



**Njuguna & another v Ragus & another (Civil Suit 389 (Previously
1661 of 2002) of 2011 & Civil Case 422 of 2007 (Consolidated))
[2024] KEHC 4188 (KLR) (Commercial and Tax) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 389 (PREVIOUSLY 1661 OF 2002) OF 2011
& CIVIL CASE 422 OF 2007 (CONSOLIDATED)**

A MABEYA, J

APRIL 30, 2024

BETWEEN

JOSEPH NJOGU NJUGUNA 1ST PLAINTIFF

JANE NYAMBURA NJOGU 2ND PLAINTIFF

AND

PAULINA RAGUS 1ST DEFENDANT

TETRA PAK LIMITED 2ND DEFENDANT

**AS CONSOLIDATED WITH
CIVIL CASE 422 OF 2007**

BETWEEN

JOSEPH NJOGU NJUGUNA 1ST PLAINTIFF

JANE NYAMBURA NJOGU 2ND PLAINTIFF

AND

TETRA PAK LIMITED DEFENDANT

Only institutions authorised to create a mortgage could lawfully exercise the statutory power of sale

Reported by Robai Nasike



Land Law – mortgages and charges – statutory power of sale – institutions authorized to create mortgages – where an institution that was not a financial institution could create a mortgage – whether a statutory power of sale exercised by an institution not authorized to create mortgages was lawful.

Civil Practice and Procedure – institution of suits – *res judicata* – what were the circumstances in which a suit could be considered *res judicata* – Civil Procedure Act (cap 21), section 7.

Brief facts

The instant judgment was in respect of two suits filed by the plaintiffs against the defendants. The first suit HCC 389 of 2011 which was previously filed as HCCC 1661 of 2002 and the second suit HCC 422 of 2007. The two suits were consolidated and proceeded against Tetra Park Ltd (the defendant) only. The defendant had not only created a mortgage on the property owned by the plaintiff, but they had also purported to exercise their statutory power of sale over the same.

The plaintiffs submitted that as co-owners of the impugned property, one party could not unilaterally deal with the suit property without the consent of the other. The plaintiff further submitted that the power of attorney was specific to sell, let and hire or lease out the property only for the benefit of the 2nd plaintiff; the defendant could not lawfully charge the suit property after the due consideration had passed between the defendant and the principal debtor (Aberdare Creameries). The 1st plaintiff was guaranteeing a past debt and no money was to be advanced as stipulated in the mortgage document and that the defendant could not create a legal mortgage as it was not a bank and the defendant was guilty of fraud and misrepresentation. It was contended that the property was sold at an undervalue.

The defendant submitted that the suit was *res-judicata* as the issue of the sale of the suit property had been settled in finality by consent. That the power of attorney's validity had not been challenged as it was signed and registered. It was submitted that the guarantee and execution of the mortgage were within the contemplation of the power of attorney.

Issues

- i. What were the circumstances in which a suit could be considered *res judicata*?
- ii. Whether a statutory power of sale exercised by an institution not authorized to create mortgages was lawful.

Held

1. A matter was *res-judicata* when it was directly and substantially in issue and the issues in the instant suit were substantially in issue in a matter that had been determined. That was encapsulated in section 7 of the Civil Procedure Act (cap 21). The respondent had raised the issue of *res judicata* vide a preliminary objection and the same was not sustained. The court could not address that issue since a court of competent jurisdiction determined it. The issued orders had not been set aside and to delve into the same would be akin to sitting on appeal of those orders.
2. From a close reading of the power of attorney, the 2nd plaintiff had nominated several powers to the 1st plaintiff with respect to the suit property. The 1st plaintiff was allowed to sell, let and hire or lease out the suit property. Further, she gave him the right to borrow and give money on mortgage of immovable property. Although the power of attorney had a general clause where the 1st plaintiff was empowered to execute the usual and customary documents and transact all the 2nd plaintiff's affairs including execution of deeds or instruments, those were restricted to her advantage. The guarantee was not necessary nor most advantageous to the 2nd plaintiff. No reasonable lender could rely on that power of attorney to lend out its money. As it turned out however, there was no money that was lent, money had long been lent and the 1st plaintiff was only guaranteeing their repayment.
3. The power of attorney did not extend to the guarantee and the mortgage. The guarantee and execution of the mortgage were not covered by the power of attorney. In any event, both the guarantee and the mortgage were never effective.



