Rufus & another v African Banking Corporation Limited; Athman (Interested Party) (Civil Appeal 24 of 2019) [2024] KECA 935 (KLR) (2 August 2024) (Judgment)

Neutral citation: [2024] KECA 935 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 24 OF 2019

DK MUSINGA, M NGUGI & JM MATIVO, JJA

AUGUST 2, 2024

BETWEEN

DAVID KIMEMIA RUFUS ..... 1ST APPELLANT

LUCY WANJIKU KIMEMIA ..... 2ND APPELLANT

AND

AFRICAN BANKING CORPORATION LIMITED ..... RESPONDENT

AND

MUSTAFA MOHAMED ATHMAN ..... INTERESTED PARTY

(An appeal against the whole judgment and decree of the Environment and Land Court at Nairobi, (Bor J.) dated and delivered on 14th May, 2018 in ELC Misc. Suit No. 30 of 2016)

JUDGMENT

1. The appellants, David Kimemia Rufus and Lucy Wanjiku Kimemia, have appealed against the judgment of the Environment and Land Court (ELC) at Nairobi (Bor J.) delivered on 14th May 2018. A brief background of the dispute before the ELC is necessary in order to contextualize the diametrically opposed arguments presented by the parties in support of their respective positions.

2. By an Originating Summons (the O.S) dated 10th June 2016, the appellants sought the following reliefs against the respondent: (a) a declaration that the respondent is not entitled to exercise its equity of redemption over title number L.R. No. 209/8029 (I.R. No. 26399/1) because no charge was registered over the said title owing to the respondent's refusal to advance the loan which was to be secured by the title; (b) an order that the respondent had no powers to demand from the applicant the refund of the deposit of the purchase price paid by the interested party because it was not part of the security provided to secure the loan; (c) an order that the respondent had contravened the law by unlawfully retaining the said documents; (d) general damages for the losses incurred by the appellants, and, (e) the

respondent pays the costs of the suit. The OS was founded on section 89 of the *Land Act* and Order 37 Rule 3 of the Civil Procedure Rules, 2010.

3. The OS was supported by the affidavit sworn on 10th February 2016 by the 1st respondent on behalf of himself and his wife, the 2nd appellant. The salient averments are: - (a) the appellants jointly own LR No.209/80929 (I.R. No. 26399). By a sale agreement dated 23rd September 2011 (the agreement), they sold it to the interested Party at an agreed consideration of Kshs. 15,800,000; (b) clause 2.1.1 of the agreement provided that a deposit of Ksh. 535,000 would be paid to the appellants upon execution of the agreement; (c) Clause 2.1.2 provided that Kshs. 5,200,000 would be paid directly on behalf of the appellants to the Central Bank of Kenya (the CBK) to liquidate the appellants' loan with the CBK secured by the said title, and, upon payment as aforesaid, the purchaser shall be entitled to collect the original title and the discharge of charge from the CBK; (d) clause 2.1.3 provided that the balance of the purchase price shall be transferred to the appellants' account within 14 days of the registration of the transfer in favour of the purchaser and the charge in favour of the respondent; (e) in conformity with clause 2.1.2, on 20th November 2012, the interested party paid Kshs. 4,163,075 to the CBK, fully settling the entire debt due and owing from the appellants to the CBK; (f) in accordance with the sale agreement, the CBK will release the security documents to the respondent as a lien for its money pending registration of a charge in its favour to secure its loan to the interested party, and, (g) within 14 days of the registration of the discharge of charge, transfer in favour of the interested party and charge in favour of the respondent, the interested party would pay the balance of the purchase price.

4. The appellants also averred that a dispute arose between the respondent and the interested party, which did not concern them, and as a result the respondent declined to release the balance of the purchase price to the appellants which led to the cancellation of the sale agreement on the understanding that the appellants would refund part of the interested party's money less the agreed penalties. The appellants wrote a letter to the respondent on 7th October 2015 seeking release of the security documents to enable them to obtain another facility so as to refund the interested party his money. It was also the appellants' case that at the respondent's request, the appellants and the interested party jointly signed a letter to the respondent consenting to the release of the said documents, but the respondent declined to release the documents unless it is paid the amount it paid to the CBK. This refusal triggered the proceedings before the ELC.

