



**Ochieng (Administrator of the Estate of Connel Onyango  
Ochieng v Kinyanjui & another (Environment and Land Appeal  
2 of 2022) [2024] KEELC 111 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 2 OF 2022  
NA MATHEKA, J  
JANUARY 25, 2024**

**BETWEEN**

**JOAN ANYANGO OCHIENG (ADMINISTRATOR OF THE ESTATE OF  
CONNEL ONYANGO OCHIENG) ..... APPELLANT**

**AND**

**CHRISTOPHER KAMAU KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**HOUSING FINANCE COMPANY (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant as representative of the estate of Connel Onyango (deceased) appeals against the whole of the judgment dated 21<sup>st</sup> day of May 2021 by Hon. G. Kiage Senior Resident Magistrates Court at Mombasa in the republic of Kenya in the Chief Magistrate's Court at Mombasa Civil Suit No 3561 of 2013. The appellant appeals on the following grounds;
  1. Hon Senior Resident Magistrate misdirected himself in applying Indian Transfer of Property Act (1882) which had been appealed before and was therefore not applicable.
  2. That having found correctly that the appellant was not served with a statutory notice prior to the date of default in paying for installment the charged house as required by law. The Senior resident magistrate erred in law in not deciding on the consequences arising upon that failure to serve statutory Notice.
    - a. In regards to the purchase itself
    - b. In regard to the chargor Housing Finance Company of Kenya
    - c. In regard to the chargor



3. The Hon Senior Resident Magistrate misdirected himself in the proper meaning of innocent purchaser without notice.
  4. The Hon Senior and misdirected himself in applying repealed legislations when were not functional at the time of transaction.
  5. The Hon Senior Resident Magistrate erred in deciding that the buyer was an innocent buyer without notice and misdirected himself in law in failing to define and relate the consequences caused there from as to whether the notice was actual or constructive or implied.
  6. The learned Senior resident magistrate erred in law failed to require that a purchaser has a duty to investigate the state of the property to be acquired by the purchaser.
  7. The Hon Senior Resident Magistrate misdirected himself in failing to appreciate as he should have done that the purchaser failed to enquire about the person in occupation and in possession of the premises
  8. The Hon Senior Resident Magistrate erred in fact in ignoring that the purchaser had actual notice of occupation and possession of the property in the defendant
  9. That the Hon Senior Resident Magistrate erred in law and in fact in failing to or ignoring to notice that the purchaser deliberately with convening and pretensions of the premises ignorance of the existence of the owners in occupation.
  10. The Hon Senior Resident Magistrate misdirected himself in law and fact in misunderstanding the necessity of imputing to the innocent purchaser the existence of construction knowledge of the occupation and possession by the defendant
  11. The Hon Senior Resident Magistrate should have found on the facts before him and in the absence of fraud on the part of the purchaser that his failure to ignore to make reasonable enquiry was negligence on his part and amounted in law to constructive knowledge.
2. The Appellant prays that the judgment on Hon Senior Resident Magistrate delivered on 21<sup>st</sup> May 2021 be and hereby dismissed.
  3. Kinyanjui and Housing Finance Company (K) Limited the Cross Appellants being dissatisfied with part of the Judgment cross appealed on the following grounds;
    1. The learned trial Magistrate erred in law and in fact by holding that the Chargee (2<sup>nd</sup> Respondent) failed to serve a Statutory Notice upon the Chargor as mandated by Section 69A of the Indian Transfer of Property Act.
    2. The learned trail Magistrate erred in law and fact in failing to award damages for loss of rent to the 1<sup>st</sup> Respondent/ Cross Appellant.
    3. The learned trial Magistrate erred in law and fact by failing to award damages for trespass to the 1<sup>st</sup> Respondent/ Cross Appellant.
    4. The learned trial Magistrate erred in law and in fact in failing to award costs to the 1<sup>st</sup> Respondent/ Cross Appellant.
    5. The learned trial Magistrate erred in law and in fact in ordering costs against the 2<sup>nd</sup> Respondent/ Cross Appellant in the Counter-Claim.
  4. It is proposed to ask the Court for Orders that;