4. The guarantee and the mortgage were given for no consideration at all. There was no evidence that after the execution by the 1st plaintiff, the defendant gave any assurances to Barclays Bank to advance any monies to Aberdare Creameries. The advances had long been made and the documents only came in to act as a trap for the plaintiff's property. That was a case of past consideration. No contract was effective.
5. The defendant sought to create a statutory power of sale which the law did not recognize. The defendant was not a bank. It could not purport to advance any money, take security and exercise the power of a bank yet it was not a bank. There was no evidence to show that the defendant was authorized to create mortgages. To the extent that the defendant sought to sell and actually sold the plaintiff's property in the exercise of a non-existent statutory power of sale, the sale was unlawful.
6. The defendant did not challenge the two valuation reports which demonstrated that the property was sold at half the price of its value. There was no valuation to counter those valuations. The property was sold at an undervalue. The defendant was not justified in selling the disputed property. There was a valuation that was produced but was for 2022. The proper valuation would be as at the time the property was sold when the loss was attached.

Judgment entered for the plaintiff against the defendant.

Orders

- i. *The sale of the suit property was unlawful and was at an undervalue.*
- ii. *The defendant was to pay the plaintiffs a sum of Kshs.32,000,000/- plus interest of 12% pa from the date of filing suit until payment in full.*
- iii. *The plaintiffs were awarded the costs of the suit plus interest thereon.*

Citations

Cases

Kenya

1. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Applied)
2. *Oduor, George Lalla v Cannon Assurance (K) Ltd* Civil Appeal 51 of 2017; [2019] KECA 294 (KLR) - (Applied)

Statutes

Kenya

1. Banking Act (cap 488) In general - (Cited)
2. Civil Procedure Act (cap 21) section 7 - (Interpreted)
3. Insurance Act (cap 487) In general - (Cited)

Advocates

Mr Katiku for the defendant

JUDGMENT

1. This judgment is in respect of two suits filed by the plaintiffs against the defendants. The first suit HCC 389 of 2011 which was previously filed as HCCC 1661 of 2002 and the second suit HCC 422 of 2007. The two suits were consolidated. The suit proceeded against the Tetra Park Ltd (hereinafter "the defendant") only.
2. In HCCC 422 of 2007 the plaintiffs instituted the suit against the defendant vide a plaint dated 9 August 2007. They sought judgment against the defendant for a declaration that the sale of property known as (LR No 1/149 "the suit property") was fraudulent illegal null and void. That the defendant be ordered to pay the plaintiff the full value of the suit property together with interest.