5. The respondent opposed the OS vide a replying affidavit sworn by its legal officer, one Evalyn Gachoki, on 28th June 2016. Its key highlights are: (a) by a letter of offer dated 9th October 2012, the respondent granted an asset finance facility to the tune of Kshs. 33,000,000 to the interested party's wife, one Aluiyah Omari Ahmed T/A Vanga Express (the borrower). The loan was partly to be secured by a third-party charge to the tune of Kshs. 25,000,000 to be registered over L.R. No. 209/8029. The title was to be registered in the name of the interested party. It was the respondent's case that the said terms were contained in the letter of offer to the borrower which was also signed by the interested party.

6. It is common ground that the appellants had charged the property to CBK and on the 20th November 2012, and in accordance with the sale agreement, the interested party instructed the respondent to transfer Kshs.4,163,075 to the CBK to settle the appellants' loan so as to facilitate the discharge of the title. The respondent maintained that upon transferring the said sum, the CBK released to it the original Grant for LR No. 209/8020, the original rent clearance certificate and a duly executed discharge of charge, but it was yet to receive from the appellants the duly executed transfer instrument in favour of the interested party. Instead, the respondent received a letter from the appellants asking for the title documents, citing rescission of a sale agreement between them and the interested party. Further, the letter falsely alleged that the respondent was to finance the balance of the purchase price in the sum of Kshs.8,000,000. The respondent maintained that if the appellants desired to recall the

said documents, they ought to refund to it the total sum it paid to the CBK which amount is also the subject of Milimani HCCC No. 540 of 2014, Mohamed Athman vs. African Banking Corporation Limited and Another.

7. In the impugned judgment, the learned judge framed and determined three issues namely: (a) whether the contract of sale was binding on all the parties; (b) whether an informal charge was created in favour of the respondent; and (c) should the sum of Kshs.4,163,075 be paid in full to the respondent. After detailing the facts of the case and the parties' submission, the learned judge, in her judgment dated 14th May 2018, decreed as follows:

> "22. Having considered the case together with the submissions of counsel, the court finds that the respondent is entitled to a refund of the full sum of Kshs. 4,163,075 which it paid to the Central Bank of Kenya on behalf to (sic) the applicants to secure the release of the title deed and discharge of charge over the suit property. The respondent not being a party to the sale agreement, the applicants are not entitled to withhold the sum of Kshs. 1,580,000 based on that contract.
>
> 23. The court further finds that the letter of offer which the interested party and the respondent's client executed created a formal charge which complied with Section 79 of the *Land Act*.
>
> 24. The Originating Summons is dismissed with costs to the Respondent."

8. In their quest to overturn this judgment, the appellants have mounted 4 grounds of appeal as follows:

   a. The learned misdirected herself in law and in fact by completely disregarding the appellants' case when she dedicated 22 paragraphs in her judgment to set out the background of the dispute and only determined the dispute in only one paragraph without interrogating the issues at all.

   b. The learned judge misdirected herself in law and in fact by considering extraneous matters by finding that it is the respondent who paid the money to the CBK and not the appellants.

   c. The learned judge erred and misdirected herself in law and in fact by holding that the appellants were not entitled to withhold the sum of Kshs. 1,580,000 because the respondent was not party to the contract notwithstanding that the respondent played a role in the transaction.

   d. The learned judge misdirected herself in law and in fact when she wrongfully found that the letter of offer signed by the interested party created an in formal charge yet the interested party was not the owner of the property.

9. The appeal was disposed of by way of written submissions and oral highlights. The appellant's submissions are dated 9th April 2024 while the respondent's submission are dated 23rd April 2024. The interested party did not participate in the proceedings before us or before the ELC.

10. In support of the appeal, learned counsel for the appellant, Ms. Wangari, faulted the learned judge for dedicating 22 paragraphs of her judgment detailing the background to the case, and only determined the case in one paragraph without providing reasons for her decision.