- a. The Appeal be dismissed with costs and the Cross-Appeal herein be allowed with costs.
  - b. The finding of the Court on Service of the Statutory Notice, Loss of Rent, Damages on trespass, failure to award costs and awarding costs against the 2<sup>nd</sup> Respondent/ Cross Appellant be set aside or varied.
  - c. This Honourable Court does take up the Submissions of the parties and/or re-assess the evidence tendered and issue a Judgment on the merits.
  - d. The costs of this Appeal be paid to the Cross-Appellants/Respondents by the Appellant.
5. This court has considered the appeal and the submissions therein. This is an appeal from a judgement delivered on 21<sup>st</sup> May 2021 by G. Kiage SRM in Mombasa CMELC No. 3561 of 2013 Christopher Kamau Kinyanjui vs Cornel Onyango Ochieng and counterclaim Connel Onyango Ochieng vs Christopher Kamau Kinyanjui and Housing Finance Co. Ltd. In the plaint dated 6<sup>th</sup> October 2009 the respondent sought inter alia vacant possession of L.R No. 9731/I/MN and general damages for trespass. The appellant filed a defence and counterclaim dated 9<sup>th</sup> November 2009 seeking inter alia a declaration that the discharge of the suit property, transfer to Housing Finance Co. Ltd (HFCK who was the 2<sup>nd</sup> defendant in the counterclaim) and the subsequent charge is illegal, null and void.
6. The learned magistrate ruled in favour of the respondent to the extent that he was legally registered as owner of the suit property but the damages for trespass were declined. In the same breadth, the learned magistrate found that the appellant had not provided evidence to support the counterclaim and punished HFCK with costs of the counterclaim.
7. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and make a determination as to whether the conclusion reached by the trial magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;
- “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
8. I am also guided by the case of *[Gitobu Imanyara & 2 Others vs Attorney General \[2016\]](#)* eKLR where the Court held that;
- “this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
9. The appellant is an ad litem representative of the defendant and the case in the trial court was that the defendant; Connel Onyango Ochieng (deceased) was the registered owner of the suit property from 24<sup>th</sup> April 1999 after he managed to successfully secure a mortgage form HFCK. That the deceased



continued servicing his mortgage until sometime in October 2006 when the suit property was sold by HFCK to the respondent herein through the statutory power of sale.

10. The respondent's case in the trial court is that he had legally obtained title to the suit property through a Transfer by Chargee which was executed on 16<sup>th</sup> October 2006 and registered at the land registry on 23<sup>rd</sup> October 2006.
11. The first ground I was about the applicable law in determining the matter. In Section 23 (3) the *Interpretation and General Provisions Act* it provides as follows:

“Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
- (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or
- (d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made...”

12. In *Barclays Bank of Kenya Ltd vs Attorney General & another (2015)* J.M Mutungi J stated as follows:

“The petitioner referred the court to the case of Fina Bank Limited –vs. Dinesh Kumar Zaverchand Jetha HCCC NO. 643 of 2005 where Havelock, J (as in then was) vide a ruling delivered on 8th March 2013 held that the law applicable for charges drawn prior to the new land laws was the law as per the repealed land laws by virtue of the transition provisions of section 162 of the Land Act and section 107 of the *Land Registration Act* of 2012. However Havelock, J in the case of Patrick Waweru Mwangi & Another –vs- Housing Finance Company of (k) Ltd (2013) eKLR delivered on 3rd October 2013 followed the holding by Mabeya, J in the case of Jimmy Wafula Simiyu –vs- Fidelity Commercial Bank Ltd (2013) eKLR where the learned Judge held that the Land Act, 2012 section 78 brings the charges created before the enactment of the Land Act under the operation of the Act.

