



Progressive Credit Limited v Kiuro & another (Environmental and Land Originating Summons E006 of 2024) [2024] KEELC 6343 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2024
CK NZILI, J
SEPTEMBER 25, 2024**

BETWEEN

PROGRESSIVE CREDIT LIMITED PLAINTIFF

AND

RIZIKI KENDI KIURO 1ST DEFENDANT

JAPHET KINOTI M'RIMBERIA 2ND DEFENDANT

JUDGMENT

1. Through an originating summons dated 7.5.2024, the plaintiff asks this court to;
 - i. Declare that an informal charge was created over L.R Title No. Gakawa/Githima/Block 3/ Mikumbune/168 suit property being security for Kshs.146,015/= that was advanced to the defendant.
 - ii. Issue leave to the chargee to exercise its statutory power of sale over the suit property secured by the informal charge dated 27.10.2021 in order to recover the loan amount together with interest currently due and owing from the defendant as of November 2021, being the facility disbursement date.
 - iii. Declare that the plaintiff is entitled to vacant possession over the property to facilitate the exercise of its statutory power of sale.
 - iv. To order the defendants, their servants, employees, or any agents or occupants to deliver and or surrender vacant possession to it.
 - v. Order that defendants, their servants, employees and or agents, or any other occupants be forcefully evicted from the suit property should they fail to deliver and or surrender vacant possession within 14 days from the order of the court.



2. The originating summons was supported by grounds on the face of it and a supporting affidavit sworn by Christine Mikai Ayoti on 7.5.2024.
3. Though the 1st defendant was served, she did not file any response. The 2nd defendant opposed the originating summons through a replying affidavit sworn by Japhet Kinoti M'Rimberia on 18.7.2024. It was averred that the plaintiff is being dishonest with the court and has not disclosed that there have been two separate suits, namely Nyeri SCCC Omm/E318/2023 and Meru SCCC OMM/E318/2023 over the same subject matter, hence was litigating in installments keeping him in a state of apprehension that it will keep suing him over and over. He attached copies of the decree as J.K. 1 (a) & (b).
4. The 2nd defendant confirmed that the 1st defendant applied for and was granted a loan of Kshs.121,295/=, to which he offered his title deed for the suit land on the understanding that the plaintiff would perfect a charge over the same as security for the loan, which the plaintiff failed to do or disclose that it did not charge yet the title was at their disposal. He attached a copy of the loan application form and the title deed as J.K. "2" and "3".
5. The 2nd defendant averred that under the loan agreement, the plaintiff was also expected to register a chattels instrument against the 1st defendant's household and business chattels instrument since it had visited the 1st defendant's bar, boutique business and house before the disbursement of the loan. He annexed copies of customer data from the sketch map and Google map coordinates for the 1st defendant's home and business premises.
6. The 2nd defendant averred that he was not aware of a mobile loan of Kshs.24,720/= allegedly taken by the 1st defendant since he was never involved or informed about it.
7. Moreso, the 2nd defendant averred that the plaintiff has not explained its failure to perfect the securities, nor has he been served with any single demand letter or notification of default save for the proceedings before the court.
8. The 2nd defendant averred that the plaintiff has not explained why it allegedly sent two sets of auctioneers to repossess the 1st defendant's chattels without a registered chattels instrument or provided any report for the same or on any challenges that it has faced in recovering the business and household chattels of the 1st defendant.
9. Further, the 2nd defendant averred that he never agreed on an arrangement of an informal charge with the plaintiff, that a charge must be in the prescribed form, parties are bound by their contract and a court cannot rewrite a contract between the parties, especially where the plaintiff had the upper hand in the contract drafting, negotiation and enforcement.
10. Again, the 2nd defendant denied that he was a borrower to pay a loan he never took and was unfortunately tricked into signing the loan application form as a borrower while knowing very well the loan was being advanced to the 1st defendant.
11. Subsequently, the 2nd defendant averred that the plaintiff was dishonest and full of deceit since in ground 2 (a) of the application form, the loan was to be secured by an informal charge, whereas the letter of offer was clear as to the form of the securities to be perfected for the loan. The 2nd defendant averred that the plaintiff was merely interested in selling his land, yet it has not explained what steps it had taken to recover the chattels of the 1st defendant, yet they know her location.
12. At the hearing, Christine Mikal, a legal officer with the plaintiff, testified as PW 1. She relied on a supporting affidavit sworn on 7.5.2024 as her evidence in chief. She told the court that on 8.10.2021, the defendants sought a loan facility from the plaintiff of Kshs.200,000/= to expand their business



