



**Mturi v Cooperative Bank of Kenya (Civil Suit E022 of 2022)
[2023] KEHC 27647 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 27647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E022 OF 2022
F WANGARI, J
OCTOBER 27, 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 Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 155,000,000/= yet his facility was a guarantee of only Kshs. 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 Kshs. 141,723,883.19 yet his guarantee was only to the tune of Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 155,527,568.29/= and the second was Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 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 Kshs. 130,000,000/= if his liability was limited to Kshs. 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 applied for and obtained a loan to the tune of Kshs. 18,500,000/= from the Defendant;
 - ii. The Plaintiff offered her five (5) houses as security for the loan advanced; and that
 - iii. The principal amount was fully paid.
30. Having found as above, the only issue and which issue was subject of this court's ruling dated 4th June, 2020 is the interest. It is not disputed that the Base Lending Rate (BLR) was at 16% as at the time the contract was made. As per clause 6 of the offer letter, it was agreed at 15.5% being 0.5% less BLR. In the same clause, the Defendant reserved the right to vary interest rates from time to time. This being the contract entered into by the parties, it is not this court's business to rewrite contracts.
31. 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...”
32. 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”



33. Having stated as above, was the Defendant at liberty to vary interest rates as it pleased? This question was answered by the Court of Appeal in the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR. Quoting the English decision of *Paragon Finance plc v Staunton*; *Paragon Finance plc v Nash* [2001] EWCA Civ 1466 [2002] All ER 248, the court quipped as follows: -

“...We are in agreement with the sentiments of the English Court that the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower... We find it particularly unfortunate that in the present appeal, the respondent varied the interest and seemed not to provide this knowledge to the appellant or to the borrower. We think this was wrong. If that information was readily availed to the borrower, the borrower would make an informed decision based on his or her circumstances and the consequences that are likely to arise due to the variation undertaken. The borrower may choose to opt out of the contract through full liquidation or look at other institution that would accommodate his or her interest. Information supplied to a borrower before any adverse variation of interest rate is made affords him an opportunity to assess this relationship with his lender, and the right to terminate the contract may even be exercised...”

34. The Plaintiff led evidence that no notice had been served upon her communicating the bank’s decision to vary the interest rates. On cross examination, DW1 confirmed that notices were to be given in writing and submitted to the borrower. She further stated that the borrower would get to know the changes in the rate of interest through the statement of account. I have no reason to disbelieve the Plaintiff’s testimony on this aspect. It was the bank’s fiduciary duty to send notices and I find the reason proffered on how the Plaintiff ought to have known the interest rate changes to be at home extremely lame.
35. There was evidence that the Plaintiff had paid the principal sum. Equally, DW1 confirmed that the Plaintiff had paid Kshs. 26,000,000/= which amount is over and above the amount advanced. PW2 who is an expert corroborated the Plaintiff’s allegation and with no counter evidence, I am convinced that the Plaintiff discharged her duty towards the Defendant. Thus, on the first issue, I am satisfied that the Plaintiff made out a case to warrant the reliefs sought. Having found as above, I find merit in the amended plaint dated 22nd June, 2017.
36. 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”



37. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs 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.”

38. There was no evidence led to show that the Plaintiff was guilty of any misconduct to be deprived of costs and as such, I award the Plaintiff the costs of the suit which shall be taxed by the Deputy Registrar of this court.

39. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. Judgement is hereby entered in favour of the Plaintiff against the Defendant as follows; -
 - i. A declaration is hereby issued that the Defendant’s intended sale of the Plaintiff’s property known as L.R. No. 15362 Section I Mainland North, L.R. No. 15363 Section I Mainland North, L.R. No. 15364 Section I Mainland North, L.R. No. 15365 Section I Mainland North and L.R. No. 15370 Section I Mainland North situated at Bombolulu Bandari Villas is illegal, null and void.
 - ii. An order of injunction is hereby issued restraining the Defendant whether by themselves, their agents, servants, employees or any other person acting under the Defendant’s instructions for advertising or further advertising for sale, alienating, selling or in any other way dealing with all that piece or parcel of land known as L.R. No. 15362 Section I Mainland North, L.R. No. 15363 Section I Mainland North, L.R. No. 15364 Section I Mainland North, L.R. No. 15365 Section I Mainland North and L.R. No. 15370 Section I Mainland North situated at Bombolulu Bandari Villas.
 - iii. The Defendant is directed to immediately forthwith release any title documents in its possession held in respect of the subject piece of land to the Plaintiff.
 - iv. Costs of the suit to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023.

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F. WANGARI

JUDGE

In the presence of;

N/A for the Plaintiff



Ms. Akwana Advocate for the Defendant
Barille, Court Assistant

