



**Victoria Commercial Bank v Kamau (Environmental and Land Originating
Summons E061 of 2022) [2024] KEELC 4709 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E061 OF 2022**

J OMANGE, J

MAY 30, 2024

BETWEEN

VICTORIA COMMERCIAL BANK APPLICANT

AND

NICHOLAS KAMAU RESPONDENT

JUDGMENT

1. In the Originating Summons application dated 24th October 2022 the Applicant sought the following orders:
 - a. Spent
 - b. That upon hearing the parties inter parties, this honourable court be pleased to issue an order directing the respondent herein, his servants and /or agents to forthwith give and yield vacant possession to the applicant herein, the suit property known as land reference no Kabete/Lower Kabete/3725 situated in lower Kabete area within Kiambu County.
 - c. Upon hearing inter parties this honourable court be pleased to issue an order directing the respondents herein to allow the applicant, their servants and/or agents to peacefully force enter/or gain possession of the suit property known as land reference no Kabete/Lower Kabete/3725 situated in lower Kabete area within Kiambu County.
 - d. Upon grant of the above prayers the officer in charge of station Kabete Police Station be hereby directed to supervise the enforcement of the order
 - e. Costs of the application.
2. The applicant through a supporting affidavit dated 24th October 2022 and sworn by Clement Gitau its legal officer, depones that it advanced a loan facility to the Respondent in the sum of ksh 14,800,000/ =for purposes of facilitating a takeover of a mortgage facility from Chase Bank Limited in respect of



- the suit property. That in respect of the same, a charge was executed dated 24th August 2017. He further depones that the loan amount fell into arrears necessitating issuance of a statutory notice dated 9th March 2020 under Section 90(1) of the Land Act and further a notice of intention to take possession dated 21st June 2022 to the Respondent. That despite several reminders to the Respondent, he has neglected to pay the arrears within the prescribed time in the notice necessitating this application
3. The Respondent opposed the application vide a replying affidavit dated 28th September 2023 in which he alleged that the Applicant had not served him with notice of intention to take possession as required by Section 90 of the Land Act. He insisted that he has at all material times been willing to settle the outstanding arrears of the loan advanced to him but has difficulty in doing so due to joblessness and the harsh economic times.
 4. The Applicant filed submissions in which it argued that the Applicant's power of entry into the suit property has crystalized. Counsel submitted that the Applicant was in order to exercise its power of entry under Section 94 (2) of the Land Act. That all the conditions existed for exercise of the statutory power of entry namely;
 - a) there is a valid existing charge;
 - b) the respondent has defaulted in repayment of the loan;
 - c) the loan has become non-performing; and
 - d) the applicant issued a notice of intention of entry which period has lapsed.
 5. Counsel submitted that a notice of intention to take possession had been issued after 90 days of issuance of the notice of statutory power of sale vide registered post and email to the Respondent. That the Respondent is in default and the bank had complied with all the requirements under the charge instrument. The Applicants cite the case of Patrick Githinji Ndichu & 2 others v Equity Bank (Kenya) Limited & Another [2021] eKLR, to support their case.
 6. The Respondents counsel submitted that the Respondent was not properly served with notice to take possession as required by section 90 of the Land Act and that the applicant had failed to prove service. Counsel cited the case of Nyahururu ELC no 287 of 2017 East Africa Ventor Co Ltd v Agricultural Finance Corporation Ltd & Another (2017) eKLR.
 7. Counsel argued that the Respondent has not refused to offset the loan facility and is willing to do so. That in any event no valuation of the suit property has been undertaken.
 8. It is not in dispute that the parties entered into a loan agreement and perfected the terms thereon by virtue of legal charge dated 24th August 2017 over land parcel no Kabete/Lower Kabete/3725. The legality and propriety of the said instruments are not denied. Neither is the default in dispute. The charge instrument spelled out the remedies in case of default.
 9. The only issue for determination before the court is whether the chargee has complied with the legal requirements for it to exercise its right of possession. Section 90 of the Land Act provides;

“90(1) If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the charge may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.



- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters: -
 - (a) The nature and extent of the default by the charger;
 - (b) If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) ...
- (3) If the charger does not comply within ninety days after the date of service of the notice under, subsection (1), the charge may: -
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) enter into possession of the charged land;
 - (e) ...

10. The law is very clear on the procedure to be followed by the chargee. Section 89 of the Land Act outlaws exercise of the right to take possession in any manner other than as prescribed in the Act. Section 90 requires the chargee to issue a notice which should contain specific information; the nature and extent of default; the amount that must be paid to rectify the default; if there is failure to perform a covenant how it can be rectified; the consequence if the default is not rectified; The notice should also be clear as to the next steps if the charger does not redeem their property; the right of the charger to obtain relief from court. In my view, the rationale for these requirements is that the charger should have full information of the amount they owe and what they should do to exercise their right to redeem their property.

11. After this notice is issued, Section 94 (1) requires that after expiry of the notice issued in Section 90 the chargee may issue a notice of intention to enter into possession of the charged land.

12. In the instant case, the Applicant issued the first notice on 9th March, 2020. The notice indicated the amount owing as ksh 17,514,665.70 which continued to earn an aggregate interest of 12.5%. The Charger was also notified that in case of continued default the Chargee would exercise their statutory remedy of power of sale without prejudice to any other remedies. The charger was notified of their right to seek relief from court.

Finally, the charger was given three months failing which the statutory power of sale was to be exercised. This notice was served on the Charger and his wife vide certificate of posting dated 23 March, 2020.

13. I am satisfied that this notice complied with the legal requirements in terms of form and in terms of service. According to the affidavit in support of the Originating Summons, the second notice was issued on 21st June 2022 over two years later. The letter itself is however dated 21st June, 2021. The Land Act appears to be silent on the question of how soon after the first statutory notice the second notice should issue.

14. However, considering that the rationale for issuing two notices is so as to present the Charger with an opportunity to exercise their right to redeem the charged property, it could not have been the intention



of parliament that the two notices be issued so far apart in time as to fail to achieve the purpose that was intended. In the instant case, given the period that had lapsed in issuance of the two notices, the amount owing had risen from ksh 17,514,665.70 to ksh 23,179, 058. The period between the two notices should be reasonable such that it is possible to relate one notice to the previous one.

15. In view of the discrepancies in service and the period that had lapsed, it is difficult to find that the notice was properly served as envisaged by the Land Act. I find that this suit is premature and is dismissed. Given that the Respondent is in default I will not penalize the Applicant to pay costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF MAY 2024.

JUDY OMANGE

JUDGE

In the presence of: -

Ms Saina for the Applicant

No appearance for the Respondent

Steve - Court Assistant

