



**Mturi v Cooperative Bank of Kenya (Civil Suit E022 of 2022)
[2023] KEHC 27528 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 27528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E022 OF 2022
F WANGARI, J
MAY 30, 2023**

BETWEEN

JONATHAN DANIEL MTURI PLAINTIFF

AND

COOPERATIVE BANK OF KENYA DEFENDANT

JUDGMENT

1. Through a plaint dated 7th April, 2022 and filed on even date, the Plaintiff sought for judgement against the Defendant for the following reliefs: -
 - a. A declaration that the claim of ksh 155,527,568.29/= against him is an illegality in law in view of the fact that the same is comprised of not only the bank overdraft of ksh 51,200,000/= that was secured by the charge dated 18th March, 2013 and the further charge dated 8th November, 2013 against his title in the suit property but also liabilities of M/s Quantum Petroleum Limited to the Defendant which the Plaintiff is not party to and which were not secured by the said charges;
 - b. An order directing the Defendant to furnish the Plaintiff with a statement of accounts for the bank overdraft facility secured by the charge dated 18th March, 2013 and the further charge dated 8th November, 2013 against his title in the suit property;
 - c. An order of permanent injunction restraining the Defendant either by itself and or its servants and or authorized agents from selling and or alienating the suit parcel of land to recover any debt payable to it by M/s Quantum Petroleum Limited which was not secured by the charge dated 18th March, 2013 and the further charge dated 8th November, 2013 against his title in the suit property;
 - d. Costs of the suit and interest at court rates; and



- e. Any other relief that the Honourable Court will deem fit to grant.
2. Contemporaneously with the suit was an application of even date which sought for among other orders, temporary injunction restraining the Defendant or its servants and or employees or any other person acting on its behalf from selling by public auction and or private treaty the Plaintiff's property known as title number CR 10092, Plot Number 1201/I/MN situate in Nyali. Prayer (2) of the application was granted and additionally, the Plaintiff was required to furnish an undertaking as to damages.
3. Upon service of the pleadings upon the Defendant, it filed its statement of defence, list of witnesses, witness statement, list of documents and copies thereof all dated 3rd July, 2023 on 6th July, 2023. Earlier on, it had filed a response to the application for injunction dated 26th April, 2022 on even date. The court having considered the pending application for injunction rendered its ruling on 12th May, 2023 allowing the pending prayer. This paved way for hearing of the main suit which took off on 27th November, 2023.

Plaintiff's Case

4. The Plaintiff, Jonathan Daniel Mturi took to the stand as the only witness. He adopted his witness statement dated 7th April, 2022 as his evidence in chief and produced the documents of even date as a bundle. He confirmed that he had charged his property to the Defendant for a total sum of ksh 51,200,000/= as a guarantor to an entity called Quantum Petroleum Limited. He was served with a notice by the Defendant indicating that he was owing in excess of ksh 155,000,000/= yet his facility was a guarantee of only ksh 51,200,000/=.
5. He denied being a shareholder or a director in Quantum Petroleum Limited. Referred to exhibit 8, he stated that the bank was demanding ksh 141,723,883.19 yet his guarantee was only to the tune of ksh 51,200,000/=. He argued that the demand was in respect of several accounts which he was not privy to. On the 45 days' notice, he stated that the same was making a demand of ksh 155,527,568/= which sum he had not guaranteed. He denied service of the statutory notice but only came to know of its existence through the directors of Quantum Petroleum Limited. He was never given any statement of account.
6. His suit was not an afterthought considering that he had not filed any suit against the Defendant. He denied being a party to Mombasa HCCC no 95 of 2019. He thus prayed that the reliefs sought in the plaint be granted.
7. On cross examination, he confirmed that the covenant to pay was an agreed term and indeed he signed the same at page 37 of the Defendant's documents. He equally agreed to clause 13 of the charge at page 50 and at page 58, he confirmed to have read and understood the remedies of sections 90 and 96 of the Land Act. At page 72, he confirmed to have guaranteed the borrower (Quantum Petroleum Limited). Referred to page 71, he confirmed that the guaranteed amount was ksh 130,000,000/=.
8. On re-examination, he made reference to page 37 of the Defendant's documents and reiterated that his guarantee was only limited to ksh 51,000,000/=. That marked the close of the Plaintiff's case.

Defence Case

9. The Defendant called the Relationship Manager, Credit Management Division, one Grace Mwikali. She adopted the contents of her witness statement dated 6th July, 2023 as her evidence in chief. She equally produced the documents in its list of even date as its exhibits in support of the defence.



