



Commercial International Bank (CIB) Kenya Ltd v Azofco General Merchants Limited (Civil Suit E217 of 2024) [2025] KEHC 640 (KLR) (Commercial and Tax) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E217 OF 2024
H NAMISI, J
JANUARY 31, 2025**

**BETWEEN
COMMERCIAL INTERNATIONAL BANK (CIB) KENYA LTD PLAINTIFF
AND
AZOFCO GENERAL MERCHANTS LIMITED DEFENDANT**

JUDGMENT

1. The Plaintiff filed Amended Originating Summons seeking the following orders:
 - i. An order of inhibition is issued restraining the Defendant from leasing, charging to any third party, transferring or in any matter whatsoever interfering with the ownership of Land Reference Number 25401 I.R Number 89571 situated in Nairobi pending the hearing and determination of the suit herein.
 - ii. A declaration is issued that an informal charge was created by Azofco General Merchants Limited by depositing with Commercial International Bank Limited (Formerly Mayfair CIB Bank Limited) the Certificate of Title to Land Reference Number 25401 I.R Number 17263 89571 upon executing the Letter of Offer dated 18th May 2021 in respect of the credit facilities advanced to Azofco General Merchants Limited.
 - iii. Leave be granted to Commercial International Bank Limited as the chargee to exercise its statutory power of sale over Land Reference Number 25401 I.R Number 17263 89571 by issuing statutory notices to the Defendant pursuant to Section 90 of the *Land Act*, 2012 to recover the sums of Kshs. 167, 209,965.51 which remain outstanding as at 12th March 2024 and continues accruing interest.



- iv. That the Honourable Court be pleased to issue any other or further relief it may deem fit to grant.
 - v. That the costs of this application be provided for.
2. In the Supporting Affidavit sworn by Maurine Kairo, Legal Manager of the Plaintiff company, the Plaintiff averred that on 18 May 2021, the Plaintiff advanced a loan of USD 1,400,000 to the Defendant for purpose of purchase of various goods from Wilben Trade Limited. The loan was secured by creating a charge over parcel number LR 9363/85/3 I.R. No. 164396.
 3. The Plaintiff averred that the Defendant defaulted on the monthly repayments and his account fell into arrears. As at 9 April 2024, the sum due and owing was KES 167,209,956.51. The Defendant made no attempts to regularise the account despite numerous indulgences.
 4. The Plaintiff stated that it had been unable to exercise its statutory power of sale over parcel number LR Number 9363/85/3 (I.R Number 164396) due to challenges on the legitimacy of the title held by the Defendant. The Defendant had previously furnished the Plaintiff with the Certificate of Title to Land Reference Number 25401 I.R. Number 89571 to be held as security by the Plaintiff for the loan advanced to the Defendant. For this reason, the Plaintiff seeks a declaration that an informal charge was created by the Defendant by depositing the title to LR Number 25401 I.R 89571 with the Plaintiff and leave for the Plaintiff to exercise its statutory power of sale in disposing of the said property in order to recover the loan amount.
 5. To the Supporting Affidavit, the Plaintiff attached copies of the letter of offer dated 18 May 2022, copy of Charge document dated 26 May 2021, copy of statement of account dated 9 April 2024 and copy of title document for parcel number LR 25401 I.R 89571
 6. In response thereto, the Defendant filed Grounds of Opposition as follows:
 - i. The entire application is bad in law as it seeks orders outside the scope of the terms of the contract being the letter of offer dated 18th May,2021 without proper justification of the law.
 - ii. The Defendant engaged the Plaintiff for a loan facility having charged Property L.R No. 9363/85/3 (I.R. 1649396) as security. The Defendant has been servicing the loan as per the Letter of Offer dated 18th May,2021.
 - iii. In any event, the Plaintiff right under the statutory power of sale shall only crystalize when there is default or breach and only accrue to the charged property herein L.R No. 9363/85/3 (I.R 1649396).
 - iv. By seeking leave to exercise the statutory power of sale over property number 25401 I.R Number 89571, the Plaintiff seeks to unilaterally and improperly extend its mandate under the letter of Offer, that forms the backdrop of the agreement.
 - v. Subsequently, it is trite law, that the Plaintiff cannot unilaterally alter the terms of the contract, the effect of that is the equitable rights as accrued shall be clogged as set in Sharok Kher Mohamed V Southern Credit Bank Limited (2008) eKLR and Spares & Services & 2 Others Vs. Trans-National Bank Kisumu (HCCC No. 439 Of 1994).
 - vi. By attempting to seek for an order for the creation of an informal charge over a property that falls outside the ambit of the letter of offer and charge instrument, the Plaintiff therefore seeks this Honourable court to rewrite the terms of contract between the parties and thereafter benefit from the same illegal act.



