



Alpking Holdings Limited v Adiungo Kenya Limited (Enviromental and Land Originating Summons E004 of 2023) [2024] KEELC 3759 (KLR) (13 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

EK WABWOTO, J

MAY 13, 2024

BETWEEN

ALPKING HOLDINGS LIMITED PLAINTIFF

AND

ADIUNGO KENYA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff, Alpking Holding Limited filed this Originating Summons dated 24th July 2023 under Section 4 of the *Banking Act*, Cap 488, Section 90(3) of the *Land Act* No.6 of 2012, Section 1A, 1B,3A of the *Civil Procedure Act*, Cap 21 and Order 37 Rule 4 of the *Civil Procedure Rules 2010*.
2. The Originating Summons sought the following questions for determination against the Defendant:
 - a. Whether the Defendant has the statutory power to engage in mortgage business in Kenya?
 - b. Whether the charge registered on 18th August 2021, against the suit property is valid and enforceable through realization of the property?
 - c. If the answers are in the negative, whether the Court should make a declaration and order that the Defendant discharges the suit property and immediately returns to the Plaintiff the title document to the suit property, failure to which the Deputy Registrar be empowered to execute the discharge of charge to the suit property;
 - d. Whether the Plaintiff should be paid costs of this suit
3. The Originating summons also sought the following reliefs after the determination of the aforementioned questions. The reliefs sought were as follows:



- a. A declaration that the charge registered against the Title Number: Unit No. 8 I.R No. 140014/1 on Land Reference No. 195/228 Karen Hills is unenforceable through realization of the suit property.
 - b. A permanent injunction be issued restraining the Defendant jointly and/or severally by itself through its agents, servants and/or employees from advertising, selling, trespassing, evicting, auctioning and or any other manner interfering with Title Number: Unit No. 8 I.R No. 140014/1 on Land Reference No. 195/228 Karen Hills
 - c. A mandatory injunction do issued against the Defendant that the Defendant discharge them suit property and immediately returns to the plaintiff the title document to the suit property failure to which the Deputy Registrar be empowered to execute the discharge of charge to the suit property.
 - d. The costs of this suit by the Defendant.
4. The Application was supported by an affidavit sworn by Josiah Muoka Mumo sworn on 24th July 2023. It was averred that on 14th April 2021, the Plaintiff and the Defendant executed an instrument creating Title Number: Unit No. 8 I.R No. 140014/1 on Land Reference No. 195/228 Karen Hills owned by the Plaintiff. The intention of the charge was to secure the Principal amount of \$ 500,000 to be advanced by the Defendant to Cresta Investment Ltd. The facility drawn down to Cresta Investment Ltd was \$300,000 less the processing charges on 10th August 2021, instead of \$ 500,000 secured against the suit property. The charge was registered on 18th August 2021 and reflected on the title document of the suit property.
 5. It was also averred that in the sometimes in 2022, Cresta Investment Ltd fell into arrears culminating into a dispute with the Defendant herein. Due to the said default by Cresta Investment Ltd, the Defendant attempted to auction the suit property in exercise of its perceived rights as a chargee.
 6. The Plaintiff stated that it later came to its attention that the Defendant is not licensed to engage in the mortgage business in Kenya under the provision of Section 4(1) of the *Banking Act* and as such cannot purport to exercise the powers of a charge and therefore the charge registered on 18th August 2021 is a nullity and unenforceable.
 7. It was further stated that the parties to this suit are currently engaged before the High Court in HCCOMM E204 of 2023- Cresta Investement Ltd And Alpling Holdings Ltd v Adiungo Kenya Ltd And Adiungo CapitalBV for interim measure of protection pending the institution and conclusion of arbitral proceedings.
 8. In response, the Defendant filed a Replying Affidavit sworn by Stan Lee, the Director of the Defendant Company on 4th October 2023.
 9. The Defendant stated that it is the chargee and the security agent of the Lender, Adiungo Capital BV who is not a party to this suit. It was averred that the Plaintiff failed to disclose to the Court that Justice Mabeya had granted stay orders in respect to HCCOMM E204 of 2023 - Cresta Investement Ltd And Alpling Holdings Ltd v Adiungo Kenya Ltd And Adiungo CapitalBV.
 10. The Defendant averred that the charge was registered pursuant to a loan agreement dated 14th April 2021, parties executed an addendum to the loan agreement dated 9th August 2021 with revisions to the repayment schedule. The Plaintiff/borrower failed to make any repayment installment as per the loan agreement and never even attempted to pay the loan as per the agreement. This prompted the Defendant to issue a 14 day notice dated 6th June 2022, statutory 90 days' notice dated 24th June



