



Co-operative Bank of Kenya Limited v Adhiambo (Miscellaneous Application E1258 of 2020) [2022]
KEHC 60 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 60 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Miscellaneous Application E1258 of 2020

DAS Majanja, J

January 31, 2022

IN THE MATTER OF THE CHATTELS TRANSFER ACT AND IN THE MATTER OF AN
APPLICATION FOR EXTENSION OF TIME FOR REGISTRATION OF A CHATTEL MORTGAGE

Between

Co-operative Bank of Kenya Limited

Applicant

and

Frank Nick Adhiambo

Respondent

Ruling

1. An application for extension of time to register a chattel mortgage is usually routine and when this matter was filed, the Applicant and Respondent were named the 1st and 2nd Applicants respectively. However, after the application was served on the 2nd Applicant, he opposed it. I have therefore exercised the general power of the court to amend pleadings under section 100 of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) to amend the pleadings and record to show that the 2nd Applicant is now the Respondent as he opposes the application.

2. The application before the court is made under sections 6 and 9 of the Chattels Transfer Act (Chapter 28 of the Laws of Kenya) which was repealed by the Moveable Property Security Rights Act, Act No. 13 of 2017. By the Notice of Motion dated 25th November 2020, stated to be made on behalf of the Co-operative Bank of Kenya Limited (“the Bank”) and Frank Nick Adhiambo (“the Respondent”) they seek, inter alia, the following orders: [2] THAT this honourable court be pleased to extend the time within which to register the chattels Mortgage dated 30th March 2012 issued by FRANK NICK ODHIAMBO over two motor vehicles and various household goods and business chattels in favour of the CO-OPERATIVE BANK OF KENYA LIMITED with the office of the register within thirty (30) days from the date of the order of this court. [3] THAT upon order (2) being granted, the chattels instrument dated 30.03.2012 be deemed to have been done in accordance with Section 6 of the Chattels Transfer Act.

3. The application is supported by the affidavit and further affidavit of Naomi Mwangi, a Legal Officer at Co-operative Bank (“the Bank”), sworn on 25th November 2020 and 8th March 2021 respectively and also by the further affidavit of the Bank’s Advocate, Mariam Onsongo, sworn on 29th June 2021. The application is opposed by the replying affidavit and further replying affidavit sworn by the Respondent on 8th February 2021 and 5th July 2021 respectively.

4. The basic facts of the application are not really in dispute. The Respondent applied for and was advanced a loan by the Bank whereupon he executed a Chattels Mortgage Instrument (“the Instrument”) dated 30th March 2012 as security for the loan of KES. 1,200,000.00. The Instrument was not registered within 21 days as required by section 6 of the Chattels Transfer Act (Repealed). The Bank states that failure to register the Instrument was inadvertent hence the application.

5. The Respondent states that although he is named as an applicant, he did not make the application for extension of time. He admits that he obtained the loan facility from the Bank and offered motor vehicles registration numbers KBP 963 and KAM 296G in addition to shop goods as security under the Instrument. He further states that he paid off the loan. He further depones that on or about 30th July 2015, the Bank instructed Yamuko Auctioneers to repossess the shop goods and motor vehicles whereupon he filed a suit against the Bank and auctioneer; KISUMU CMCC NO. 406 of 2015, Frank Nick Odhiambo t/a Faja Investments Ltd v Co-operative bank of Kenya and Yamuko Auctioneers (“the Suit”).

6. The Respondent contends that according to the affidavit of George Okinyi filed on behalf of the Bank in the suit, the goods and motor vehicles attached by auctioneer have already been sold. He further contends that in view of the Suit and the fact that 5 years have elapsed since the Instrument was executed, the court should not grant the orders sought by the Bank. He accuses the Bank of attempting

to defeat the suit.

7. On its part, the Bank admits that the Suit is pending but its existence is necessary for the determination of the application before this court. It adds that when the Respondent filed the Suit, he also applied for an injunction which was granted. It also denies that the Respondent has cleared the loan and that he in fact owed it KES. 555,625.91 as at 19th March 2019. The Bank avers that while the Instrument is valid as between the parties, the purpose of registration is to protect lenders against third parties and non-registration cannot render the instrument void and that it should be registered

8. I have considered the parties' positions advanced in their depositions and written submissions supplemented by the brief oral submissions made by their respective advocates. On the one hand the Bank seeks time to register the Instrument out of time while the Respondent opposes on the basis of the pending Suit. Since there is a Suit pending between the parties, it is important for this court to exercise great circumspection in commenting on or otherwise making any determination on the matter in that Suit. The issues whether the Respondent is indebted or not or whether the Bank's actions in repossessing the assets are valid cannot be litigated in this matter. As the validity of the Instrument, in the sense that it is executed by both parties is not disputed, the only reason I directed the parties to file additional affidavits in that regard was to confirm that assets secured by the Instrument have not been sold as this would render the application unnecessary.

9. The Respondent pointed out that the Bank had, in the affidavit of George Okinyi filed in the Suit, stated that the assets secured by the Instrument had been sold. I have looked at the deposition sworn on 4th September 2021 and the Bank does not state or otherwise admit that the assets have been sold. At para. 15 thereof, Mr Okinyi depones, in part, as follows, "Indeed it is noteworthy that the Applicant has not denied being in default and as such the sale of the business chattels should proceed. Orders restraining such a sale shall occasion prejudice to the 1st Respondent." This averment is clear that the assets have not been sold and I so find.

10. Having reached the conclusion that the assets are still securities for the loan under the Instrument, the court now proceeds to exercise its jurisdiction under section 9 of the Chattels Transfer Act (Repealed) which states as follows: 9. Time for registration may be extended, and mistakes in register corrected. The High Court, on being satisfied that the omission to register an instrument or an affidavit of renewal thereof within the time prescribed by this Act, or according to the form or effect required by this Act, or that the omission or misstatement in the register or in any affidavit of the name, residence or occupation of any person, or of any other matter, was accidental or due to inadvertence, may order the omission or misstatement to be rectified by extending the time for registration, or by the filing of a supplementary affidavit, or by the insertion in the register of the true name, residence or occupation, on such terms and conditions as it thinks fit. [Emphasis mine]

11. The question for the court is whether the Bank has established that its failure to register the Instrument was accidental or due to inadvertence. In its deposition, the Bank states that the failure to register the instrument was "inadvertent and innocent" and the delay was "not intentional but was caused by inadvertent mistake and error". The Respondent argues that the Instrument was executed on 30th March 2012 yet the application for extension of time was filed on 30th November 2020, a period of 8 years despite the Bank knowing that it had not registered the Instrument when the Suit was filed in 2015.

12. I agree with the Respondent. The Bank knew that the Instrument had not been registered when it filed the Suit. The long delay in seeking condonation negated the "accident or inadvertence" it is required to demonstrate in order to succeed. It slept on its right and cannot turn around to argue that it failed

to take steps to protect its interests as a result of a mistake. I find and hold that the Bank has failed to substantiate its case under section 9 of the Chattels Transfer Act (Repealed).

13. I dismiss the application dated 25th November 2020 with costs to the Respondent which I assess at KES. 30,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S.

MAJANJA JUDGE Court Assistant: Mr M. Onyango Mr Ragot instructed by Owiti, Otieno and Ragot Advocates for the Applicant. Mr Yogo instructed by Otieno, Yogo and Ojuro Advocates for the Respondent.



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