- vii. Further, the orders sought shall not only be in contravention of the Banking laws, but also Article 40 of *the Constitution* of Kenya, 2010 and shall open a Pandora box for unilateral creation of charge over the property and thereafter, allowing the Plaintiff to exercise a power of sale.
7. Parties were directed to canvass the Summons by way of written submissions. By the time of preparing this judgement, only the Plaintiff had filed submissions. In its submissions, the Plaintiff identified the following issues for determination:
- a. Whether a loan secured via a parcel of Land Reference number 25401 (I.R. number 89571) created an informal charge?
 - b. Whether the Plaintiff should exercise the statutory power of sale over title Land Reference number 25401 (I.R. number 89571)?
 - c. Who should pay costs of the suit?
8. On the first issue, the Plaintiff relied on the provisions of section 79 of the *Land Act*, No 6 of 2012. They submitted that at the time of obtaining the loan, the Defendant deposited the title for LR No. 25401 (I.R. 89571) with the intention of creating an informal charge. They further relied on the cases of Kingdom Bank Limited v Okotsi (Civil Suit E004 of 2021) [2022] KEHC 12771 (KLR) (30 August 2022) (Judgment), Jamii Bora Bank Limited v Wapak Developers [2018] eKLR, and HFC Limited v Ombwera (Environment & Land Case 2 of 2022) [2023] KEELC 18746 (KLR).
9. On the second issue, it was the Plaintiff's submission that the Defendant's failure to pay the loan amount as per the loan agreement has resulted in the default. Despite several reminders and demand letters, the Defendant failed to redeem themselves, thus the exercise of the statutory power of sale over the property would enable the Plaintiff secure their interests.
10. On the third issue, the Plaintiff relied on the provisions of section 27 of the *Civil Procedure Act*, Cap 21.

Analysis and Determination

11. I have thoroughly considered the Originating Summons, the Grounds of Opposition and the submissions by the Plaintiff, as well as the law relating to informal charges. I have discerned that there are only two issues for determination; (i) whether there was an intention to create an informal charge; and (ii) if circumstances have arisen to entitle the bank to realise the security hence the need to grant leave.
12. Section 79 of the *Land Act* provides for Informal charges as follows:
- (1) An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.
 - (2) The power conferred by subsection (1) shall include the power to create second and subsequent charges.
 - (3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.



- (4) The power conferred by this section shall be exercisable subject to—
- (a) any prohibition or limitation imposed by this Act or any written law; and
 - (b) any restriction contained in an instrument creating or affecting the interest in land that is to be the subject of a charge.
- (5) A formal charge shall take effect only when it is registered in a land register and a chargee shall not be entitled to exercise any of the remedies under that charge unless it is so registered.
- (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 plus interest as agreed by the chargor and 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.”
- (9) A chargor shall not possess or sell land whose title documents have been deposited by a chargee under an informal charge without an order of the court;
13. Section 79 of the [Land Act](#) creates prerequisites for the creation of both formal and informal charges. For informal charges what is required is writing to disclose clear intent to offer the title out laid 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 document agreed to evidence the ownership of the land by the chargor.
14. In this instance, the document presented by the Plaintiff to demonstrate the intention between the parties is the Letter of Offer dated 18 May 2021, from which I discern the following facts. On 11 February 2021, the Defendant requested the Plaintiff to establish a revolving letter of credit facility for the sum of USD 1,400,000/= and Time Loan/LC financing/Post import financing facility for the sum of USD 980,000/=.
15. With regard to security, the letter of offer provides as follows:
- The facilities will be secured by the following securities (and such other security as the Bank may from time to time require to secure the Borrower's obligations herein:
- i. First Legal (Continuous) Charge over the property known as property I.R No 9363/85/3 Ruai Area, Nairobi County registered in the name of Azofco General Merchants Ltd to be stamped and registered in our favor for the USD 1,400,000 together with all present and future developments thereon;



