



**HFC Limited v Njora (Environment & Land Case E027 of 2023)
[2024] KEELC 3255 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E027 OF 2023**

MD MWANGI, J

APRIL 11, 2024

IN THE MATTER OF SECTION 79 OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF TITLE NO. NAIVASHA/MARAIGUSHU BLOCK 18/1819

BETWEEN

HFC LIMITED APPLICANT

AND

AMOS MUKIRIA NJORA RESPONDENT

JUDGMENT

1. The case before me is rather straightforward. The Applicant is a bank trading in the name of HFC Limited. As deposed in the supporting affidavit of one, Boniface Oro, a legal officer, the Respondent was on the other hand at all material times, a Customer of the Applicant's Rehani House Branch in Nairobi.
2. The Applicant granted the Respondent a term loan of Kshs 1,000,000/= sometimes in May, 2016. Soon thereafter in in the same year, the Respondent was allowed by the Applicant to overdraw his 'SME BIZ Account' to the tune of Kshs 625,000/= for purposes of raising working capital. The two facilities extended to the Plaintiff were secured by an informal charge over title number NAIVASHA/MARAIGUSHU BLOCK 18/1819 whose original title was deposited with the Applicant Bank.
3. The deponent asserts that the Respondent has failed and or neglected to service the said loan facilities which continues to accrue interest. As at 1st March, 2023, the debt due and owing from the Respondent to the Applicant in respect to the 1st loan was Kshs 984,767.75. In regard to the overdraft facility, the amount owing was Kshs 1,285,620.73. The deponent exhibited bank statements in proof of the assertion.



4. The deponent asserted that in spite of several reminders to the Respondent to offset the debt due and owing to the Applicant bank, the Respondent had refused and or neglected to clear the loans necessitating the filing of this suit.
5. The Respondent had requested the Applicant to consolidate the two loan facilities into a single loan which the Applicant did. Accordingly, the amount due and owing to the Applicant on the consolidated loan facility was Kshs 2,300,468.56 as at 1st March, 2023.
6. Since the security offered by the Respondent was an informal charge, the deponent avers that leave of the Court to sell the security is required in accordance with the provisions of Section 79 of the Land Act.
7. Accordingly, the Applicant prays for orders:
 - a. THAT the Court be pleased to grant leave to the Applicant to sell the property known as Title NAIVASHA/MARAIGUSHU BLOCK 18/1819 charged to the Applicant by way of simple deposit of title to secure the repayment of Bank facilities advanced to the Respondent, together with interest and costs now outstanding to the tune of Kshs 2,300,468.56 as at 1st March, 2023.
 - b. THAT the Respondent grants the Applicant and/or its agents free and unlimited access to the property known as title NAIVASHA/MARAIGUSHU BLOCK 18/1819 for the purpose of inspection and valuation.
 - c. THAT the attendant costs of valuation, Auctioneer's fees, Legal fees and other related expenses be paid from the proceeds of the sale of the said property.
 - d. THAT costs of this Application be borne by the Respondent.

Response by the Respondent

8. The Respondent's response to the Originating Summons by the Applicant was by way of a Replying Affidavit sworn by the Respondent, Amos Mukiria Njora on 20th September, 2023.
9. The Respondent acknowledges the loans from the Applicant bank as expressed in the Originating Summons filed by the Applicant Bank. He avers that he experienced difficulties which made it difficult for him to regularize payments as scheduled. He particularly refers to the Covid-19 Pandemic that affected his business. He states that in spite of the difficulties, he has made attempts to regularly make payments to offset the outstanding arrears.
10. The Respondent asserts that he has reached out to the Applicant to negotiate a suitable timetable within which to clear the outstanding sums due to the Applicant bank. He requests the Court to stay these proceedings to allow the parties to work on a mutually convenient formula to offset the outstanding loan. He urges the Court to take judicial notice of harsh economic times coupled with increased taxation that has fostered a negative operating environment for small businesses as his.