- vide a loan letter offer dated 27.10.2021 to which, after due diligence was conducted, a loan of KShs.121,295/= was approved and accepted by the defendants secured with the title for L.R No. Gakawa/Githima/Block 3/Mikumbune/168 owned by the 2nd defendant and household and business chattels owned by the 1st defendant, which was to be repaid in six consecutive monthly installments of KShs.27,500/= with effect from 30.11.2021. PW 1 produced copies of the letter officer, loan balance statement, and demand letters dated 1.12.2021 & 29.6.2023 as P. Exh. No's 1-4 respectively.
13. PW 1 stated that the 1st defendant also took a mobile money loan of KShs.24,720/=, payable in three equal installments from November 2021 to January 2022.
 14. Further, PW 1 stated that after making ordinary deductions, including loan offset, the monies for the loan were deposited in the 1st defendant's Equity Bank Account No. 0270199624161, only for the defendants to become uncooperative in repaying the loan amount, defaulted and have since reneged on their obligation to repay or clear the loan.
 15. Following the breach, PW 1 told the court that they desired to exercise their statutory power of sale over the property to recover the outstanding debt in line with Sections 79 (7) of the Land Act, hence the need for leave of court.
 16. In cross-examination, PW 1 told the court that the letter of offer was only covering the principal loan but had contemplated perfection of a legal charge by way of its registration against the title offered by the 2nd defendant. PW 1 said that the 2nd defendant declined to pay the charges to register the charge, yet both the borrower and the guarantors must meet the charge for the same.
 17. PW 1 further stated that although the letter of offer was to the 1st defendant, the loan was disbursed to a joint account owned by the defendants. Similarly, PW 1 alleged the two defendants signed the offer letter. Again, PW 1 said that though she could not confirm the residences of the defendants, auctioneers nevertheless were dispatched to trace the chattels all in vain.
 18. Similarly, PW 1 clarified that they unsuccessfully filed and lost two previous suits, hence the reason they were in court seeking leave to register the informal charge and realize the security; otherwise, they have been unable to repossess the chattels through the auctioneers. PW 1 said that she was not aware that under the law, an informal charge must be in a prescribed form.
 19. Regarding the loan statement, PW 1 said that there was an error in indicating KShs.46,000/= as a lawyer's fee instead of for the auctioneer's charges. She said the previous suits were dismissed on technicalities.
 20. Japhet Kinoti testified as DW 1 Relying on his replying affidavit sworn on 18.7.2024 as his evidence in chief, he told the court that the loan was extended to the 1st defendant and was never notified of any default for the loan repayment by the plaintiff save for the court suits. DW 1 produced copies of the court decrees in Nyeri E318 of 2023 and Meru E455 of 2024 as D. Exh No. 1 (a) & (b), copy of the loan application form as D. Exh No. (2) a copy of his title deed as D. Exh No. (3), customer data form, sketch map, and a Google map as D. Exh No. (4) (a), (b) & (c), instructions by Onyx Auctioneers and instructions to Joset Auctioneers as D. Exh No. 5 (a) & (b).
 21. Further, DW 1 stated that the plaintiff did not notify him of the consequence of loan repayment default and especially the necessity to charge the title deed, which he had offered to secure the loan extended to the 1st defendant. DW 1 said that the 1st defendant lived in Isiolo, while he was a resident of Mikumbune.
 22. At the close of defense testimony, parties were directed to file and exchange written submissions. The plaintiff relied on written submissions dated 3.9.2024 and isolated six issues for determination. The