11. Counsel maintained that the appellants proved their case to the required standard by providing supporting documents which include the sale agreement, the RTGS confirming transfer of the funds to the CBK and a letter jointly signed by the appellants and the interested party consenting to the release of the documents to the CBK. However, notwithstanding the foregoing, the trial judge dismissed their case, only relying on the respondent's submissions which were not supported by evidence. Counsel

cited Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR in support of the proposition that submissions cannot take the place of evidence.

12. In support of the assertion that the learned judge considered extraneous matters, Ms. Wangari submitted that at the time the sale agreement was signed, the property was charged to CBK and in accordance with clause 2.1.2 of the sale agreement, the outstanding mortgage debt was paid to the CBK by the interested party on 20th November 2012 from an account he jointly owned with his wife who intended to charge the property to secure funding for the balance of the purchase price, but the loan facility was never granted. Therefore, the learned judge erred in holding that the Kshs.4,163,075/= paid to the CBK emanated from the interested party's overdraft account held at the respondent bank without supporting evidence. Consequently, there was no basis for the respondent to demand a refund of the Kshs.4,163,075/=from the appellants. Further, in any event, if at all the said sum is payable, it is the interested party who is entitled to claim and not the respondent. Furthermore, the appellant was not privy to the deal between the respondent and the interested party.

13. Regarding the question whether the appellants were entitled to withhold the sum of Kshs.1,580,000, Ms. Wangari maintained that clause 13.1 of the sale agreement stipulated that the purchaser shall forfeit the sum of Kshs.1,580,000 and return or authorize the return of all completion documents to the vendor. She asserted that courts cannot rewrite contracts willingly signed by parties as was held in Samuel Kamau Macharia vs. Daima Bank Limited [2008] eKLR. Consequently, the only amount refundable to the interested party is Kshs.2,583,075.

14. Regarding the trial court's finding that the letter of offer signed by the interested party and the respondent created an informal charge, notwithstanding the fact that the interested party did not own the property, Ms. Wangari cited the High Court decision in Jamii Bora Bank Limited vs. Wapak Developers [2018] eKLR in support of the proposition that section 79 (6) of the *Land Act* 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 interests in land with the repayment of money or monies obtained from the charge. Further section 2 of the *Land Act* envisages the definition of informal charge. She also cited the High Court decision in Kingdom Bank Limited vs. Okotsi [2022] KEHC 12771 in support of the proposition that what is required to support the existence of an informal charge is evidence of clear intent to offer the title or an interest in land to secure the payment of a debt, whether existing, contingent, or future. Counsel maintained that only a registered proprietor of a property can charge the property. In conclusion, Ms. Wangari urged this Court to set aside the judgment and allow the Originating Summons.

15. Mr. Kiplagat, learned counsel for the respondent, in opposition to the appeal, submitted that the trial court cannot be faulted for the brevity of the judgment. He submitted that the respondent established by evidence the source of the Kshs. 4,163,075 paid to CBK and how the title was released to the respondent. Counsel cited section 79 (6) (b) of the *Land Act* which provides for creation of an informal charge and asserted that the property was to be transferred to the interested party. He contended that even though the interested party's wife was the borrower, the ultimate beneficiaries of the Kshs. 4,163,075 were the appellants because the said funds settled their loan with the CBK. Counsel stressed that the title was forwarded to the respondent as opposed to the interested party, therefore, the learned judge correctly found that the Kshs. 4,163,075 was part of the overdraft facility advanced to Aluiya Omar Ahmed by the respondent.

16. Regarding the creation of an informal charge despite the interested party not being the owner of the property, counsel submitted that under section 79 (6) (b) of the *Land Act* as read with section 79 (b), an informal charge can be created where the chargor deposits, inter alia, the certificate of title with the intention of creating a charge, and in this case, there was a common understanding that the suit

property would be transferred to the interested party and charged in favour of the respondent to secure its loan to the interested party and his wife, and that is why the 1st appellant authorized the release of the title to the respondent. Counsel cited the ELC decision in Tassia Coffee Estate Limited & Another vs. Milele Ventures Limited [2014] eKLR in support of the holding that the act of depositing a title created an informal charge over the property as security for the payment of the balance of the purchase price. Counsel contended that the respondent in this case holds a lien over the title in its possession.