Directions by the Court

11. On 31st October, 2023, the parties agreed before the Deputy Registrar to dispense off the matter by way of written submissions. By the time the parties appeared before the Court on 15th February, 2024, they had already filed their respective submissions which I have had occasion to read and consider.



Issues for Determination

12. Having considered the pleadings filed by the parties and their respective submissions, the issues for determination in this matter are:
- A. Whether the Applicant has proved the existence of an informal charge.
 - B. Consequently, and subject to the finding in (A) above, whether the Applicant has satisfied the conditions for the grant of leave to sell the suit property.
 - C. What orders should issue in respect to the costs of this suit?

Analysis and Determination

- A. Whether the Applicant has proved the existence of an informal charge
13. Section 79(6) 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 Chargee;
 - b. The Chargor deposits any of the following:
 - i. A certificate of title to the land;
 - ii. A document of lease of land; or
 - iii. Any other document which it is agreed evidences ownership of land or a right to interest in land."
14. The deposit of documents by the Chargor alluded to under Section 79 (6) (b) is referred to as a Lien by deposit of documents.
15. In the case of *Tassia Coffee Estate Limited & Another -vs- Milele Ventures Limited* [2013], eKLR, the Court had to determine whether an informal charge had been created by the parties, essentially through a Lien by deposit of documents. The Court held that:
- “...It would appear that the Defendant having deposited his title deed for the suit property with the Plaintiffs, it created an informal charge in favour of the Plaintiffs over the suit property as security for the payment of the balance ... The Plaintiff therefore becomes the Chargee of an informal charge over the suit property and enjoy a lien by deposit of documents ...”
16. The Respondent herein deposited a certificate of title number NAIVASHA/MARAIGUSHU/BLOCK 18/1819 with the Applicant bank with a clear intention that it was to be a security for the money advanced to him by the Applicant Bank. This is evidenced by a copy of the certificate of title filed as an annexure to the Originating Summons. Moreover, this Court notes that the creation of an informal charge of the aforementioned land is not disputed, as deponed by the Respondent in his replying affidavit. The Respondent readily acknowledges the arrangement with the Applicant Bank.



17. It is therefore my finding that the applicant has indeed duly proved the existence of an informal charge created by way of deposit of title.
- B. Consequently, and subject to the findings above, whether the Applicant has satisfied the conditions for the grant of leave to sell the property?
18. Under Section 90(3) of the [Land Act](#) (2012), the Chargee or Creditor secured in land, has the following remedies:
- i. Suing the Chargor for any money due and owing under the Charge;
 - ii. Appointing a receiver of the income of the charged land;
 - iii. Leasing the charged land, or if the charge is of a lease, subleasing the land;
 - iv. Entering into possession of the charged land; and
 - v. Selling the land.
19. Part VII which makes general provisions on charges does not distinguish the remedies available in respect to a formal charge and those available to an informal charge with regards to selling the land. The general rule however, is that a chargee has a statutory power of sale; the right to sell a charged land upon default by the borrower.
20. Section 79(7) of the [Land Act](#) (2012) however, is specific to informal charges. It is clear that the sale of land, the subject of an informal charge, must be with leave of the court. It provides that:
- “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.”
21. Whereas the [Land Act](#) (2012) does not set forth specific considerations that the Court should make in determining whether to grant or deny leave to sell the land, my reading of the law is that a chargee holding charge, whether formal or informal, must satisfy some fundamental conditions. These include:
- i. The Chargee must proof that the Chargor is indebted to the Chargee and has defaulted in payment of the debt thereof;
 - ii. The Chargee has given a redemption notice to the Chargor; and
 - iii. The Chargor has failed to comply with the notice.
22. This Court insists that the foregoing set conditions must be met conjunctively.
23. Of great importance before exercise of the right of sale is the equity of redemption. Section 89 of the [Land Act](#) (2012) provides for the equity of redemption. The equity of redemption grants the Chargor a reasonable opportunity to redeem the property, by repaying the principal amount and interest as agreed by the parties before it is disposed off by the Chargee.
24. In *Kamulu Academy & Another -vs- British American Insurance (K) Ltd & 2 others*, the Court opined that,
- “Equity of redemption is the right of a Chargor to extinguish the mortgage (to read charge) and retain ownership of the property by paying out the debt.”