- plaintiff submitted that there was no dispute that the loan was extended to the defendants who offered security for it; hence cannot question the validity of the offer letter and the security documents, which were valid contracts and binding on the parties. Reliance was placed on Kingorani Investments vs Kenya Commercial Bank Ltd & another (2007) eKLR and Al-Jalai Enterprises Ltd vs Gulf African Bank Ltd (2014) eKLR.
23. The plaintiff submitted that for almost three years, the loan has remained unpaid with no efforts ever to clear it; hence, the plaintiff was rightfully entitled to seek the court's leave to realize the security in line with Section 79 (6) & (7) of the [Land Act](#). Reliance was placed on Jamii Bora Bank Ltd vs Wapak Developers (2018) eKLR.
 24. The plaintiff submitted that the prerequisites for the creation of an informal charge, which they have demonstrated, include writing to disclose the clear intention to offer the title out or an interest in land to secure the payment of a debt, whether existing, contingent or future which instrument is then accepted by the chargee as a written commitment and the deposit of any documents agreed to evidence the ownership of the land by the chargor as set out in Section 79 (6), (7), (8) & (9) of the [Land Act](#).
 25. The plaintiff submitted that the letter of offer dated 27.10.2021 and the title deed surrendered by the 2nd defendant was a clear intention to satisfy the requirements of Sections 79 (6), (7), (8) & (9) of the [Land Act](#) and therefore, the court should grant the reliefs sought. Reliance was placed on National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd (2001) eKLR, Seikei t/a Masco Enterprises vs Delphis Bank (2004) eKLR and Jim Kennedy Kiriro Njeru vs Equity Bank (K) Lt (2019) eKLR, on the proposition that on the creation of an informal charge the needs to respect the intentions of the contracting parties and that the interest of the bank on its security need ought to be protected and not obstructed by the court.
 26. Therefore, the plaintiff submitted that the court, in view of the circumstances of this case ought to enforce the letter offer for the offering of the suit property as security equated to a commodity capable of being disposed of by the chargee. Reliance was placed on Andrew M. Wanjohi vs Equity Building Society & others (2006) eKLR. The plaintiff urged the court to grant it the costs of the suit guided by Republic vs Rosemary Wairimu Munene exparte Ihururu Dairy Farmers Coop Society Ltd.
 27. The 2nd defendant relied on written submissions dated 15.8.2024, isolating two issues for determination. The 2nd defendant submitted that this suit is res judicata given the decrees tendered as evidence in the previous suits seeking for recovery of Kshs.461,901.65/=. Reliance was placed on Gladys Nduku Njuki vs Letshego (K) Ltd (2022) eKLR, Apondi vs Canvald Metal Packaging (2005) 1 E.A 12, Gurbacha, Singh Kalsi vs Yowani Ekori C.A No. 62 of 1958, Mburu Kinyua vs Gachini Tuti (1978) KLR 69, Churanji Lal & Co. vs Bhajjee (1932) 14 KLR 28 and Siri Ram Kaura vs MJE Morgan (1961) E.A 462.
 28. The 2nd defendant submitted that the court should not rewrite contracts on a clear letter of offer dated 27.10.2021, in which the plaintiff has been unable to explain any hardship on why the security documents were not perfected on time or at all especially, where the defendants did not frustrate the process at all to register the chattels instrument and the charge in line with Sections 43 & 56 (3) of the [Land Registration Act](#) and Section 79 (5) of the [Land Act](#).
 29. Moreso, the 2nd defendant submitted that the plaintiff cannot hide under Section 79 (7) of the [Land Act](#), especially when it has not complied with Regulations 67 (2) & 71 of the Land Registration (General) Regulations 2017 and Section 56 & 79 (6) of the [Land Act](#) as per form L.R.A. 54 set out in the Sixth Schedule.