17. Submitting on the argument that the respondent was not entitled to withhold the Kshs. 1,580,000 because it was not a party to the agreement between the appellants and the interested party, the respondent's counsel maintained that the sale agreement could not be used to deprive the respondent the sums it paid to the CBK to discharge the appellants' title. To buttress this submission, Counsel cited K'owade & Ng'ang'a Advocates vs. Mutune Investment Limited [2016]eKLR where this court held that money received on the strength of a professional undertaking cannot be used to cover a debt or liability between parties who are not privy to the transaction.

18. This being a first appeal, our duty is to re-evaluate the evidence afresh and draw our own conclusions bearing in mind that unlike the trial court, we do not have the benefit of seeing the witnesses testify, therefore we should give due allowance for that. (See Selle vs. Associated Motor Boat Co Ltd & Others [1968] EA 123).

19. Flowing from our analysis of the entire record and the parties' submissions, we find that the following issues fall for determination.

    a. Whether the impugned judgment is bad in law for failure to comply with the requirements of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

    b. Whether the learned judge failed to consider the appellants' case.

    c. Whether the learned judge considered extraneous matters.

    d. Whether an informal charge was created when the title was deposited with the respondent.

    e. Whether the act of delivering the title document and the discharge of charge to the respondent after it paid Kshs. 4,163,075 to the CBK created a lien over the said documents in favour of the respondent pursuant to 79(8) of the *Land Act*.

    f. Whether the appellant was entitled to withhold the sum of Kshs.1,580,000.

20. Regarding the first issue, the appellants fault the impugned judgment for its brevity and failure by the learned judge to provide reasons for her decision. Their contestation is that the learned judge dedicated 22 paragraphs of her judgment to detailing the background of the case, and determined the entire case in only one paragraph without providing reasons for her decision. It is important for us to clarify that the analysis of the respective parties' cases and submissions runs from paragraphs 1 to 2, and not 22 as claimed by the appellants. The final determination appears in two paragraphs, that is, 22 and 23 reproduced earlier, and not in one paragraph as alleged by the appellants. However, the appellants are right in their grievance that the learned judge never provided reasons for her decision as required by Order 21 Rule 4 of the Civil Procedure Rules, 2010.

21. The above provision provides in peremptory terms that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision therein, and reasons for such

decision. This provision was explicated in Kiarie Wamutu vs. Mungai Kiarie & Others [1982] KLR 481 where this Court (Madan, JA. (as he then was), Law & Porter JJA.) held inter alia that:

> "in defended suits, the Judgment shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by Order XX, rule 4 of the CPR (as it was then cited) and now Order 21 rule 4."

22. An important explanation of the purposes served by the giving of reasons for judicial decisions was given in Soulemezis vs. Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, 279 where McHugh JA (as he then was) explained three key purposes served by the giving of reasons in judicial decisions. The first purpose identified by McHugh JA was that reasons enable the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. The second purpose concerns judicial accountability. The giving of reasons enables decisions to be scrutinized, whether by appellate courts or the public. The third purpose identified by McHugh JA is that reasons allow people to ascertain the basis upon which like cases will probably be decided in the future.

23. Fairness requires that the parties (especially the losing party) should be left in no doubt why they have won or lost. This is especially so since, without reasons, the losing party will not know (as was said in Ex p. Dave [1994] 1 All ER 315) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The other requirement to give reasons enables parties to appreciate whether the decision is based on the evidence and the law.

24. We have carefully considered the entire judgment. It is true that the learned judge, after analyzing the factual background to the dispute and the parties' submissions, rendered her final decision in the earlier cited paragraphs without explaining the reasons for her decision or applying the law to her conclusions. The issue under consideration turns on the question whether the said failure is so material that it amounted to a serious misdirection or that it caused prejudice to the appellant warranting this court to interference. Granted, Order 21 Rule 4 is couched in mandatory terms. However, while hearing a first appeal, an appellate court is in the same footing as the trial Court. Rule 31 of this Court's rules empowers this Court to re-evaluate the entire evidence and arrive at its own conclusions. As we do so, we may arrive at a different conclusion from the finding of the trial Court or affirm her decision. For this reason, we shall independently address the issues identified earlier and arrive at our own independent conclusions and provide reasons for our findings. In so doing, no prejudice will be suffered by either party because we will have re- heard the case as mandated by Rule 31. This means that we shall determine the appeal on merits as opposed to overturning it for failure by the learned judge to provide reasons. This finding determines the ground that the learned judge failed to provide reasons.