3. In HCCC 389 of 2021, the plaint dated 5 November 2002 sought a declaration that the sale of the suit property was fraudulent and an injunction to restrain the defendants from evicting the plaintiffs from the suit property.
4. The plaintiffs' case was that, being husband and wife, they co-owned the suit property which was their matrimonial home. That the 2nd plaintiff donated her power of attorney to the 1st plaintiff to sell, let or hire the suit property. They pleaded that the power of attorney did not donate the power to charge or mortgage the property. That by a deed of guarantee dated June 29, 2000, acting on the power of attorney, the 1st plaintiff guaranteed a company known as Aberdare Creameries Ltd a sum of Kshs 15,000,000 paid by Barclays Bank of Kenya Ltd.
5. A charge was executed by the 1st plaintiff on 4 June 2000 pursuant to the deed of guarantee. The plaintiffs averred that the charge was unlawful since the 1st plaintiff did not have the authority to charge the property and the defendant ought to have investigated the circumstances behind the issuance of the charge. That from the contents of the power of attorney, the defendant knew that it was not authorized to charge the suit property.
6. It was contended that the principal debtor, Aberdare Creameries Limited, drew cheques for the amount outstanding which were received by the defendant. That the plaintiffs were discharged of their liabilities and the defendant was obliged to discharge the suit. That the sale of the property to a
7. The defendant filed a statement of defence in HCCC 389 of 2011 dated 22 November 2002 and a statement of defence dated 20 September 2007 in HCCC 422 of 2007. It contended that the power of attorney gave the 1st plaintiff the authority to deal with the suit property in any manner including charging the property and executing the deed of guarantee.
8. That there was sufficient consideration since the charge was created after the deed of guarantee was executed. That there was no variation of the guarantee between the 1st plaintiff and the defendant as the attempt to pay the debt was not successful. That the property was sold upon failure of the 1st plaintiff to pay the debt.
9. At the trial, the 2nd plaintiff was the first to testify. She adopted her witness statement dated 30 March 2015 and produced the bundle of documents dated 14 March 2002 and 12/09/2019 as PEhx 1 and 2, respectively. She stated how the 1st plaintiff had approached her when she was outside the country and requested her to sign a power of attorney in order for him to rent out the property. She signed the power of attorney on 22 February 2000. That the power of attorney was issued only for rental purposes so that the husband could downsize and move to a smaller unit. That no one sought her consent for offering the property as security. She did not sign the charge or deed of guarantee.
10. She testified that the sale agreement stated that the property was sold on 26 April 2002 whereas the auctioneers notice was dated 29 April 2002. That the first formal communication for the sale was on 31 October 2002. That at the time, the property was valued at between Kshs 31 to 34 million. That however, it was sold at Kshs 14.5 million. That the valuation report done on July 25, 2019 showed that the current value of the suit property was Kshs 947 million. That the defendant's advocate Mr Katiku received Kshs 3million from another purchaser but never refunded the same.
11. In cross examination by Mr Katiku for the defendant, she stated that the power of attorney was specific to leasing the property. That the property was sold at an undervalue. She did not get any value for the property.
12. As at the time of trial, the 1st plaintiff was so sick to testify. He had donated a power of attorney to Grace Mueni Njogu (PW2) to testify on his behalf. She told the court that the 1st plaintiff gave her a



- power of attorney dated 11 January 2022 to represent him in matters concerning the suit and hearing. The 1st plaintiff had recorded statements dated 27 July 2017 and 11 January 2023 which she relied on as evidence. She produced the bundle of documents dated 11 January 2023.
13. She testified that the 2nd plaintiff gave the 1st plaintiff a power of attorney to sell, lease or rent the property. However, the 1st plaintiff guaranteed Aberdare Creameries a sum of Kshs. 15 million. That the property was sold as per sale agreement on 26 April 2002 despite the advert stating that the auction would be on 29 April 2002. That the plaintiffs found a buyer and paid 10 percent of the purchase price but they were not aware that the property had been sold. The purchaser had put a caveat dated 21 June 2000 but the conveyance was registered on 31 October 2002 notwithstanding the restriction.
 14. It was her testimony that the consent of the 2nd plaintiff was not sought for the sale and the plaintiffs were not notified of the sale. she testified that the property was sold at an undervalue.
 15. DW1 Daniel Njenga adopted his witness statement dated 8 August 2018 and produced the of documents bundle dated March 28, 2022 as DExh 1. He testified that the debt was not paid by the borrower and the property was sold on 26 September 2002 by private treaty. The loan had not been released to the borrower Aberdare Creameries when the plaintiff was guarantying the defendant. With respect to the cheques issued to the defendant by the borrower, he testified that the defendant could not accept the postdated cheques. Further, it was contended that the deed of guarantee and the mortgage were independent documents.
 16. DW2 Njee Muturi adopted his witness statement dated 24 March 2022 as evidence in chief. He testified that the conveyance was dated October 18, 2002 and was registered on 20 October 2002. That the market value of the suit property was Kshs 31 million. That although the forced sale value was Kshs 24.8 million, nevertheless the suit property was sold for Kshs 14.5 million.
 17. The parties filed their respective submissions which I have carefully considered. For the plaintiffs, it was submitted that as co-owners, one party could not unilaterally deal with the suit property without the consent of the other.
 18. That the power of attorney was specific to sell, let and hire or lease out the property only for the benefit of the 2nd plaintiff. That the defendant could not lawfully charge the suit property after the due consideration had passed between the defendant and the principal debtor. That the 1st plaintiff was guaranteeing a past debt and no money was to be advanced as stipulated in the mortgage document. That the defendant could not create a legal mortgage as it was not a bank and the defendant was guilty of fraud and misrepresentation.
 19. That the 1st plaintiff, without legal representation, was tricked into signing the deed of guarantee and mortgage instrument. In this regard the doctrine of non- est factum came into effect. That there was no loan that was advanced to Arberdare creameries as the 1st plaintiff was only guarantying a past debt.
 20. It was contended that the property was sold at an undervalue as the valuation report of Lloyd Masika done in August 2002 disclosed that the open value of the property was Kshs 31,000,000 with a forced value of Kshs 24,800,000. That Kshs 14.5 million was too low. It was submitted that the plaintiffs were denied their equity of redemption since the property was sold even when they were negotiating with potential buyers to buy the property.
 21. The defendant submitted that the suit was *res judicata* as the issue of the sale of the suit property had been settled in finality by a consent entered upon on 29 April 2002. That the suit property was sold as a result of the plaintiffs' failure to abide by the terms of the consent order. Counsel submitted that the issue of *res judicata* had been dealt with by Khaminwa J but she had not been informed that the



