



**Ombonya v Housing Finance Ltd & 3 others (Civil Case 484 of 2004)  
[2024] KEHC 869 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 869 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 484 OF 2004  
A MABEYA, J  
JANUARY 30, 2024**

**BETWEEN**

**JUDITH ONYANGO ORIEDO OMBONYA ..... PLAINTIFF**

**AND**

**HOUSING FINANCE LTD ..... 1<sup>ST</sup> DEFENDANT**

**STANDARD CHARTERED BANK LTD ..... 2<sup>ND</sup> DEFENDANT**

**GIBSON OMBOYA SHIKARU ..... 3<sup>RD</sup> DEFENDANT**

**CHAPEX LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff's suit was tried via the Further Amended Plaintiff dated 22/10/2019. In it, she sought judgment against the defendants for a declaration that the release of the title to the property known as LR. No 13768/69 ("the suit property") was null and void, that the 2<sup>nd</sup> defendant had no authority receive the title and cause the same to be charged in its favour. That the suit property be discharged in favour of the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendant pursue their remedy from the 3<sup>rd</sup> and 4<sup>th</sup> defendant. She also sought general damages and the costs of the suit.
2. The plaintiff pleaded that at all material times, she was the owner of the suit property. She had acquired the same through a mortgage facility financed by the 1<sup>st</sup> defendant. In 1993, she charged the same in favour of the 1<sup>st</sup> defendant for a sum of Kshs. 826,880/-. As at 6/7/2004, she received confirmation from the 1<sup>st</sup> defendant that the loan had been fully repaid.
3. However, the 1<sup>st</sup> defendant refused to release the title to the property and on 16/8/2004, she received a letter from the 2<sup>nd</sup> defendant by which she learnt that the 1<sup>st</sup> defendant had entered into an arrangement with the 2<sup>nd</sup> defendant and the property was charged in favour of the 4<sup>th</sup> defendant. That these



- arrangements had been entered without her knowledge and consent. That the 3<sup>rd</sup> defendant being her husband had admitted that he introduced her title as security to the 2<sup>nd</sup> defendant bank. She termed the entire transaction as fraudulent.
4. The 1<sup>st</sup> defendant filed its defence on 30/11/2018. It contended that the plaintiff had initiated redemption in September, 2003 through financing by the 2<sup>nd</sup> defendant. That it therefore released the title documents to the 2<sup>nd</sup> defendant upon request through the plaintiffs advocates in an effort to redeem the mortgage.
  5. It denied entering into any arrangement with the 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> defendant without the consent of the plaintiff. It contended that it acted upon instructions received from the plaintiffs advocates and the plaintiff had not fully repaid the loan as Kshs. 455,550/- remained due and owing. It denied removing any caveat to the property.
  6. The 2<sup>nd</sup> defendant filed its dated 26/2/2019. It contended that the 3<sup>rd</sup> defendant, who is the plaintiff's husband, approached it for financial accommodation and offered the suit property as security. That, consequently, it paid off the plaintiff's mortgage to the 1<sup>st</sup> defendant in the sum of Kshs 449,809.90 and Kshs 28,235. That the 3<sup>rd</sup> defendant held a specific power of attorney which donated powers for negotiation as well as execution of documentation. That the perfection of the suit property was legal.
  7. At the hearing, the plaintiff adopted her witness statement as evidence in chief and produced her bundle of documents dated 27/2/2012 and 17/1/2018 as Pexh1 and 2, respectively. She testified that the 2<sup>nd</sup> defendant did not have her consent to charge her property. That the charge document did not show that the same was executed pursuant to the power of attorney. Her position was that the power of attorney was granted to her husband because she was travelling abroad and the same was to aid in the discharge of the charge.
  8. She confirmed that the money from the 2<sup>nd</sup> defendant was used to offset her loan but the same was without her consent. With respect to legal representation, she contended that the firm of Miller and Okundi did not act on her behalf or under her instructions.
  9. DW1, Jeremiah Okumu relied on her witness statement dated 11/4/2017 and produced the bundle of documents dated 5/11/16 as D1exh1. Her evidence mirrored the 1<sup>st</sup> defendant's defence as narrated above. In cross examination, she confirmed that the 1<sup>st</sup> defendant dealt with the 2<sup>nd</sup> defendant and Kshs. 444,989/90 was received from the 2<sup>nd</sup> defendant to clear the plaintiff's indebtedness.
  10. DW2, Boniface Machuki testified for the 2<sup>nd</sup> defendant. He Adopted his witness statement dated 19/7/2017 as his evidence in chief and produced the 2<sup>nd</sup> defendant's bundle of documents dated 19/7/2017 as D2exh1. He testified that in August, 2003, the plaintiff's husband approached the 2<sup>nd</sup> defendant for banking facilities on behalf of Chapex Ltd and offered the suit property as security. On 24/11/2003, the said husband executed a charge over the suit property, under a power of attorney, securing a sum of Kshs.1,765,000/- and a sum of Kshs.449,809/90 and Kshs.28,235/- was paid over to the 1<sup>st</sup> defendant in redemption of the plaintiff's account with the 1<sup>st</sup> defendant.
  11. The parties filed their respective submissions. The plaintiff submitted that the charging of her property without her knowledge was fraudulent and illegal. That there was no evidence to show that the plaintiff had participated in the transactions or was even consulted. Counsel submitted that the plaintiff was not a director or shareholder of the 4<sup>th</sup> defendant and therefore, gave no authority in the dealings of her property. That the letter of offer had been received and accepted by Ms. Belinda who was neither a director nor shareholder of the 4<sup>th</sup> defendant.



