



REPUBLIC OF KENYA



**Ndinguri & another v Equity Bank Limited (Civil Suit 90 of 2019)
[2024] KEHC 10293 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 10293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 90 OF 2019
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

EMMA WANJIRU NDIINGURI 1ST PLAINTIFF

BRENDA WANGUI NDIINGURI 2ND PLAINTIFF

AND

EQUITY BANK LIMITED DEFENDANT

JUDGMENT

1. In the Plaint dated November 7, 2019, the Plaintiffs pleaded among others that:
 - i. The Defendant advanced to East Adrican Cargo Logistics Limited where the 1st and 2nd Plaintiffs are Directors a loan of Kshs. 11 Million as well as USD 9000 which the 1st Defendant agreed and advanced sometimes in 6th June 2013 and 2nd December 2014 respectively.
 - ii. The 1st and 2nd Plaintiffs did nit pass a resolution for the loan to be issued and decision by other directors did it bind them.
 - iii. The resultant charge executed pursuant to the transaction was not executed by the Plaintiffs.
 - iv. The Directors who executed the charge did so without authority.
 - v. There was default and the Defendant instructed the Auctioneer to issued notification of sale of East African Cargo Logistics property known as L.R No. Mainland North/Section 1/6032.
 - vi. The charge and further charge are consequently null and void fir want if capacity.
 - vii. The Plaintiff averred that by 29th June 2019, they had paid a total of Kshs. 4 Million and the balance was Kshs. 11,567,325.35.
 - viii. The Defendant demands Kshs. 53,000,000 from the Plaintiffs.



2. The Plaintiffs thus prayed for the following reliefs
 - a. A Declaration that the loan agreements and charges between East African Cargo Logistics Limited and the Defendant dated 6th June 2013 and 2nd December 2014 respectively re illegal, null and void.
 - b. An injunction restraining the Defendant from advertising for sale, selling by public auction or in any other manner whatsoever disposing off all that property known as LR. No. in purported exercise of its statutory power of sale.
 - c. Cost of the suit.
3. The Defendant filed its Defence dated 1st June 2022 on 10th June 2022 in which it was inter alia pleaded as follows:
 - i. The Defendant advanced an aggregate amount of USD. 1,050,000.
 - ii. The amount was secured by charge dated 14th March 2011 for Kshs. 12,000,000, further charge dated 12th November 2012 of Kshs. 11,000,000 and second further charge dated 6th June 2013 of Kshs. 11,000,000.
 - iii. The Plaintiffs are directors and so bound.
 - iv. The company is in arrears for which the Plaintiffs are responsible.
4. At the hearing, the Plaintiff called, PW1, the 1st Plaintiff who testified and produced evidence in Court. The witness relied on her witness statement dated 7th November 2019 filed in Court as well as the bundle of documents of the same date produced.
5. It was her testimony that she was a Director of East African Cargo Logistics Limited. Her late father was involved in taking the loan but the 2nd Plaintiff who is her sister and herself were never involved.
6. On cross examination, she said that she was a shareholder to the company and not director. She further testified that they did not pass any resolution to approve the loan. As at 6th June 2013, she was 6 years old and could not have the capacity to sign the resolution. She testified that Hannah Nyiha was her mother.
7. In re-examination, she testified that they were affected because she lived in the house subject of the statutory power of sale.
8. The Defendant called one witness, DW1. He introduced himself as the Manager in charge of loans at the Defendant's bank. He relied on his witness statement dated 15th June 2023. He also relied on the Bundle of Documents of the same date which be produced in evidence.
9. He testified that when the Plaintiffs were in arrears, the Defendant issued the 90 day statutory notice as well as the 40 days notice. He further stated that the Defendant received a request from the borrower through the Directors to restructure the loan facility and the Defendant had the property revalued. The witness also stated that the same matter had been filed in the Land Court but was dismissed.
10. In cross examination, it was his case that the borrower was East African Cargo Logistics Limited and the loan was extended by Hannah Nyiha, the Plaintiffs' mother.
11. The witness also confirmed that the value of the land was Kshs. 36,000,000.



12. The Court directed parties to file their respective written submissions. I have perused the submissions filed by the parties as well as the authorities in support thereof. I appreciate the detailed legal analysis that the advocates have done to shape this Judgement. It is not for the lack of regard and appreciation that I do not set out the contents thereof in this submission.
13. The issue before the court is whether the loan agreements and charges between East African Cargo Logistics Limited and the Defendant dated 6th June 2013 and 2nd December 2014 respectively are illegal, null and, depending on the answer to the issue, whether an Injunction should issue to stop the Defendant from exercising the statutory power of sale.
14. I understand this suit arose from the action taken by the Defendant to sell the suit property by public auction in exercise of the statutory power of sale due to default in loan repayment. This is the common position of the parties.
15. The Plaintiffs' submitted that the charge purportedly created over the property was void and could not confer a statutory power to sale the property. They contend that they did not sign the resolution and so did not consent to charging the suit property. Therefore, that there was no resolution authorising charging of the property and the statutory notice issued for purposes of selling the property was illegal for all intents and purposes.
16. On its part, the Defendant submitted that a valid charge was created and registered, the East Africa Cargo Logistics Limited's Directors passed a resolution to authorise the charge to secure money advanced and the money was advanced as a result of which the Company had defaulted and a statutory right of sale had crystallized once there was default.
17. The Defendant submitted that the charge having been dully executed and registered, the Plaintiffs could not challenge its validity only after action had been taken to exercise the statutory power of sale under Section 90 of the *Land Act*.
18. On perusal of the evidence produced in Court, I note that there is no denial that money was advanced to East Africa Cargo Logistics Limited, a company in which the Plaintiffs are listed as directors and shareholders per the CR 12 Form dated 4th September 2015 and produced by the Plaintiffs in evidence.
19. There is no denial that the East Africa Cargo Logistics Limited defaulted. The Plaintiff did not also deny that demand was made and notices duly served which was why this suit was filed before the property was sold in exercise of the statutory power of sale. The argument by the plaintiff was that the charge was invalid for the reason that there was no proper resolution.
20. It concerns this court that the Plaintiffs' case is not that unauthorized persons executed the resolution. It is also not that authorized persons executed the documents through fraud or any form of impropriety. It is that as the Plaintiffs did not sign the resolution, any action authorized by the such resolution was a nullity.
21. In *Giro Commercial Bank Ltd v Eccon Construction & Engineering Ltd & another* [2014] eKLR, the Court of Appeal cited Steward Kyd's *Treatise on the Law of Corporations*, Vol 1, Butterworths, London, 1793 where the author stated that; A corporation aggregate, being considered as an indivisible body, cannot manifest its intentions by personal act or oral discourse...the law therefore has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. That is by affixing the common seal.



