guarantee and undertaking from the 1st Plaintiff.
6. The Defendant denied that the Plaintiffs serviced the loan, contending instead that they defaulted from the outset, with the outstanding amount standing at Kshs. 29,518,650.35 as at 01/12/2022 which amount continues to accrue interest and other charges. They averred that owing to this default, they

lawfully exercised their statutory power of sale by advertising the charged property for sale by public auction on 17/03/2017. They averred that although several meetings were held to explore repayment options, the Plaintiffs failed to make meaningful progress despite having ample time.

7. The Defendant maintained that the Plaintiffs knowingly charged property held in trust, thereby converting it into a commercial commodity capable of being dealt with as such in the event they defaulted in making payment. They urged that they should not be deprived of their statutory power of sale merely because the 1st Plaintiff holds the charge property in trust.
8. In the Counterclaim, the Defendant sought inter alia, the dismissal of the Plaintiffs suit with costs; the sum of Kshs. 29,518,650.35/= being the outstanding loan amount as at 01/12/2022; an order that the Defendant proceeds with the sale of the suit property identified as land parcel Mbeti/Gachuriri/430 to recover the monies owed; interest on (b) at commercial rates as well as costs of the suit.
9. The Plaintiffs filed a reply to the amended Defence and Counterclaim. They averred that the suit property was not available for a charge as the land was being held in trust and no sanction or authority had been sought from the Court. They denied owing the Defendant the sum of Kshs. 29,518,650.35 or any other sums claimed.
10. The matter proceeded for hearing on 19/02/2026 where the 1st Plaintiff, Christine Mutile Mwangi, testified as PW1. She

adopted her written statement as her evidence in chief. She testified that she is a business lady in the business of construction and the Director of the 2nd Plaintiff. She testified that when she transacted with the bank in borrowing the loan, she was not represented by a lawyer and that the lawyer involved was the banks lawyer. She averred that she just gave them the title deed to the suit property and they advanced the loan to her.

11. She averred that they never told her that the title deed could not be used to borrow the loan as she held in trust for herself and her children. She averred that the persons she holds the land in trust for were not adults and that the Court did not sanction the transaction. She produced in evidence an agreement dated 01/08/2014, a copy of a deposit slip, a bundle of letters, a notice by the Auctioneer, a copy of a certificate of confirmation of grant in Succession Cause No. 1464 of 2007 is the estate of the late Samuel Mutua Mwangi and a copy of the title deed to land parcel No. 430.

12. The 3rd Plaintiff, Steven Katula Mwangi testified as PW2. He adopted his written statement as his evidence in chief. He testified that the 1st Plaintiff was his mother and that the title to the suit property was in her name. He stated that from the proprietorship section in the green card of the suit property, the 1st Plaintiff was holding the title in trust for herself and her children. He stated that the Defendant did not have authority to charge the suit property.

13. On cross examination, he stated that he has an interest in the suit land and therefore it was necessary for him to have been consulted before the property was charged. He stated that he was now 26 years old and that he did not agree to have the bank sell the property.
14. The Defendants failed to adduce any evidence in support of their Defence and Counterclaim despite the hearing date being taken by consent. Consequently, upon an application by counsel for the 3rd Plaintiff, the Defence and Counterclaim were dismissed for want of prosecution with costs awarded to the Plaintiff.
15. The 1st and 2nd Plaintiff's advocates made oral submissions. It was submitted that the Plaintiffs had proved their case on a balance of probabilities as the Defendant had not tendered any evidence to challenge the Plaintiff's claim. They cited the case of *EMY V MY & Another* (1983) Eklr where the Court held that a transaction where property is held in trust and the same is not sanctioned by the Court then the transaction is not enforceable. They further cited Succession Cause No. 594 of 1986 *FWG V SMK & Others* and highlighted paragraph 15 of the decision where the Court held that "one of the fundamental principles of a trust is that the trustee owes the beneficiary fiduciary duty not to waste the property but infact to manage it to a fruitful end all geared towards benefitting the beneficiary"
16. They submitted that the transaction which was between the 1st and 2nd Plaintiff and the Defendant was not geared towards

benefiting the beneficiaries and that it is only the Court which determines the issue of ownership of the suit property. They averred that since the property was being held in trust for the benefit of the minors, only this Court had the powers to determine the matter.