25. Closely related to the appellants' argument that the learned judge failed to provide reasons for her decision is the second issue, which is whether the learned judge failed to consider their case. The appellants maintained that they proved their case to the required standard by provided all the supporting documents, namely, the sale agreement, RTGS payment establishing that the funds paid to the CBK emanated from the interested parties' account and a letter signed by the appellants and the interested party consenting to the release of the title by the CBK to the appellants. It was also submitted that the respondent never adduced evidence and that the learned judge relied on its submissions which are not a substitute for evidence.

26. Undeniably, it is imperative that a trial court evaluates all the evidence and the submissions presented by the parties. A court cannot afford to be seen to be selective in determining what submissions to consider. However, requiring the trial court to consider and weigh all the submissions does not meant that the judgment of the trial court must also include a complete embodiment of all the submissions made, as if it comprises a transcript of the proceedings. In other words, in order to determine the

merits or otherwise of the appellants' contention, this court must consider the evidence tendered by the parties and their respective submissions in the trial court, and, juxtapose it against the judgment, and finally determine whether there is any basis for interfering with the judgment.

27. If this court finds that a particular fact or submission is so material that it should have been dealt with in the judgment, but such fact or submission is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether either the said misdirection, viewed on its own or cumulatively with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by this court. Undeniably, some evidence or submissions might be found to be irrelevant or of little value. The best indication that a court has applied its mind in the proper manner to all the material presented before it is to be found in its reasons for judgment.

28. We have already found in the first issue that the learned judge never provided reasons for her findings, and that under Rule 31, this is a re-hearing, and therefore, we shall re-evaluate the evidence and make our own findings of fact and law. For this reason, we are unable to annul the judgment on this ground.

29. Next, we will address the question whether the learned judge considered extraneous matters. The appellants maintained that as at the time of the sale, the property was charged to the CBK and it was ascertained that the loan due stood at Kshs. 4,163,075 and under clause 2.1.2, the said sum became due to the CBK from the interested party. The appellants maintained that the interested party paid the said sum to the CBK on 20th November 2012 from a bank account owned by the interested party and his wife and the security documents were released to charge the property to the respondent so as to pay the balance of the purchase price. The appellants contended that the overdraft facility which was to be provided by the respondent to the interested party had nothing to do with the sale. Accordingly, the appellants contended that there was no basis for them to pay to the respondent the sums it paid to the CBK because the appellants were not privy to the transactions between the respondent and the interested party and his wife.

30. Even though the interested party did not participate in the proceedings before the ELC and in this appeal, we have examined all the material on record to satisfy ourselves whether there is merit in the appellants' accusation that the learned judge's decision was informed by extraneous matters. Notably, in their grounds in support of their OS, the appellants stated that in accordance with the sale agreement, the CBK was to release the security documents to the respondent as a lien for its money pending registration of a charge in its favour to secure its loan to the interested party. A proper appraisal of this ground renders the appellants' argument that the respondent was a stranger to the transaction otiose because it places the respondent at a central role in the transaction. Two points support our aforesaid observation, One, CBK was to release the security documents to the respondent. Two, the respondent had a lien over the documents for its money pending the registration of the charge to secure its loan.

31. More important, the documents relied upon by the parties were not contested. The respondent annexed a letter of offer dated 9th October 2012 which demonstrates that it had agreed to provide credit facilities to the interested party's wife, one Aluiya Omar Ahmed t/a Vanga Express. As per annexure II at page 48, the said loan was to be secured by a legal charge over the same property the appellants were selling to the interested party. As per the said documents, the property was to be registered in the name of the interested party. On record is a deed of assignment of rental income in relation to the same property and a personal guarantee and indemnity of Aluiya Omari Ahmed. Importantly, there is uncontroverted evidence that the respondent paid to CBK the sum of Kshs.4,163,075/= to settle the appellants' loan with the CBK to enable the CBK release the title documents and a duly executed discharge of charge to facilitate the registration of the discharge, a transfer in favour to the interested party and a charge in favour of the respondent as security for their loan to the interested party, part of

which was paid to the CBK as aforesaid, and the balance was to be paid to the appellants. However, the transaction was rescinded before the registration of the above instruments.