30. Similarly, the 2nd defendant submitted that an informal charge is not created by implication or in limbo, but must be express such that both parties to the charge are aware that the instrument being executed is an informal charge.
31. The 2nd defendant also submitted that the reliefs sought should be declined, since the plaintiff has failed to prove the existence of an informal charge and cannot be entitled to exercise non-existent rights in the name of the statutory power of sale or to gain vacant possession or eviction from the suit land. In contrast, it had registered a chattel's instrument against the 1st defendant, which it ought to pursue instead.
32. The 2nd defendant submitted that the plaintiff has also failed to plead with specificity the loan amount. It was submitted that the pleadings and documents tendered before the court have varying figures, the same are ambiguous, misleading, unsubstantiated, almost tantamount to an abuse of the court process and a travesty of justice.
33. On service of pleadings upon the defendants, the 2nd defendant submitted that the affidavit of service before the court was misleading as to how service of summons was effected. It was further submitted that there were doubts as to whether the 1st defendant was served with any court processes; otherwise, the 2nd defendant was lucky to have learned about the matter through the assistance of his lawyer on record through the case tracking system.
34. The issues calling for my determination are:
- i. If the suit is res judicata
 - ii. If the plaintiff and the defendants entered into a binding contract out of which the 2nd defendant offered his title deed as security for the loan.
 - iii. If the parties intended to create an informal charge against the title to the 2nd defendant's parcel of land.
 - iv. If the plaintiff is entitled to the reliefs sought.
 - v. What is the order as to costs?
35. It is trite law that parties are bound by their pleading, and out of the pleadings, issues for the court's determination arise. The application before the court is brought under Order 37 Rule 4 Civil Procedure Rules and Section 79 (9) of the Land Act 2012.
36. The 2nd defendant attacks the suit on account of res judicata based on D. Exh No. (1) (a) & (b). In D. Exh No. (1) (a), the suit was withdrawn with costs while in D. Exh No. 1 (b), the suit was dismissed with costs. The claim in both suits was for Kshs.461,901.65/= . The pleadings, the ruling, or the judgment in the two previous suits have not been tendered as exhibits in this suit. For the doctrine of res judicata to be appropriately invoked and upheld, the following elements must all be satisfied:
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. The parties were litigants under the same title.
 - d. The issue was heard and finally determined in the former suit.



- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. See *IEBC and others vs. Maina Kiai & others* (2017) eKLR.
37. The 2nd defendant has pleaded that *res judicata* applies to the instant suit in view of the alluded decrees in the previous suits. Other than D. Exh No. 1 (a) & (b), no pleadings or proceedings have been produced for the court to make a finding that the issues before this court were canvassed on merits as substantial issues over the same title and determined to finality by a court of competent jurisdiction and that the plaintiff was now-reopening the same issues for re-litigation so as to get a different result. A cursory glance at D. Exh No. (1) (a) & (b) shows that the suit in D. Exh No. 1 (b) was withdrawn while in D. Exh No. 1 (b) was dismissed.
38. The claims was for Kshs.461,901.65/=, while what is before the court are entirely different issues. I find the plea of *res judicata* inapplicable or unsustainable in the circumstances.
39. The next issue is whether the parties signed a binding contract. It is trite law that courts of law do not rewrite contracts between parties since parties have the freedom to contract. In *Margaret Njeri Muiruri vs Bank of Baroda (K) Ltd*, the court cited *N.B.K. vs Pipeplastic Samkolit (K) Ltd* (*supra*) it was held that a court of law cannot rewrite a contract with regard to interest as the terms of the contract bind the parties. However, the court went further to say courts will not shy to interfere with or to refuse to enforce contracts that are unconscionable, unfair, or oppressive due to procedural abuse during the formation of the meaningful choice for the other party, openly where the contract is unduly harsh, commercially unreasonable and grossly unfair, given the existing circumstances of the case.
40. In *Fidelity & Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the court observed that it would adopt the objective theory of contract interpretation to give effect to the expressed intentions of the parties when construing a contract by looking at the four corners of an instrument to derive meaning without reference to anything outside of the documents such as the circumstances surrounding its writing or the history of the parties signing it.
41. In *Housing Finance Co. of Kenya Ltd vs Gilbert Kibe Njuguna* NRB C.A No. 1601 of 1999, it was observed that courts are not there for the parties to indulge in varying terms of their agreements since contracts belong to the parties who are at liberty to negotiate and even vary the terms as and when they choose and must do it together with the meeting of the minds. The court said that if it appears to the court that one party varied the terms of the contract without the knowledge, consent, or otherwise of the other party, and that other party demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contracts.
42. In this suit, both parties are in agreement about the existence of the letter of offer dated 27.10.2021 loan application form dated 8.10.2021, the surrender of a title deed belonging to the 2nd defendant for L.R No. Gakawa/Githima/Block 3/Mikumbune/168, customer data form dated 8.10.2021 and residence sketch map dated 8.10.2021.
43. In Clause (1) the definition describes the borrower as the defendant while the lender is the plaintiff. The signatures of the defendants appear at the bottom of all the six pages of the offer letter. Clause (6) states that the loan shall be secured by a legal charge in favor of the lender over the 2nd defendant's title deed and household and business chattels.
44. The purpose of the loan was to be utilized by the defendants to add more assorted wines and spirits drinks. The borrowers, as per Clauses (6) & 10, were to cater for all costs to perfect the securities. In the event of default clause No.14, stated the lender was entitled to repossess and dispose of the securities



as indicated in the letter of offer through a method it would prefer Clause (16) related to service of default notices.

45. On page 6 of the letter of offer, the defendants signed the offer letter twice and confirmed that they had read, understood and accepted the terms and conditions therein. There is no dispute from the defendants that there were security documents which the defendants executed, which formed part of their agreement with the plaintiff leading to a release of a loan and the surrender of the 2nd defendant's title deed to the plaintiff as security.
46. The only complaint by the 2nd defendant regarding the letter of offer is that he is indicated as the borrower instead of a guarantor. He accuses the plaintiff of delaying the perfection of the charge yet he surrendered his original title deed and there was no challenge to the process. Further, the 2nd defendant says that he was tricked into signing the offer letter as a borrower while the plaintiff knew that the loan was being advanced to the 1st defendant, whose business chattels and household goods should have been the ones to be followed up to realize the loan.
47. The 2nd defendant, in his replying affidavit, averred that the court should not rewrite the contract, especially where the plaintiff had the upper hand in contract drafting, negotiation and enforcement. Additionally, the 2nd defendant, on oath stated that the letter of offer was clear and couched in no contradictory terms.
48. In *Peter Kimaiyo Langat vs Co-op Bank Ltd (2017) eKLR*, the court said that parties are bound by the terms and conditions of their contract unless coercion, fraud, or undue influence is pleaded and proved.
49. The 2nd defendant, in his pleadings on the one hand, urged the court to find that parties are bound by their contract, but at the same time invited the court to assist him in walking away from the contract, by saying that he was a mere guarantor and not a borrower.
50. Other than pleading being tricked to sign the letter of offer as a borrower and not a guarantor, the particulars of the trick coercion and undue influence were not pleaded and evidence tendered at the hearing. No questions were put to PW 1 by the 2nd defendant touching on the elements of trick, coercion, undue influence, fraud, unfair bargain and the failure by the lender to explain to the 2nd defendant the consequences of offering his title deed as security to be charged for the loan.
51. During the hearing and especially the defense testimony the 2nd defendant appeared knowledgeable. He made no remotest suggestion of coercion, fraud, undue influence and unconscionable bargain for this court, as one of equity to be prepared to relieve him from what he bargained for.
52. Above all, the letter of offer was duly signed by the 2nd defendant on every page with a description as a borrower and not a guarantor. While signing almost fourteen times on the said document, it would have raised eyebrows on the part of the 2nd defendant before completing signing the last page to demand that the document be changed to reflect him as a guarantor or surety for the loan.
53. The purpose of the loan is indicated as for the improvement of the business of the borrower. There is no indication anywhere in the letter of offer that the household and business chattels belonged to the 1st defendant and not to both of them, Clause 3 (11) of the letter of offer indicates that the loan repayment was to be made by the two defendants using their two names. The 2nd defendant equally provided his details and signed the customer data form. Therefore, my finding is that the defendants duly jointly executed the security documents and hence, are binding on both of them.