17. Counsel for the 3rd Plaintiff indicated that she would rely on the pleadings, witness statements, and the exhibits on record, and associated herself with the submissions made by her learned counterpart.
18. Having considered the pleadings, the evidence adduced, and the submissions of counsel, the issue for determination is whether the charge created over land parcel Mbeti/Gachuriri/430 in favour of the Defendant was lawful and enforceable, and whether the Plaintiffs are entitled to the reliefs sought.
19. The 1st Plaintiff testified that she executed the charge over the suit property, which she held in trust for her children pursuant to a confirmed grant in Succession Cause No. 1464 of 2007. The evidence produced, including the certificate of confirmation of grant and the green card, confirms that the property was registered in her name but in trust for herself and her three children.
20. The law is settled that a trustee cannot deal with trust property in a manner prejudicial to the beneficiaries without the sanction of the court. See *Re Eunice Wanjeri Wanjenga* (2013) eKLR, where the court held that;

“In summary the general duties of trustees in relation to the trust property are to safeguard the assets of the trust, to invest any trust money in his or her hands, and to distribute the assets to the beneficiaries and satisfy any claims of the beneficiaries. With relation to the beneficiaries, trustees are under a duty to maintain equality between beneficiaries and to provide accounts and information to the beneficiaries. Section 56 of the Trustees Act cited in the foregoing also gives this court power to authorize specific investments upon application by a trustee, and together with section 59 permits this court to order that costs of a sale and application to the court be met from the proceeds of sale of a trust property.”

21. In the present case, there is no evidence that the 1st Plaintiff obtained the consent of the beneficiaries or sanction of the court before charging the suit property. The charge was therefore irregular and unlawful ab initio.
22. On the Defendant’s statutory power of sale, The Defendant contended that the Plaintiffs defaulted and that the outstanding amount stood at Kshs. 29,518,650.35 as at 01/12/2022. However, the Defendant failed to adduce any evidence in support of its Defence and Counterclaim despite being accorded opportunity. The Defence and Counterclaim were dismissed for want of prosecution. In law, pleadings are not evidence, and the Defendant’s assertions remain unsubstantiated.

23. The Plaintiffs have demonstrated that the charge was unlawful for want of authority and consent. The Defendant failed to rebut this evidence. The Plaintiffs are therefore entitled to a declaration that the charge was null and void. Further, the Plaintiffs have shown willingness to settle the loan through sale of an alternative property, L.R No. Mavoko Town Block 3/4415. While this Court cannot compel the Defendant to accept alternative security, it can restrain the Defendant from unlawfully interfering with trust property.

24. Accordingly, I make the following orders:

1. A declaration is hereby issued that the charge created over land parcel Mbeti/Gachuriri/430 in favour of the Defendant was unlawful, irregular, null and void.
2. A permanent injunction is hereby granted restraining the Defendant, its servants, agents, or employees from selling, auctioning, alienating, transferring, or otherwise interfering with land parcel Mbeti/Gachuriri/430.
3. The Defendant shall release the title to the suit property upon settlement of the loan advanced, should the Plaintiffs conclude the sale of L.R No. Mavoko Town Block 3/4415 or otherwise settle the debt.
4. Costs of the suit are awarded to the Plaintiffs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 07TH DAY OF MAY, 2026.

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. Mr. Were for the 1st and 2nd Plaintiffs
2. Mr. Koskei for the 3rd plaintiff
3. Defendants/Advocate-absent
4. M/S Ruth C/A