10. On cross examination, she confirmed that the Plaintiff was a guarantor of the Borrower which had been offered several facilities by the Defendant. She confirmed that the Borrower was engaged in the sale of Petroleum Products. She was not aware of any other engagement between the bank and the borrower. Referred to defence exhibit 1, the witness confirmed that it was addressed to the Plaintiff and not the Borrower. She had nothing to show that the notice had been served upon the Borrower and the Plaintiff. Similar, exhibit 2 was only addressed to the Plaintiff and not copied to the Borrower. She had nothing to show that the notice had been served on the Plaintiff and Borrower.
11. At pages 103 and 107 of the Plaintiff's exhibits, the witness stated that the first demand was for ksh 155,527,568.29/= and the second was ksh 141,723,883.19/=. She was not aware if the Plaintiff had paid money to reduce the figure. She stated that the two (2) documents are from two (2) different entities, that is, the auctioneer and the bank. She added that the auctioneer should get information from the bank. She was not aware when the relationship between the bank and the Plaintiff began but tentatively when the facility was given. Referred to page 73, the witness stated that it was talking of CFA which she did not know what it was. It had been signed by Catherine Munyiri and Lawrence Miriti who were no longer at the bank. That marked the close of Defence case. Parties opted to file written submissions.

Plaintiff's Submissions

12. They are dated 19th February, 2024. The Plaintiff framed two (2) issues for determination being whether the Plaintiff proved its case against the Defendant and who pays the costs of the suit. On the first issue, the Plaintiff adopted two (2) prongs as to why he believed he had proved his case to the required standard. The first prong was that the consolidation of accounts for all sums owed by the Borrower was an illegality. It was pointed out that the charge dated 18th March, 2013 and the further charge dated 8th November, 2013 was for a sum of ksh 51,200,000/=.
13. The Plaintiff made reference to paragraph 21 of DW1's statement which had pointed out that clause 13 and 14 of the charge and further charge entitled the Defendant to consolidate the accounts of the Borrower or the Plaintiff. In response to this averment, the Plaintiff sought refuge under the provisions of section 83 of the *Land Act*. Special emphasis was placed on the wording and construction of section 83 (2) thereof. Accordingly, the Plaintiff pointed out that whereas clause 14 of the charge and further charge on consolidation was not applicable, the Defendant was required to record the right in the register or registers against all charges consolidated.
14. Making reference to his exhibit 1 and 2, the Plaintiff submitted that the Defendant did not register its alleged consolidation as required by section 83 (2) of the *Land Act*. The case of *Equip Agencies Ltd v I & M Bank Limited* [2017] eKLR was cited in support of this line of submissions. In conclusion of this limb, the Plaintiff submitted that due to the Defendant's non-compliance with the provisions of section 83 (2) of the *Land Act* on consolidation was not available to the Defendant as alleged in the statement of defence or DW1's testimony or at all.
15. The second line of attack was the Defendant's issuance and service of relevant statutory notices upon the Plaintiff. The Plaintiff confirmed that he was privy to the 45 days' notice dated 21st January, 2022, the notification of sale of immovable property and the Daily Nation newspaper of 28th March, 2022. It is out of these documents that he filed the present suit. The notices dated 11th June, 2015 and 20th November, 2015 though indicated to have been served through registered post and copy by ordinary mail, there was no evidence of service by either means.
16. Based on DW1 testimony, it was submitted that it could not be said that the Plaintiff was served with the notices. The case of *Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others* [1996] eKLR



was cited in support. Concluding on this limb, the Plaintiff submitted the Defendant's failure to serve statutory notice on him renders the exercise of statutory power of sale which culminated in the advertisement of the suit land for sale by public auction void *ab initio*.

17. On costs, the Plaintiff submitted that having proved his case to the required standard in civil cases, he was entitled to costs which he so prayed.