13. Honourable Justice Havelock in the case of Patrick Waweru Mwangi & Another –vs- Housing Finance Co. Ltd (supra) in considering the applicability of the Land Act to charges executed and registered before the coming into force of the Act stated:-

“9. That being said, the question is whether the provisions of the Land Act and *Land Registration Act* are therefore applicable in the instant suit, given that the charge instruments before the said Acts were enacted. The savings and transitional provisions with respect to rights, actions dispositions etc



are provided under section 107(1) & (2) of the Land Registration Act and sections 106 (1) & (2) of the Land Act”. Both regimes of the law provide that “Unless the contrary is specifically provided in this Act”, any rights, interest, obligations acquired, accrued, or established before the commencement of the Act shall continue to be governed by the law applicable. This is the saving transitionally clause for the transition into the new laws with the repeal of all previous land laws including the Registered Land Act Cap 300. The “Contrary provision” aspect that the Land Act provides for is the issue of the matrimonial home. Having established indeed the suit premises is matrimonial property, the other issue is to establish what the remedies available to both the chargee and charger under the Act and whether the same is applicable in the instant application”.

14. On the applicability of the new land laws the learned Judge cited with approval the holding of Mabeya, J in the case of Jimmy Wafula Simiyu –vs- Fidelity Commercial Bank Ltd (supra) where the Judge stated thus:-

“A careful reading of this section will show that there is the use of the words “ Unless the contrary is specifically provided in this Act” section 78 of the Land Act, 2012 which the plaintiff relies on is in my view, express and specific that part VII of the Act on “General provisions on charges” applied to all charges on land including any charge made before the coming into effect of that made before the coming into effect of that Act. That part VII generally deals with the creation, transfer, contents of charges and the remedies thereon part VII extends from section 78 to 106 of the Act. In my view therefore notwithstanding the provisions of section 162 (1) of the Act, the provisions of section 78 of the Act being express and specific as to application of part VII of the Act, that part applies to the charges made before 2nd May, 2012 when the Land Act 2012 came into effect. In this regard, I hold the view that prima facie, the provisions of the Land Act, 2012 is applicable in this case as regards part VII thereof”.

15. Hon Justice Havelock despite holding that section 78 rendered charges created before the coming into force of the Land Act, 2012 subject to the provisions of the Act nonetheless held that the conduct of a spouse who makes the application for relief under the provisions of the Act should be taken into account in deciding whether or not to grant the relief sought. The granting of the relief is not automatic and the attendant circumstances in every case are a relevant factor to be considered in determining whether or not to grant an order or any relief against the operation of a chargee's remedy of enforcement of the security. A spouse cannot having been aware of the existence of the charge and having for instance participated in its servicing simply turn around and become obstructionist by resorting to the provisions of the Act to curtail a chargee's legitimate exercise of its powers under the charge.

16. In the above case the learned judge expounded section 78 of the Land Act 2012 further and stated that;

“The petitioner referred the court to the case of Overseas Private Investment Corporation & 2 others –vs- AG (2013) eKLR where Hon. Justice Majanja was invited to find section 78(1) of the Land Act unconstitutional and null and void in so far as it applies to charges made before the coming into effect of the Land Act on 2nd May 2012 for being in contravention of articles 40(1) and (2) of the Constitution. Hon Justice Majanja in the case held that the



legislature may in its wisdom and with clear intention legislate a law that in its operation is intended to have retrospective application. The Judge observed that.

“the duty of courts is to give effect to the will of Parliament so that if the legislation provided for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a “lack of wisdom or applies retrospectively”.

The judge further stated that section 78(1) of the Land Act cannot be construed in abstract and that the same should be looked at within the context of the entire part VII of the Act.