12. It was further submitted that the 2<sup>nd</sup> defendant witness had confirmed in cross-examination that the power of attorney was not in existence at the time of issuing the letter of offer. That the process was flawed and the 2<sup>nd</sup> defendant could not get legitimacy from the same. Further, that the charge document did not show any endorsement on the power of attorney.
13. The 1<sup>st</sup> defendant submissions were dated 25/10/2021. It was submitted on its behalf that the plaintiff donated a power of attorney to the 3<sup>rd</sup> defendant to deal transact, negotiate any document with respect to the suit property. That the power of attorney was registered on 23/11/2003 and based on it, the property was charged to the 2<sup>nd</sup> defendant. That the decision to release the title to the 2<sup>nd</sup> defendant was based on the power of attorney and the instructions received from the plaintiff's advocates. Counsel submitted that the loan was in arrears and the plaintiff looked for alternative means of servicing the same.
14. On behalf of the 2<sup>nd</sup> defendant, it was submitted that, the 2<sup>nd</sup> defendant received a specific power of attorney from the 4<sup>th</sup> defendant and based on it, the charge dated 24/1//2003 was executed. That the power of attorney was signed by the plaintiff on 5/11/2003 and registered on 23/11/2023. That the charge was valid as it was executed on the strength of the power of attorney.
15. I have considered the pleadings, the evidence and the written submissions. The core issue that runs through the pleadings is whether the defendants had the authority to transact with respect to the suit property. The relationship between the plaintiff and the 1<sup>st</sup> defendant is that of banker-customer. The plaintiff had obtained a mortgage facility from the 1<sup>st</sup> defendant and a charge was registered against the suit property.
16. The dispute ensued when the plaintiff realized that the 1<sup>st</sup> defendant had discharged the property and the same used to secure another facility obtained by the 4<sup>th</sup> defendant. That the 3<sup>rd</sup> defendant being the plaintiff's husband participated in the transactions without her consent.
17. On its part, the 1<sup>st</sup> defendant stated that it relied on the correspondence from the plaintiff's advocates and the power of attorney donated by her to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant also averred that the charge was registered on the strength of the power of attorney which had been registered before the charge.
18. With respect to the 1<sup>st</sup> defendant, it is trite that the relationship between a bank and its customer is contractual and the bank is under an obligation to diligently handle the accounts of the customer. In *Karak Brothers Company Ltd -vs- Burden* [1972] AII ER 1210, it was held: -

“... a bank has a duty under its contract with its customer to exercise ‘reasonable care and skill’ in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely.”
19. In this case, the 3<sup>rd</sup> defendant had approached the 2<sup>nd</sup> defendant for the discharge of the mortgage and advancement of facilities based on a letter dated 21/11/2000. The 1<sup>st</sup> defendant also received a letter dated 29/9/2003 from Ms. Miller & Okundi Advocates purportedly representing the plaintiff. The contents of the letter were such that the plaintiff's debt would be taken over by the 2<sup>nd</sup> defendant. Further the same law firm sent an executed discharge of charge to the 1<sup>st</sup> defendant.
20. PW1 testified that she did not engage the law firm of Ms. Miller & Okundi Advocates to represent her. That the mortgage instrument had a different law firm representing her. Further, there was no



endorsement from the plaintiff to the 1<sup>st</sup> defendant informing it that the said law firm would represent her in any engagement.