Defendant's Submissions

18. They are dated 19th February, 2024. It identified a single issue for determination being whether the Defendant has a legal basis for demanding any sum in excess of ksh 51,200,000/=.
19. Before addressing the issue, the Defendant raised a matter it considered was raised during trial. This was the issue of lack of service of statutory notices. According to the Defendant, a review of all the Plaintiff's seventeen (17) paragraphs in his plaint discloses that nowhere did the Plaintiff raise the issue of non-service of statutory notices. Relying on the case of *Housing Finance Co. of Kenya Ltd & 2 Others v Samuel Kiti Lewa* [2019] eKLR, it was submitted that parties are bound by their pleadings and cannot lead evidence beyond the confines of his pleadings.
20. Accordingly, if the Plaintiff was minded to question service of the statutory notices, he should have amended his pleadings to include it. Having not done so, he is precluded from leading evidence on the issue since it would be grossly unfair to the Defendant who had no notice that service of statutory notices would be contested.
21. Making reference to the court's ruling on the interlocutory application, the Defendant submitted that the court had held the view that the Plaintiff had established a prima facie case with probability of success on the question of consolidation. Citing the case of *Loise W. Wambua v Kenyatta University & Another* [2015] eKLR, the Defendant opined that views expressed on an interlocutory application do not bind the Trial Judge.
22. Accordingly, since what was being dealt with are contractual documents all of which were signed by the Plaintiff, his stance on re-examination violated at least two (2) principles of contract cited in *Josephine Mwikali Kikenye v Omar Abdalla Kombo & Another* [2018] eKLR and *Mukika Chai Dzombo & Daniel Lewa Dzombo v Coast Development Authority* [2015] eKLR. Therefore, it matters not that the Plaintiff may not have read the particular clause.
23. Secondly, it was submitted that under sections 97 and 98 of the *Evidence Act*, a party cannot vary the terms of a written contract through oral evidence (parole evidence). The Plaintiff's subjective understanding of the clause is irrelevant. But if the Plaintiff was attempting to say that the contract captured is not in fact what was agreed and intended, he was bound to adduce evidence that would bring into play the doctrine on non est factum.
24. On contractual interpretation of the documents, the Defendant contended that the Letters of Offer, Charge, Further Charge and Guarantee all permit it to provide advances to the Borrower and when so provided, make them parts of the amounts secured under any security that the Defendant holds. Reference was made to clause 1 of the charge at page 37 of the Defendant's documents which was produced verbatim. Further reference was made to clause 13 of the Charge and Further Charge. According to the Defendant, the words used are plain and admit not contest.
25. The Plaintiff was permitting the Defendant to give further advances beyond the ksh 51,200,000/= and to secure those further advances by the Charge and Further Charge. The Defendant reproduced section 82 of the *Land Act* in support its line of submission. The Defendant equally brought to the fore the Plaintiff's signature on a Guarantee and Indemnity dated 12th February, 2012. According to



the Defendant, the Plaintiff could not execute a guarantee for ksh 130,000,000/= if his liability was limited to ksh 51,200,000/=.

26. In support of its position on contractual provisions, the Defendant cited the case of *Robert Njoka Muthara & Another v Barclays Bank of Kenya Limited & Another* [2017] eKLR which held that a continuing guarantee is one which covers liabilities or transactions which continue to occur between the principal and creditor. Further cases of *Equip Agencies Ltd v I & M Bank Ltd* (above) and *John Karanja Kihagi & Another v Jamii Bora & 2 Others* [2020] eKLR were cited to support the proposition on continuing guarantees.
27. Lastly on noting of rights in section 82 of the *Land Act*, the Defendant submitted that the Plaintiff did not provide any register to show that indeed no such rights were registered. Moreover, the charge contained the Plaintiff's express authority to have those rights noted in the register. The Defendant sought for the suit to be dismissed with costs.

Analysis and Determination

28. I have carefully considered the pleadings, the evidence tendered, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the Plaintiff made out a case for grant of orders sought in her amended plaint dated 7th April, 2022;
 - b. What is the order as to costs and interests?
29. At the onset, the following issues are not in dispute:
 - i. The Plaintiff guaranteed a loan of ksh 51,200,000/= on behalf of Quantum Petroleum Limited from the Defendant;
 - ii. This was through a charge dated 18th March, 2013 and a further charge dated 8th November, 2013;
 - iii. The Plaintiff offered his title L.R no 1201 Section I Mainland North as security for the guarantee;
 - iv. There was a default in terms of service of the loan; and that
 - v. The Defendant sought to realize its security.
30. Having settled on the above, the only issue is whether the Defendant can proceed to realize the security. At this juncture, the Defendant raised an issue in terms of statutory notices. The argument proffered was that it was never pleaded and as such, the Plaintiff is precluded from raising it. Accordingly, it is imperative that this issue be settled first. There is a plethora of authorities on parties being bound by their pleadings.
31. The Court of Appeal and the Supreme Court have reiterated the importance of pleadings. In *Galaxy Paints Company Limited v Falcon Guards Limited* [2000] eKLR, it was held as follows: -

“...It is trite law, and the provisions of O.XIV of the *Civil Procedure Rules*, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment



on the issues arising from the pleadings or such issue as the parties have framed for the court's determination....”