- 2022, 40 day statutory notice of sale dated 17th October 2022 and a 45-day Redemption Notice dated and served on 19th December 2022. It was also averred that the time sought by the Plaintiff to settle the amount lapsed on 15th April 2023 without full settlement of the outstanding amounts by the Plaintiff who remains in default and further failed to provide concrete proof that it was in the process of obtaining financial help to offset the loan facility instead offering through its advocates then (Messrs Migos –Ogamba & Waudu Advocates) a purported undertaking which proved a lack of seriousness on the part of the Plaintiff towards settling their debts with the Respondent.
11. The Defendant contended that mortgage business is not specifically defined in the *Banking Act* however Section 2(2) of the *Banking Act* defines mortgage finance to mean a company (other than a financial institution) which accepts from a member of the public money on deposit repayable on demand or at the expiry of a fixed period after notice or on current account and payment on and acceptance of cheques and is established for the purpose of employing such money in accordance with Section 15.
 12. The Defendant contended that it does not undertake any mortgage business, take any form of deposit from the public and it is not a bank or a mortgage finance company and thus is not subject to regulation by the Central Bank of Kenya. It was also contended that the Plaintiff has not adduced any evidence showing that the Defendant requires a license from Central Bank of Kenya and or regulated by the *Banking Act*.
 13. The Defendant disputed the Plaintiff's averments that the charge is invalid and that the Defendant can recover the same as a civil debt. Reliance was placed to the cases of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *George Lalla Oduor v Canon Assurance (K) Ltd* Civil Appeal No 51 of 2017.
 14. The Defendant contended that the charge is valid for the reasons that the same was executed on 14th April 2021 which was registered on the 18th August 2021 in compliance with Section 56(1) of the *Land Registration Act* and Section 79(5) of the *Land Act* and that the Plaintiff has not adduced any evidence to show and prove the invalidity of the charge.
 15. It was averred that in the absence of a specific legislation prohibiting the registration of securities against property, the Court should be cautious as to interfere with the rights and powers granted to the parties by statute and by themselves through contract. The Court was urged to dismiss the originating summons with costs.
 16. Parties also filed written submissions in respect to the originating summons. The Plaintiff filed written submissions dated 11th January 2022 while the Defendant filed written submissions dated 6th February 2024.
 17. The Plaintiff submitted on the following issues:
 - i. Whether the Defendant has the statutory power to engage in mortgage business in Kenya?
 - ii. Whether the charge registered on 18th August 2021 against the suit property is valid and enforceable through realization of the property?
 - iii. Whether the Court should grant the orders sought in the originating summons dated 24th July 2023?
 18. According to the Plaintiff, for a person to engage in mortgage business on Kenya, the decision of *George Lalla Oduor v Cannon Assurance (K) Ltd* Civil Appeal No 51 of 2017 at Nairobi provided that the aforementioned person is to be licensed under Section 4 of the *Banking Act* and that without a license



from the Central Bank of Kenya, a person lacks the statutory power to engage in mortgage business. The Plaintiff argued that the contention by the Defendant that it doesn't engage mortgage business as it does not take deposits from members of the public and therefore the provisions of the Banking Act and in essence the decision of George Lalla (*supra*) do not apply to it is a cock-eyed legal argument and purposefully intended to mislead this Honorable Court. The Court was urged to follow the decision of the Court of Appeal in finding that without a license issued by the Central Bank of Kenya under Section 4 of the Banking Act the charge remains invalid. It was also submitted that in view of the foregoing, then the charge registered on 18th August 2021 against the suit property is invalid.