- ii. Lien over Fixed Deposit for USD 420,000,000 in the name of Azofco General Merchants Ltd to be held in favor of Mayfair CIB Bank Limited as security for the facility and such deposit is to be discharged by appropriate execution;
The above deposit shall be renewed on every Maturity until the facility is paid in full.
- iii. Signed Lien Forms over the fixed deposit referred to in clause 6 (ii) above together with confirmation that the funds are not held in trust of any fiduciary capacity and that the Bank has complete right of disposal for the said transaction;
- iv. Joint and/or several personal guarantees of the directors of the company, namely Mulid Ahmed Mahamed and Mohamud Yusuf Abdi in support of the borrowing of USD 1,400,000/=;
- v. Credit Life Protection cover with an insurance company acceptable to the Bank in the name of Mulid Ahmed Mahamed with the Bank's interest noted thereon as first loss payee for USD 1,400,000/=

16. The Memorandum of Acceptance is duly executed by the Defendant and the same is not disputed.

17. From the foregoing provisions, it is clear that there was intention by the parties to create a secured loan facility. The Defendant had the obligation to furnish the Plaintiff with the title document for parcel number I.R 9363/85/3 Ruai Area. At paragraph 4 of the Supporting Affidavit, the Plaintiff confirms that the loan was secured by creating a charge of the above-mentioned property. A copy of the registered Charge is annexed thereto.

18. From the Supporting Affidavit, it is discernible that upon default by the Defendant, the Plaintiff attempted to exercise their statutory power of sale over the charged property but were met with challenges on the legitimacy of the Defendant's title to the property. Save for that statement, it is not clear the nature of challenges faced. It is for this reason that the Plaintiff has moved this Court seeking to exercise statutory power of sale over a property (LR No. 25401 I.R 89571), whose title was previously furnished by the Defendant as a security for a loan. Once again, from the Affidavit it is not clear if the second property was security for the current or previous loan, whether the same was formally charged or whether the loan was repaid fully. The paragraph that introduces the second title simply states thus:

That the Defendant had previously furnished the Plaintiff with the Certificate of Title to Land Reference Number 25401 I.R. Number 89571 to be held as security by the Plaintiff for the loan advanced to the Defendant. A true copy of the tile is annexed herewith and marked as MK-4.

19. According to Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), Mativo, J opined thus on the issue of burden of proof:

“Burden of Proof” is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or “standard” in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the



legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.

20. In summary, the Plaintiff herein has the obligation to adduce sufficient evidence of a fact, in order to justify a finding of a particular matter. The Plaintiff has provided evidence of a written agreement for the creation of a secured loan facility. The evidence also points to the fact that the Defendant furnished the Plaintiff with the title document for the agreed parcel of land (property I.R No 9363/85/3 Ruai Area), over which a formal charge was subsequently registered. The Plaintiff has provided evidence that the Defendant has defaulted in repayment of the sums loaned.
21. Nonetheless, the Plaintiff has merely mentioned that it has been unable to realise the statutory power of sale over the charged property. It is not clear what challenges it has faced. Now the Plaintiff wishes to realise another security offered by the Defendant. It is not discernible from the evidence presented how the Plaintiff came to be in possession of the title for the second property. It is not clear whether the second property was offered as security for the same loan or a different loan. Has the Plaintiff attempted to realise any of the other securities provided in the Letter of Offer? On this issue, I find that the Plaintiff has not proved its case to the required standard. Instead, the Plaintiff has left many gaping holes, expecting the Court to play guessing games in order to fill in the blanks.
22. In its Grounds of Opposition, the Defendant argued that the Plaintiff's right under the statutory power of sale shall only crystalize when there is default or breach and only accrue to the charged property herein L.R No. 9363/85/3 (I.R 1649396). By attempting to seek for an order for the creation of an informal charge over a property that falls outside the ambit of the letter of offer and charge instrument, the Plaintiff therefore, seeks this Honourable court to rewrite the terms of contract between the parties. I couldn't agree more.
23. In the premise, the suit against the Defendant is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE

Delivered on virtual platform in the presence of:

Ms. Mutimba h/b Mr. Kayika..... for the Plaintiff

Lutukai h/b Mr. Madowo..... for the Defendant

Libertine Achieng.....Court Assistant