25. Section 90 of *Land Act* (2012), envisions a redemption notice. Where a Chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge, and continues to be in default for one month; the Chargee may serve upon the Chargor a notice in writing to pay the money owing. This is the notice referred to as a redemption notice. The redemption notice ought to inform the Chargor of the following:
- a. The nature and extent of the default by the Chargor;
 - b. A demand of repayment for the amount owing to rectify the default and the time being not less than three months;
 - c. The consequences that if the default is not rectified within the time specified in the notice, the Chargee will proceed to exercise his remedies.
26. The purpose of a redemption notice is not only to protect the Chargor; it is a means of affording both parties a measure of protection. This was affirmed in the case of *First Choice Mega Store Limited -vs- Ecobank Kenya Ltd* (2016) eKLR. The Court noted that:
- “A purposive construction of Section 90 is necessary. Section 90 must be read and understood with the open factor that the Chargee also has the right to pursue his various remedies. Any interpretation which curtails that right, should not be favoured given that it is the same section that triggers application of a Chargor’s rights and remedies. Whereas the *Land Act* 2012 envisions a redemption notice as a protective measure for the Chargor, the Court needs to adopt a prudent construction of Section 90 of the *Land Act* (2012). This involves weighing the redemption equity of the Chargor against the Chargee’s right to sell upon default.”
27. The Respondent in this case does not deny being indebted to the Applicant; neither does he deny default in payment of the amount owing i.e. a sum of Kshs 2,300,468.56 as pleaded by the Applicant. He in fact acknowledges it, attributing his failure to service the loan to financial constraints occasioned by the economic aftermath of the COVID-19 Pandemic.
28. The Applicant in my considered view has demonstrated that it has afforded the Respondent adequate and sufficient opportunity to redeem the suit property through issuance of the redemption notice.
29. This court must balance the right of the Creditor, a bank in this case, vis-à-vis that of the borrower. The economic disturbance of the COVID – 19 Pandemic cannot in my opinion justify failure to service a loan or rather a debt in the year 2024. This Court reminds the Respondent of the Kiswahili saying that, “Dawa ya deni ni kulipa!” (the remedy for a debt is to pay the debt). That being the case, the Court finds that the Applicant has satisfied the conditions for grant of leave to sell the suit property.

C. What orders should issue in respect to costs of the suit

30. Section 27 of the *Civil Procedure Act* lays down the general principle regarding payment of costs at the conclusion of a suit. Thus:
- i. The costs follow the event
 - ii. The event is that the unsuccessful party will be ordered to pay costs to the successful party
 - iii. The Court has discretion as to who pays costs, the amount thereof and when they are to be paid.



31. The Applicant having succeeded in its case herein, I find it appropriate to award the costs of this suit in its favour.

Conclusion.

32. The conclusion of the matter is that the Applicant's suit against the Respondent succeeds. Accordingly:-

A. Leave be and is hereby granted to the Applicant to sell the property known as Title NAIVASHA/MARAIGUSHU BLOCK 18/1819 charged to the Applicant by way of simple deposit of title to secure the repayment of Bank facilities advanced to the Respondent, together with interest and costs now outstanding to the tune of Kshs 2,300,468.56 as at 1st **March, 2023.**

SUBPARA B.

The Respondent is ordered to grant the Applicant and/or its agents free and unlimited access to the property known as title NAIVASHA/MARAIGUSHU BLOCK 18/1819 for the purpose of inspection and valuation.

C. The attendant costs of valuation, Auctioneer's fees, Legal fees and other related expenses be paid from the proceeds of the sale of the said property.

D. The costs of this suit be borne by the Respondent. **//

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Okello holding brief for Mr. Ojiambo for the Applicant

Ms. Nguru for the Respondent

Yvette: Court Assistant

M.D. MWANGI

JUDGE

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