21. With respect to the power of attorney, the plaintiff admitted donating the same to the 3<sup>rd</sup> defendant to transact on her behalf. It declared thus: -

“to enter upon any arrangements, agreements, negotiations with any bank, persons including myself, corporations, authority or any competent body for the sale, pledge, transfer either to out attorney, any person, persons, corporations or authority and endorse, sign, complete any such documentation on my behalf in respect of my said property as if I was personally present.”
22. What then is the legal implication of the said power of attorney. It is trite that the power of attorney conferred power upon registration and not before. The record shows that the power of attorney was registered on 23/11/2003. The charge was created on 24/11/2023. However, the letter of offer was executed on 12/8/2003 by the 3<sup>rd</sup> defendant in favor of the 4<sup>th</sup> defendant. The offer letter was clear that the suit property was to secure the facilities.
23. The question that has to be answered is, what was the intention of the power of attorney? Why was it donated and its effect? What were 3<sup>rd</sup> parties not privy to the discussions and or arrangement between the plaintiff and her husband expected to do when confronted with that power of attorney?
24. It was the plaintiff's contention that her intention in donating the power of attorney was not to authorize her husband, the 3<sup>rd</sup> defendant to take a loan on it. This was however, not expressly stated in that document. If that was the intention, nothing would have been difficult than to state so in the power of attorney. The agreement and arrangement between her and the 3<sup>rd</sup> defendant was binding between themselves inter-se. It cannot bind 3<sup>rd</sup> parties who were not party to.
25. The general rule is that a power of attorney is to be taken on the face value unless the person acting on its strength is privy to any further information than what the document itself pronounces itself on. A third party was entitled to rely and act on the power of attorney to the extent that it authorized.
26. In the present case, it authorized the 3<sup>rd</sup> defendant to execute all documents and enter into all arrangements with 3<sup>rd</sup> parties in relation to the suit property as if the plaintiff was present. In my view, and I so hold, both the 1<sup>st</sup> and 2<sup>nd</sup> defendant were entitled to rely on that document to the extent that they were not aware of the restrictions tied to it, which were not there. If the 3<sup>rd</sup> defendant acted fraudulently, which he did, that cannot be extended to the 1<sup>st</sup> and 2<sup>nd</sup> defendant who have not been shown to have acted mala fides.
27. In my view, they acted in good faith and cannot be held liable for the fraudulent actions of the 3<sup>rd</sup> defendant. The plaintiff's claim is as against the 3<sup>rd</sup> and 4<sup>th</sup> defendant and not the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
28. In the premises, the plaintiff has not proved her case against the 1<sup>st</sup> and 2<sup>nd</sup> defendant and her case against them is hereby dismissed with costs to them but only as against the 3<sup>rd</sup> and 4<sup>th</sup> defendant with whom they dealt with and not the plaintiff.
29. However, as against the 3<sup>rd</sup> and 4<sup>th</sup> defendant who for obvious reason did not oppose the plaintiff's case, they acted callously and fraudulently against the plaintiff. The fact of being a husband to the plaintiff did not give the 3<sup>rd</sup> defendant the right to charge her property without her consent and authority. The 4<sup>th</sup> defendant benefited from the proceeds of the loan without any consideration to the plaintiff. The property was valued at Kshs. 4,000,000/- as per the valuation at pages 20 to 38 of Pexh1.



30. Accordingly, judgment is hereby entered against the 3<sup>rd</sup> and 4<sup>th</sup> defendant for Kshs. 4,000,000/- together with interest thereon at Court rate from the date of the suit until payment in full. The plaintiff shall have the costs of the suit against the 3<sup>rd</sup> and 4<sup>th</sup> defendant.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. MABEYA, FCIArb**

**JUDGE**