- parties had been the same and that the facts prevailing on the said ruling had overtime evolved. That the power of attorney's validity had not been challenged as it was signed and registered.
22. Counsel submitted that the guarantee and execution of the mortgage was within the contemplation of the power of attorney. That the power of attorney was broad to empower the 1st plaintiff to execute the guarantee and to mortgage the property. That the plaintiffs failed to prove the allegations of fraud and misrepresentation.
 23. That under the ITPA, the mortgage could be secured for a future or previous debt and the validity of a mortgage could not be challenged since it was executed under seal. With respect to valuation, counsel submitted that the valuation reports had no probative value since the makers of the reports were not called in court to give evidence. That the plaintiffs did not specifically plead that the property was sold at an undervalue.
 24. I have considered the pleadings, the evidence and the submissions on record. Having done so 4 issues arise namely, whether the suit was *res judicata*, whether the power of attorney donated to the 1st plaintiff by the 2nd plaintiff covered the guarantee to Barclays Bank for the facility of Kshs 15 million and creation of the mortgage instrument, whether the sale of suit property was lawful, and whether the property was sold at an undervalue.
 25. Whether the suit was *res judicata*. The defendant contended that the suit was *res judicata* since on 29 April 2002 the parties had recorded a consent with respect to the sale of the property. The plaintiffs on their part submitted that Khaminwa J had already pronounced herself on the issue.
 26. It is trite that a matter is said to be *res judicata* when it is directly and substantially in issue and the issues in the present suit are substantially in issue in a matter that has been determined. This is encapsulated in section 7 of the [Civil Procedure Act, 2010](#).
 27. In [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR, the Court of Appeal held that: -
 - “.... the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
 - 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) Those parties were litigating 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.....”
 28. I have perused the record. It shows that the defendant had raised that issue vide a preliminary objection and the same was not sustained. The court therefore cannot address that issue having been determined by a court of competent jurisdiction. The said orders had not been set aside and to delve into the same would be akin to sitting on appeal on the orders of Khaminwa J.



29. The second issue is whether the power of attorney donated by the 2nd to the 1st plaintiff covered the guarantee to Barclays Bank for the facility of Kshs. 15million and the creation of the mortgage instrument. It is not in dispute that the 2nd plaintiff donated a Power of Attorney dated 22 February 2000 to the 1st plaintiff. In dispute is whether the power of attorney extended to the guarantee and mortgage issued by the 1st plaintiff.
30. The 2nd plaintiffs' position was that the power of attorney was specific and only limited to authorizing the 1st plaintiff to sell, let, hire or lease out the property and not to guarantee any third party or offer the property as security. On the other hand, the defendant contended that the power of attorney encompassed the right and power to execute the guarantee document as well as execution of the mortgage instrument.
31. The power of attorney in part read as follows: -
- “That I Jane Nyambura Njogu nominate and appoint Joseph Njogu Njuguna ... to be my true and lawful attorney and agent, with full power and authority for me and in my name in regard of property LR 1/149; to sell, let and hire or lease out property No 1/149 which is described as all that piece of land in the City of Nairobi
- ... further, for me and on my behalf, to borrow or give money on mortgage of immovable property and to appear before the registrar of deeds, Register of claims and make a pass, give or receive all such mortgage bonds, deeds of hypothecation or other securities as may be requisite or necessary under obligation of my person and property LR No 1/149.
- ... And for that purpose to execute the usual and customary documents; and generally for me and in my name to manage and transact my affairs in regard to LR 1/149 and execute such deeds or instruments as may be necessary or most to my advantage and to use all lawful ways and means thereto as fully and effectively to all intents and purposes as might or could do if personally present and acting therein; hereby granting to my said attorney and agent full power and authority to substitute one or more attorneys.... ”
32. A close reading of the power of attorney demonstrates that the 2nd plaintiff had nominated several powers to the 1st plaintiff with respect to the suit property. First, it is evident the 1st plaintiff was allowed to sell, let and hire or lease out the suit property. Further, she gave him the right to borrow and give money on mortgage of immovable property.
33. Although the power of attorney had a general clause where the 1st plaintiff was empowered to execute the usual and customary documents and transact all the 2nd plaintiff's affairs including execution of deeds or instruments, those were restricted to her advantage. The clause read,
- “and execute such deeds or instruments as may be necessary or most to my advantage”.
34. The question that arises is whether the guarantee was necessary or most advantage to the 2nd plaintiff. It was not. No reasonable lender could rely on that power of attorney to lend out its money. As it turned out however, there was no money that was lent, money had long been lent and the 1st plaintiff was only guaranteeing their repayment.
35. I hold that the power of attorney did not extend to the guarantee and the mortgage. In view of the foregoing the guarantee and execution of the mortgage was not covered by the power of attorney.