19. On whether the court should grant the orders sought in the originating summons, the Plaintiff reiterated that the Defendant lacks statutory powers to engage in mortgage business in Kenya and as such the reliefs sought herein ought to be granted as prayed.
20. The Defendant filed written submissions dated 6th February 2024 and submitted on the following issues:
 - a. Whether the Defendant has the statutory power to engage in mortgage business?
 - b. Whether the charge registered on 18th August 2021 is valid and enforceable?
 - c. Whether the Court should grant the orders sought?
21. The Defendant submitted that the Banking Act is clear on restrictions and definitions of entities that are subject to regulation and that Section 2(c) clearly defines what a mortgage finance company is. A key element of what brings mortgage finance company into the orbit of Section 3 of the Banking Act is deposit taking, the same applies to other institutions and the Plaintiff herein has not provided any evidence to demonstrate that the Defendant has conducted the business of a mortgage finance company and thus contravened Section 3 of the Banking Act. It was argued that the decision of George Lalla Oduor (*supra*) is not applicable to this case as outlined at Paragraph 32-34 of the Defendant's Replying Affidavit.
22. In respect to the validity and enforceability of the charge, it was submitted that charges are governed by the Land Act and Land Registration Act as the principal laws. It was argued that a clear reading of Section 3 of the Land Act, 2012 and Section 56 of the Land Registration Act demonstrates that there is no provision that restricts registration of charge to institutions or persons licensed under Section 4 of the Banking Act. It was further submitted that Section 90 of the Land Act further provides for remedies of a charge in the event of a default, one of these being exercising the statutory power of sale and that clause 5 and Clause 7.22 of the explicitly provided for the same. It was also submitted that Courts should be cautious not to rewrite the contract of the parties.
23. On whether the Court should grant the reliefs sought, it was argued that this suit offends the provisions of Section 6 of the Civil Procedure Act in view of Milimani HCCOMM No. E204 of 2023.
24. It was also submitted that the Plaintiff has admitted its indebtedness to the lender and that this Court showed not order a discharge of the property. The Court was urged to dismiss the application.
25. The Court has now carefully considered the written and oral submissions made by the parties. The Court has also considered the pleadings filed herein and the issues that arise for determination are as follows:
 - i. Whether this suit is sub-judice in view of Hccomm E204 Of 2023 - Cresta Investement Ltd And Alpling Holdings Ltd v Adiungo Kenya Ltd And Adiungo CapitalBV.



- ii. If the answer to the above is in the negative, whether the Plaintiff has made a case for grant of the orders sought?
26. The first and salient issue that the Court needs to consider is whether the Plaintiff suit is subjudice. This is an issue that was raised by the Defendant. The Defendant averred that the suit is subjudice and ought to be dismissed for the reasons that the suit property is subject for determination and currently pending before Justice Mabeya in HCCOMM E204 of 2023 - Cresta Investement Ltd And Alpling Holdings Ltd v Adiungo Kenya Ltd And Adiungo CapitalBV. It was averred that the same also seeks similar prayers as the current suit. It was also averred that there are stay orders issued by the Commercial Court and that the Plaintiff's action of filing this suit is an abuse of the Court process.
27. The Defendant did not dispute the existence of the said suit save for urging this Court to stay this instant suit instead of dismissing it.
28. The Court has perused the said pleadings and notes that there is a nexus between this suit and the one pending before Justice Mabeya. This suit before the Commercial Court was filed earlier than the current suit. Whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on the instant suit and the other pending suit in respect to the suit property may affect the future dealings of the said property. This Court must therefore be aware of such a possibility and be alive to the fact that proceedings with this suit may lead to different Courts granting conflicting orders over the same subject property. The Plaintiff ought to await the outcome of the other pending matter before moving this Court. The Plaintiff's action clearly amount to an abuse of the Court process as the same amounts to forum shopping.
29. In view of the foregoing, this Court has no option but to strike out the entire suit. Each party shall bear own costs of the proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY 2024.

E. K. WABWOTO

JUDGE

In the Presence of:-

N/A for the Plaintiff.

Mr. Mutunga for the Defendant.

Court Assistant: Caroline Nafuna.