22. The Court of Appeal also stated in Giro Commercial Bank Ltd (supra) thus:

In a case where a transaction has been entered into; money has been disbursed; the instrument in question is sealed with the seal of the company; that seal is authenticated by two directors; there is a certificate by an advocate confirming that the company is fully aware of the effect of execution of the instrument; and the company does not contend that it did not sign the instrument or that it did not know the effect of signing, it would, in our view, be a monumental injustice to hold that the instrument is invalid. It is the kind of injustice that a court, conscious of the principles that underpin the administration of justice under Article 159 of *the Constitution*, cannot countenance.

23. Therefore, as the charge and further documents and resolution were executed and signed by and on behalf of the East Africa Cargo Logistics Limited, the Plaintiffs could not turn around and argue that the documents were not signed.

24. In civil proceedings, the Plaintiff bears the burden of proof. In that respect, section 109 of the *Evidence Act* provides that burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by a law that the proof of the fact lies on particular person.

25. In Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

“When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given.”...

...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”

26. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

27. Therefore, it follows that the Plaintiffs had the duty to prove their claim of against the Defendant. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.

28. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party



the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

29. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. The burden thus rested on the Plaintiffs to prove that the charge, the subject of this suit was illegal null and void as claimed. I hold the view that the Plaintiff failed to discharge their burden by proving the case on a valance of probabilities that the absence of their signature on the resolution invalidated the charges and further charge.
30. They did not too prove that the consequential statutory notices of sale were illegal null and void. The Defendant on its part produced documentary evidence to show that resolution was passed before the charge was executed and registered, which rebutted the Plaintiff’s contention that the charge was void for want of their accent by signature. As have held above, there is no allegation of fraud or forgery to rule out the validity of the resolution.
31. As to whether the Defendant could exercise the statutory power of sale, the Plaintiffs submitted that there was no valid resolution and so the charge and further charge as well as the statutory notices for void for all intents and purposes. However, the Plaintiffs did not dispute the fact that the statutory notice was served and that is not an issue here.
32. This Court has already established that the charge and further charge were validly executed and registered. The law is settled that a lender must serve a statutory notice before exercising the statutory power of sale. Where there is default, the debt is admitted and the notice is served, the court will not interfere if the lender is exercising its statutory power of sale.
33. Dealing with such a scenario, the Court in *Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others* [2018] eKLR appreciated that:

“both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages.
34. The irresistible conclusion is that the Defendant’s impugned statutory notices remained valid and were not voided by virtue of the fact that the Plaintiffs had not signed the resolution.
35. Under Section 90 of the *Land Act*, 2012, the law provides thus;

90 (1) If a chargor 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 chargee may serve on the chargor 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—
 - (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;



36. In Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien’g Civil Appeal No. 114 of 1991, the Court of Appeal held that:

“Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered *Land Act* Cap 300. For instance, they must serve on the chargee three months’ written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family... The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor’s solicitor, the court will fix a sum probably sufficient to cover his claim... The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage.”

37. I find that the Defendant properly moved to issue the notification of sale as anticipated under statute now that the East African Cargo Logistics Limited was in breach. That was the position adopted in the case of Al-Jalal Enterprises Limited vs. Gulf African Bank Limited [2014] eKLR cited with approval by Nyamu, J. (as he then was) in the case of Mathya vs. Housing Finance Co. of Kenya Limited & another [2003] 1 EA 133 where the Court stated that:

“...he who comes to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court’s discretion.”

38. Further, on the undisputed case of the Plaintiffs that they could not finance their loan obligation owing to harsh economic conditions, Pall, J (as he then was) in the case Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73 stated as follows:

“The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale.”

39. The Defendant pleaded and its witness testified that the issues the Plaintiff raised in this suit were determined in Mombasa ELC Suit No. 181 of 2017. Hannah Wambui & East Africa Cargo Logistics v Equity Bank. I have perused the Rulings attached to the and produced by the Defendant and I am



not convinced that the issues in that Petition were determined in their finality. The Rulings pertained interim Applications.

40. Having considered and evaluated the evidence on record and exhibits produced, the conclusion the court comes to is that the Plaintiff failed to prove their case on a balance of probabilities.

Determination

41. In the upshot, the Plaintiffs' suit is dismissed with no orders as to costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23RD DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of:-

Okumu Advocate for the Plaintiff

Randiek Advocate for the Defendant

Barile, Court Assistant