32. Earlier in this judgment, we reproduced paragraph 23 of the impugned judgment. It will add no value to reproduce it here. In summation, the learned judge held that the respondent was entitled to a refund of the full sum of Kshs. 4,163,075 which it paid to the CBK on behalf of the applicants to secure the release of the title deed and discharge of charge over the suit property. It is in respect of this finding that the appellants accuse the learned judge of taking into account extraneous matters.

33. Extraneous means irrelevant or unrelated to the subject being dealt with. We have in the above paragraphs re-evaluated the facts presented before the ELC. We have examined all the documents relied upon by the parties and the role played by the respondent as a Bank. There is cogent evidence showing that the sum of Kshs. 4,163,075 was paid by the respondent from the interested party's wife's bank account. The money was paid as provided in the sale agreement. Earlier, we reproduced the relevant clauses and conditions upon which the respondent paid the said sum. We find absolutely no merit in the appellant's assertions that the learned judge's finding was based on irrelevant considerations. In any event, the appellants are speaking from both sides of their mouths, blowing hot and cold air at the same time. On one hand they are accusing the learned judge of failing to provide reasons for her decision, and on the other hand they claim that her findings were based on extraneous matters. Therefore, the accusation that the learned judge considered extraneous matters is devoid of merit.

34. The next issue is whether an informal charge was created when the title was deposited with the respondent. The appellants' counsel, Ms. Wangari, submitted that no informal charge was created between the appellants and the respondent, because the same was not in writing. Furthermore, the appellants were not guarantors to the alleged informal charge.

35. On its part, the respondent maintained that the title was deposited with the respondent with the intention of creating a charge and that the original certificate of title and discharge from CBK were released and deposited with the respondent as a lien to hold on account of the charge that was to be created to settle the balance of the purchase price. There was therefore a common intention of all the parties and consideration, which was the Kshs. 4,163,075/=, which created an informal charge. The trial Court's finding on this issue was:-

> "The court further finds that the letter of offer which the interested party and the respondent's client executed created a formal (sic) charge which complied with Section 79 of the *Land Act*."

36. An informal charge is defined at section 2 of the, *Land Act* 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 sub charge 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; and
>
> b. a customary charge which is a type of informal charge whose undertaking has been observed by a group of people over an indefinite period of time and considered as legal and binding to such people;

37. Section 79 of the *Land Act*, 2012 provides that 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 charge.

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 right to interest in land.

38. Section 79 (6) of the *Land Act* provides as follows:-

Informal charges.

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;

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.

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."

7. 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. "

10. Section 2 of the *Land Act* 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...."

39. The Act defines an interest in land as:- "interest" means a right in or over a land.

40. There is uncontroverted evidence on record demonstrating the payment of Kshs.4,163,075/= to CBK by the respondent on behalf of the interested party pursuant to the sale agreement between himself and the appellants to clear the appellants' loan with the CBK. This payment was made in conformity with the terms of the sale agreement which was signed by both parties. It was part of the purchase price and it was paid to settle the appellants' loan with the CBK. More important, Clause 2.1.3 of the agreement signed by the appellants and the interested party provided as follows:

> "The balance of the purchase price shall be transferred into the vendor's account (as it shall notify) within fourteen (14) days of the registration of the transfer in favour of the purchaser and the charge in favour of the African Banking Corporation (ABC Bank) which is financing purchaser for the said balance".

