



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.14 OF 2019

OBADIAH NAMUNYU ODEKE.....APPELLANT

VERSUS

NATIONAL BANK OF KENYARESPONDENT

J U D G M E N T

[1] The appellant, **Obadiah Namunyu Odeke**, commenced this suit way back in the year 2003 vide the plaint filed herein on 3rd September 2003, in which he pleaded that the respondent, **National Bank of Kenya Ltd**, without any justifiable colour of right advertised for sale through public auction his parcel of land described as **No.South Teso/Asinge/1051** measuring 10.4 acres or thereabout without any notification or demand notice for monies due from him to the bank. He therefore prayed for a permanent injunction against the bank restraining it and its agents/servants and/or employees from selling by public auction and/or advertising for sale the said parcel of land.

[2] The appellant also prayed for a declaration that he did not owe the respondent bank any amount of money or at all and should be left to peacefully enjoy his property.

The respondent denied the claim vide its statement of defence dated 10th May 2005 and contended that the appellant took a loan which he secured using the suit property No.South Teso/Asinge/1051 for which a legal charge was created over the title in its favour and which could only be discharged upon settlement of the loan by the appellant.

[3] It was further contended by the respondent that the appellant failed to service the loan facility as agreed resulting in an aggregate indebtedness in the sum of ksh.189,139/50cts as at 15th November 2002 which sum continued to attract interest at the rate of 29% per annum. From the said date until full settlement. That, due to the appellant's default in settling the loan the statutory right of sale reserved for the bank capitalized thereby resulting in the notification of sale of the charged property and service thereof upon the appellant.

[4] The respondent averred that the charged property became a commodity for sale and was indeed put up for sale as the appellant was indebted to it in the sum aforesaid. It's prayer was therefore for dismissal or striking out of the appellant's case with costs.

[5] After several interlocutory applications and rulings, the matter was ultimately placed for hearing on the 28th October 2013, when the plaintiff/appellant testified and apparently closed his case in the absence of the defendant/respondent. The court's judgment in favour of the appellant was to follow on the 24th February 2014 but this was set aside on 4th February 2015, on application by the respondent. The hearing effectively commenced afresh on 3rd April 2018, when the appellant testified as **PW1** and closed his case without calling any witness.

[6] The defendant/respondent's case commenced and closed on 22nd May 2018, with the evidence of its employee, **Ezra Ondieki Omari (DW 1)**.

The trial court considered the evidence in its totality and rendered its judgment on 28th May 2019, dismissing the appellant's case with costs to the respondent.

Being aggrieved with the judgment and the accruing decree, the appellant preferred the present appeal on the basis of the eight (8) grounds set out in the memorandum of appeal dated 27th June 2019.

[7] The hearing of the appeal proceeded by way of written submissions. Both parties filed their respective submissions through **Obwogo Onsongo & Co. Advocates** and **Otieno Yogo, Ojoro Advocates** respectively.

This court considered the rival submissions in the light of the grounds of appeal. It's duty was to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

[8] In that regard, the evidence adduced by both parties at the trial was revisited herein and in the opinion of this court there was no dispute that the appellant obtained a loan of ksh.40,000/= from the respondent bank upon terms and conditions specified in the letter of offer dated 24th July 1989, which set the period of repayment to be thirty one (31) months together with an interest rate of 15% per annum to be secured by a legal charge over the appellant's property known as South Teso/Asinge/1051 valued at ksh.350,000/=.

[9] The charge instrument was executed by both parties and registered on 3rd August 1989 thereby granting the respondent statutory power of sale of the charged property in the event of default by the appellant in setting the loan as agreed.

[10] Apparently, this suit was precipitated by the respondent's lawful action of exercising its statutory power of sale by issuance of necessary notification for sale and advertising the property for sale. This action was not substantially disputed by the appellant. However, he stated that the intended sale of public auction was halted after he engaged the bank over the matter and explained the reason for his default in payment of the outstanding loan amount. He continued with the loan repayment but in the year 2003, the bank informed him that his indebtedness to it stood at ksh.118,000/=. He undertook to pay the amount to prevent auction of his property.

[11] The appellant stated further that he paid that amount of kshs.118,000/= with an excess of ksh.5,509/= as indicated in the records availed to him by the bank pursuant to a court order, which records also indicated that his loan A/C No.01030-366367-00 had no outstanding loan balance. He therefore contended that he was no longer indebted to the bank after clearing or repaying the entire amount arising from the loan and implied that it was for this reason that he instituted this suit against the bank.

[12] Despite the appellant's contention of having repaid the loan in full, he did not avail any documentary evidence such as payment receipts to establish the fact. Indeed, he conceded that he did not present any payment receipts in court, yet he alluded to having received the receipts from the bank's lawyers at the time i.e Manwari & Co. Advocates. Therefore, his allegation that he cleared the entire loan balance remained a mere allegation in the absence of proof of all payments made by him to the bank.

[13] The bank through its employee (DW 1) provided credible evidence which effectively disproved the appellant's allegations and claim by showing how the loan's outstanding balance of ksh.137,560/= was arrived at. The appellant is therefore required to discharge his obligation by clearing or paying the outstanding loan balance together with any additional amounts arising from interest and/or penalties, failure to which the respondent shall be at liberty to exercise its statutory power of sale on the appellant's suit property.

[14] For all the foregoing reasons this court must find and hereby finds that all the eight (8) grounds of appeal preferred by the appellant are devoid of merit and are hereby overruled.

In sum, this court fully agrees with the trial court's judgement dismissing the appellant's claim against the respondent for want of proof. This appeal must therefore take the same route and is hereby dismissed with costs to the respondent.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DATED & DELIVERED THIS 16TH DAY OF FEBRUARY 2022]