32. The court in the above case had cited its predecessor’s case of *Gandy v Caspair* [1956] EACA 139 which had reiterated as follows: -

“...that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record...”

33. The above position has been reiterated in numerous other binding decisions among them *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR and I will do no more than abide by the Superior Courts’ position. I agree with the Defendant that the issue of statutory notices was not pleaded by the Plaintiff. However, on cross examination of DW1, the issue of service of statutory notices was raised. It cannot be gainsaid on compliance with issuance of statutory notices. With the coming into force of the *Land Act*, 2012, the Defendant has no option but to comply with issuance of the requisite statutory notices. A party ought to be given a chance to redeem its property before any sale is conducted.

34. Having reviewed the evidence on record, the Defendant failed to satisfy this court that it issued the requisite notices and as such, I cannot turn a blind eye on such a central issue. In any event, it has been held that courts can render a decision on based an unpleaded issue if it appears from the course of the trial that the issue was left for the court’s determination. In *Odd Jobs v Mubia* [1970] EA 476, the Court of Appeal for East Africa held thus: -

“...a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision...”

35. The above decision was followed by the Court of Appeal in *Vyas Industries v Diocese of Meru* [1982] 114 where it was held thus: -

“...The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in *Odd Jobs v Mubia* [1970] EA 476 in which it was held that:

- a) a court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision.
- b) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.”

36. In *Automobile Association of Kenya v James Jaguga* [2005] eKLR, it was held as follows: -

“...As I have said earlier, in our present case, the issue of the vicarious liability of the appellant for the acts of its employee Silas was an issue that was raised in evidence. It was also raised in written submissions by both counsel for the parties. It was therefore an issue that was left to the learned magistrate to decide upon...”

37. Therefore, though it was not pleaded, it was a germane issue that came out during evidence and therefore, this court is duty bound to make a determination on the issue of service of statutory notices.

38. Having found as above, I now turn to the issue of whether the Plaintiff’s suit is merited. The parties negotiated the terms of their engagement which crystallized on execution of the charge dated 18th



March, 2013 and the further charge dated 8th November, 2013. The said documents are the guiding terms in so far as the parties' relationship is concerned. The documents clearly delineated each party's duties and responsibilities. Being the contract entered into by the parties, it is not this court's business to rewrite contracts. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court of Appeal held as follows: -

“...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”

39. The court cited the decision by Shah, J (as he then was) in *Fina Bank Limited v Spares & Industries Limited*, Civil Appeal no 51 of 2000 (unreported) where it was held as follows: -

“...It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain”

40. Having stated as above, can the Plaintiff be relieved from his duties and responsibilities in terms of the contract? The Plaintiff made heavy weather on his guarantee being only limited to ksh 51,200,000/= . However, he confirmed having read the terms and conditions and he understood. He confirmed as much when he was referred to clause 1 of the charge document. To show his acceptance, he signed the charge as well as the further charge. His any other understanding is immaterial. The cases of *Josephine Mwikali Kikenye v Omar Abdalla Kombo & Another* and *Mukika Chai Dzombo & Daniel Lewa Dzombo v Coast Development Authority* cited by the Defendant suffices.

41. Having found as above, it was not open for the Plaintiff to resile that which he executed. This court cannot rewrite that which the parties expressly agreed. The amount sought to be recovered cannot be said to be limited to ksh 51,200,000/= when the Plaintiff voluntarily executed the charge document. In any event, the Plaintiff has not denied being indebted and no evidence was tendered to show that he had made effort to make any payment towards reducing the debt. I have said enough to show that the Plaintiff's claim on his limit cannot be sustained.

42. Having found as above and noting that the Defendant failed to show that the requisite statutory notices were served, the Plaintiff partially succeeds only to extent of service of the statutory notices demanded by sections 90, 96, 97 and 98 of the *Land Act*.

43. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The *Halsbury's Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

44. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others v Tarlochan Rai & Others* [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of



costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

45. The Plaintiff having partially succeeded, I direct that each party shall bear their own costs.
46. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Plaintiff’s suit as against the Defendant partially succeeds to the extent that the Defendant is hereby directed to comply by issuing the requisite statutory notices;
 - b. An order of injunction is hereby issued against the Defendant from dealing in any way with the suit land pending compliance with statutory notices and/or agreement between the parties;
 - c. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF MAY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Ms. Katama Advocate h/b for Mr. Lewa Advocate for the Plaintiff

Mr. Kongere Advocate for the Defendant

Barille, Court Assistant