41. The above clause read independently or together with clause 2 of the agreement which provided for the release of the original title and a discharge of charge signed by the CBK to the respondent is a clear written undertaking within the definition of sections 2 and 79 of the *Land Act* reproduced above. The above clauses and the correspondence signed by the 1st appellant and the interested party authorizing the CBK to release the title document and the discharge of charge brings out the clear intention of the parties to register a charge to secure the funds already paid to the CBK and the balance of the purchase price which the respondent was to pay within 14 days from the date of the registration of the charge in its favour. Also relevant is the 1st appellant's averment at paragraph 6 of the affidavit in support of the Originating Summons, where he states on oath that the original title and the discharge from the CBK were to be deposited with the respondent as lien, to hold on account of the charge that was to be created on the title to settle the balance of the purchase price. In the face of the the foregoing unchallenged evidence disclosing the parties' clear intention to have the charge registered in favour of the respondent, coupled with absence of evidence to the contrary, we find that an informal charge was created in favour of the respondent.

42. The collapse of the agreement between the interested party and the appellants could not affect the respondents' already accrued rights. The High Court in Kingdom Bank Limited vs. Okotsi [2022] KEHC 12771 (KLR) held that a clause in a letter of offer that showed that a loan facility would not be availed until and unless all security documentation would have been finalized and pledged in favour of the bank created an informal charge.

43. Section 79 of the *Land Act* provides the requirements for the creation of both formal and informal charges. For informal charges, a duly signed letter of offer was held in the above case as the clearest indication of the chargor's intent to offer the title to be held as security by the bank in order to release the monies. It was also held that the letter of offer was the only document that showed the parties' agreement. A reading of the letter of offer and the act of depositing the title with the bank demonstrates the parties intent to create an informal charge under section 79 (6), (7), (8), and (9) of the *Land Act*. The Court also held that the intention had to be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt. After evaluating the material before it, the court in the above case was satisfied that there was a clear demonstration in the letter of offer showing the intention to charge the property, informally, to secure the payment of any amount that would be availed to him as a temporary overdraft facility.

44. A reading of the sale agreement and in particular the clauses cited above shows that there was a clear intention that a charge was to be registered. The respondent performed its part by issuing a letter of

offer, which was signed by the interested party, which confirmed the intention to register a charge. The clauses in the agreement cited above clearly contemplated a charge in favour of the respondent.

45. We will now address the issue whether the act of delivering the title document and the discharge of charge to the respondent after it paid Kshs.4,163,075 to the CBK created a lien in favour of the respondent pursuant to 79 (8) of the *Land Act*. The scope and meaning of Banker's Right of General Lien is explained in Halsbury's Laws of England, 2nd Edn., Vol.20, p. 552, para 695 as follows:

> " Lien is in its primary sense a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract."

46. In Chalmers on Bills of Exchange, 13th Edn., p. 91, the meaning of 'Banker's lien' is stated as follows:-

> " A banker's lien on negotiable securities has been judicially defined as `an implied pledge'. A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer."

47. In Chitty on Contract, 26th Edn., p. 389, para 3032 the Banker's lien is explained as under:-

> " Extent of lien.
>
> By mercantile custom the banker has a general lien over all forms of commercial paper deposited by or on behalf of a customer in the ordinary course of banking business. The custom does not extend to valuables lodged for the purpose of safe custody and may in any event be displaced by either an express contract or circumstances which show an implied agreement inconsistent with the lien .... The lien is applicable to negotiable instruments which are remitted to the banker from the customer for the purpose of collection. When collection has been made the proceeds may be used by the banker in reduction of the customer's debit balance unless otherwise earmarked."

48. In Paget's Law of Banking, 8th Edn., p. 498, it is stated:-

> " The Banker's Lien apart from any specific security, the banker can look to his general lien as a protection against loss on loan or overdraft or other credit facility. The general lien of bankers is part of law merchant and judicially recognized as such."

49. In Brandao vs. Barnett, (1846)12 Cl & Fin 787, it was stated as under:

> " Bankers, most undoubtedly, have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien."

50. The above passages demonstrate that commercial banks have a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognized. In the absence of an agreement to the contrary, a banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. It

was Lord Campbell who said in Brandao vs. Barnett (1846) 12 Cl & Fin 787 that the right acquired by a general lien is an implied pledge. Since that day this phrase has become an axiom.