- “28. The question is whether in the circumstances of the petitioners, such an application of the law contravenes their fundamental rights and freedoms. Section 78(1) of the Act which has been impugned is part of Part VII of the Act titled, “General provisions on charges”. The part relating to charges contains 28 sections dealing with a range of issues governing, among others, the formation of the charges, the rights and obligations of the parties, the rights of third parties and the remedies of the chargor and chargee.
29. section 78(1) is the introductory section in part VII and whether and to what extent it applies to the matters in part VII must be tested as against each and every section. As demonstrated by the petitioner, some of the sections of part VII when considered against section 78(1) may be considered retrospective and indeed amount to interfering negatively with accrued rights Section 78(1) cannot be read in isolation as doing so would be inconsistent with the legislative intention to enact what is in effect retroactive legislation. As the authorities I have cited demonstrate, the legislature is entitled to enact statutes with retrospective effect the question is whether the court should intervene in this particular instance”.
17. The trial magistrate used the Court of Appeal case of *Nancy Kaboya Amadiva vs Expert Credit Limited & Another (2015)* eKLR and determined that failure to issue a statutory notice does not invalidate the respondent’s title as the remedy would be in the form of damages. It is prudent to notice that the damages addressed at the end of the said judgment were in relation to the damages the respondent suffered for loss of rent and general damages for trespass.
18. In following the guidance of Majanja’s J in the Overseas Private Investment Corporation & 2 others, the circumstance is that a statutory notice dated 28<sup>th</sup> November 2005 exists and it has the wording “registered mail”. It was the trial magistrates view that the certificate of posting whose address was written 680-693 and a list of addresses where the deceased is no. 692 was a leap of faith in assuming that the said notice was sent. I am in support of the same as the purported list was not certified by a commissioner and also no officer from HFCK was produced to explain if that is their modus operandi when dispatching letters. Still guided by the above case Majanja J. stated as follows;
- “32. These transitional provisions I have cited are intended to mitigate the full rigour of the retrospective effect of the provisions of Part VII. Section 162 of the Act permits the application of the repealed law to specific instruments made or any rights or interests accrued prior to the Act coming into force. Specifically, section 162 (2) of the Act permits transactions commenced prior to the Act to continue in accordance with the repealed law”.



19. I therefore do not find any reason to interfere with the trial magistrate's judgment in finding that although the statutory notice was not properly served, the respondent still maintained a valid title and the only remedy for the appellant would be in damages. Be that as it may, the trial magistrate failed to award damages for failure by HFCK to properly serve the statutory notice. He found that the defendant had reasonable excuse to remain in the suit property pending the determination of ownership.
20. In *Executive Curtains & Furnishings Ltd vs. Family Finance Building Society (2007)* eKLR, Warsame, J (as he then was) stated as follows-
- “The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower.”
21. In the case of *Kitur vs Standard Chartered Bank & 2 others (2002)* 1KLR the court opined as follows:
- “It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits.”
22. Finally, in the case of *Bii vs Kenya Commercial Bank Ltd (2001)* KLR 458 Justice Ringera held that;
- “Once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages.”
23. On special Damages, it is trite that the law that special damages must be specifically pleaded and proved. That the plaintiff pleaded Kshs. 1,277,515/= from the 1<sup>st</sup> respondent as special damages which he incurred during the eviction. The defendant did not produce any evidence documentary or otherwise to prove it.
25. The Court of Appeal in the *Satwant Singh Dhanjal & 2 others t/a Paramount Hauliers v Kenya Revenue Authority* stated that;
- “But even assuming that breach of contract was established it is trite that special damages must be specifically pleaded and strictly proved. This Court made this clear in *Bangué Indosuez vs DJ Lowe and company Ltd [2006]* 2KLR 208; where this Court stated as follows:
- “Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of



the acts themselves. This has been adumbrated by Bowen Lj In *Ratcliffe v. Evans* (1892), 2 QB 524, 532, 533, Lord Macnaghten in *Storms Bruks Aktic Bolag v. John & Peter Hutchinson*, [1905] AC 515, 525, 526 Lutta JA in *Kampala City Council V. Nakaye*, [1972] EA 446, 447 and *Chesoni, J in Ouma V. Nairobi City Council* [1976] KLR 294, 304 and in *Sande Charles C. V. Kenya Co-operative Creameries Ltd. Civil Appeal No. 125 of 1996* (unreported). With respect, therefore, we think that the learned Judge was wrong to grant the sums under the heading of special damages.”

26. I agree with the trial magistrate that special damages were not proved and cannot be awarded. Be that as it may, I find that the defendant when it comes to general damages, he was in occupation of the suit property and enjoyed the same until after the judgement of the trial court when he was evicted to give vacant possession and will not award any for that reason. On the award of costs, Section 27 of the [Civil Procedure Act](#) provides;

27

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

27. In *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 court held as follows;

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

28. The trial court ordered that each party meets their costs of the main suit and the 2<sup>nd</sup> defendant to bear the costs of the counterclaim owing to the adverse finding against them. I concur with the court’s discretion on the costs and I do not fault it. I find that the appeal and the cross appeal are not merited and I dismiss them with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