54. The next issue is whether there was an intention to create a legal charge. Having found that the defendants lawfully and jointly executed the security documents which are binding on them, clause 6 of the letter of offer expressly provided for securing the loan with a legal charge against the 2nd defendant title L.R No. Gakewa/Gathima/Block 3/Mikumbune/168. In order to comply with that provision, the 2nd defendant unconditionally, without force, undue influence, fraud, or coercion, surrendered his original title to the plaintiff. Similarly, the 2nd defendant consented to clause (14) (Vii) not to tamper with the security, its repossession, and disposal to realize the outstanding debt.
55. The plaintiff has come to this court seeking a declaration that an informal charge was created over the 2nd defendant's property for the disbursed loan of Kshs.146, 015/= for leave to exercise a statutory power of sale, vacant possession or forceful eviction due to the default in repayment of the loan. The 2nd defendant opposes the same on the basis that there is no justification why the charge was not perfected as agreed and that another avenue to follow up the chattel's instrument against the 1st defendant is available and was not put into motion. Further, the 2nd defendant faults the figure given for the outstanding loan. See *Kingdom Bank Ltd vs Okotsi* (Civil suit no. E004 of 2021 (2022) KEHC 12771 9KLR) (30th August 2022) (Judgment).
56. The plaintiff has submitted that this court is under a duty to enforce the contract for the 2nd defendant offered the title deed and his property as a commodity for sale, in case of default to repay the loan; otherwise, the intentions of the parties were clear. The plaintiff relied on *Kingorani Investment vs K.C.B. Ltd* (supra), *Jamii Bora Bank Ltd vs. Wapak Development* (supra), *N.B.K. vs Pipeplastic Samkolit* (supra), *Ibrahim Seikei t/a Masco Enterprises vs Developments Bank* (supra) and *Jim Kennedy Kiriro Njeru vs Equity Bank Ltd* (supra).
57. Section 79 of the *Land Act* provides the prerequisites for the creation of an informal charge. Among them is a writing to disclose the clear intent to offer title out of and the deposit of any document agreed to evidence the ownership of the land by the chargor. Upon perusal of the security documents and especially the letter of offer, I do not doubt that the same fits the requirements of Section 79 (6) – (9) of the *Land Act*. There is equally evidence of indebtedness going by P. Exh No. (2) a joint bank account statement by the defendants and demand letters produced as P. Exh No. 3 & (4).
58. I, therefore, declare that an informal charge has been created, with the attendant duties and obligations of a charge to protect and secure the equity of redemption and trusteeship. The plaintiff is allowed to sell its security in the informal charge subject to compliance with the law on the realization of securities. During the exercise of the realization of the security, the plaintiff is granted unlimited access to the suit property. Prayers 3, 4 & 5 are disallowed.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 25th DAY OF SEPTEMBER, 2024

In presence of

C.A Kananu

Miss Musavakwa for Kimathi for the plaintiff

Maheli for 2nd defendant

HON. C K NZILI

JUDGE