51. Clause 2.1.2 of the sale agreement provided that Kshs.5,200,000 would be paid directly on behalf of the appellants to the CBK to liquidate the appellants' loan with the CBK. Pursuant to the said clause, the respondent forwarded to the CBK a total sum of Kshs. 4,163,075 which was the entire outstanding loan due and owing to the CBK from the appellants. The said clause also provided that upon payment of the said sum, the purchaser (the interested party) shall be entitled to collect the original title and the discharge of charge from the CBK. Also relevant are clauses 2.1.2 and 2.1.3 referred to earlier. The appellants instructed the CBK in writing to release the title document and the discharge of charge to the respondent to facilitate the registration of the discharge of charge, the transfer in favour of the interested party, and the charge in favour of the respondent. The CBK complied with the said instructions and released the said documents.

52. Thereafter, the transaction was cancelled. The appellants now claim they are entitled to recover the money paid on their behalf by the respondent. They claim that the respondent was not a party to the transaction between them and the interested party. Interestingly, they do not deny they benefited from the said funds. In our view, unless a contrary intention is demonstrated (which has not been done), the respondent has a lien over the title documents until its funds are fully paid.

53. Lastly, we will address the issue whether the appellants are entitled to withhold Kshs.1,580,000 as per clause 13.1 of the agreement. Ms. Wangari submitted that pursuant to condition 13.1(a) of the sale agreement, the interested party was to forfeit a sum of Kshs.1,580,000 if it failed to pay the entire purchase in accordance with the agreement.

54. The respondent's counsel submitted that the sale agreement was between the appellants and the interested party. Therefore, the doctrine of privity of contract applies to excuse the respondent from being bound by the terms of the agreement between the appellants and the interested party, and it is for that reason that the interested party never bothered to participate in these proceeding because the sum advanced by the respondent did not belong to him.

55. In her judgement, the learned judge held that "...the respondent not being a party to the sale agreement, the appellants are not entitled to withhold the sum of Kshs. 1,580,000/= based on that contract." In Halsbury's Laws of England, 4th Edition Volume 9(1) Paragraph 748, it is stated:-

> " The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and..."

56. On the exceptions to the privity of contract rule, the Court of Appeal in William Muthee Muthami vs. Bank of Baroda [2014] eKLR stated:-

> " The Appellant's father did not bring himself within the well-known exceptions to the doctrine of privity of contract. For example, he did not demonstrate the existence of:
>
> i. a collateral contract to the one in question in which he was a party,
>
> ii. an agency relationship in which the appellant transacted on his behalf,
>
> iii. a trust by which the appellant contracted and held the property in trust for him (the witness),

iv. an express provision or implied term in the agreement made for the benefit of the appellant's father."

57. The issue at hand cannot be determined in isolation as the appellants seem to suggest. There is cogent evidence that the respondent paid Kshs.4,163,075 to the CBK, effectively settling the appellants' mortgage over the subject property. There is unquestioned evidence that the appellants and the interested party jointly wrote to the CBK authorizing it to release the security documents to the respondent to enable the respondent to register the discharge of charge, the transfer in favour of the interested party, and a charge in its favour to secure the loan to the interested party and his wife. The Kshs.4,163,075 paid to the CBK was part of the amount to be secured by the said title. The appellants benefitted from the said funds. They now want to benefit more by burdening the respondent with the said sum of Kshs.1,580,000. Ironically, the appellants describe the respondent as a stranger to their agreement when it is convenient for them to do so, But when it comes to the said sum, it is convenient to pass the said debt to them. If the respondent is a total stranger to the entire transaction, one wonders why the appellants now wish to benefit from its money.

58. It will suffice to state that the appellants did not bring the respondent within the exceptions stated in William Muthee Muthami vs. Bank of Baroda (supra) since the appellants have not demonstrated that the sale agreement was a collateral contract, neither did the appellants prove that there was an agency relationship between the respondent and the interested party nor a trust by which the interested party contracted and held property in trust for the respondent, and there was no express or implied term of the agreement made for the benefit of the respondent. Consequently, the appellants are not entitled to enforce condition number 13.1(a) of the sale agreement as against the respondent, and as a result the appellant cannot retain the sum of Kshs.1,580,000.

59. In conclusion, arising from our analysis of the facts, the submissions, the authorities, the law and our consideration of the issues discussed herein above and the conclusions arrived at, it is our finding that this appeal is devoid of merit. Accordingly, we hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.