36. In any event, both the guarantee and the mortgage were never effective. Both were executed;
- “In consideration of your having agreed at our request to guarantee to Barclays Bank of Kenya Limited ... to enable the Bank to advance a financial facility of a principal sum of ... to Aberdare Creameries Limited....”.
37. It is clear that both the Guarantee and the Mortgage were given for no consideration at all. There was no evidence that after the execution thereof by the 1st plaintiff, the defendant gave any assurances to Barclays Bank to advance any monies to Aberdare Creameries. It turned out that the advances had long been made and the documents only came in to act as a trap for the plaintiff's property. Surely, that was a case of past consideration. No contract was effective.
38. The next issue is whether the sale of the suit property was lawful. The security documents were challenged on how they were executed without legal advice. I have looked at the said documents and in particular the Mortgage document. The defendant sought to create a statutory power of sale which the law did not recognize. The defendant was not a bank. It could not purport to advance any money, take security therefor and exercise the power of an bank yet it was not a bank.
39. In *George Lalla Oduor v Cannon Assurance (K) Ltd* [2019] eKLR, the Court of Appeal held that the *Insurance Act* did not authorize an insurance company to issue mortgages, and that a licence under the *Banking Act* to carry out mortgage business was mandatory. Therefore a mortgage created by the insurance company was found to be unenforceable. Likewise, there was no evidence to show that the defendant in this case was authorized to create mortgages.
40. In this regard, to the extent that the defendant sought to sell and actually sold the plaintiff's property in exercise of a non-existent statutory power of sale, the sale was unlawful.
41. Finally, the last issue is whether the property was sold at an undervalue. The defendant admitted that the property was sold via private treaty for Kshs 14,500,000. The plaintiffs challenged this amount stating that it was a gross undervalue of the property since at the time it was valued at more than Kshs 30 million.
42. The plaintiffs produced two valuation reports from Tysons Limited which gave the Open Market Value at Kshs 32,000,000 - and Forced sale value of Kshs 25,000,000. The other valuation report by Lloyd Masika Limited gave an open Market value of Kshs 31,000,000 and a forced sale value of Kshs 24,800,000.
43. The court notes that the defendant did not challenge these two valuation reports which demonstrate that the property was sold at half the price of its value. There was no valuation to counter the said valuations. In the premises, the evidence points out to the fact that the property was sold at greatly an under value.
44. In view of the foregoing, the court finds that the defendant was not justified to sell the property known as LR No 1/149. There was a valuation that was produced but was for 2022. The proper valuation will be as at the time the property was sold, when the loss attached.
45. Accordingly, I find that the plaintiffs have proved their case to the required standard and I enter judgment in their favour against the defendant as follows: -
- a. The sale of the suit property was unlawful and was at an under value.
 - b. The defendant do pay to the plaintiffs a sum of Kshs 32,000,000 plus interest of 12% pa from the date of filing suit until payment in full.



c. The plaintiffs are awarded the costs of the suit plus interest thereon.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

