



Ndura (the Administrator of the Estate of James Ndura Gichia) v Housing Finance Company Limited (Civil Suit 107 of 2006) [2022] KEHC 16946 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16946 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT 107 OF 2006
WM MUSYOKA, J
DECEMBER 23, 2022**

BETWEEN

REBECCA WAIRIMU NDURA (THE ADMINISTRATOR OF THE ESTATE OF JAMES NDURA GICHIA) PLAINTIFF

AND

HOUSING FINANCE COMPANY LIMITED DEFENDANT

JUDGMENT

1. The suit herein was brought by the plaintiffs, by her plaint dated December 6, 2006, against the defendant. The defendant is alleged to have had granted a loan to the estate of kshs 855, 000, on May 5, 1997, repayable at monthly instalments of kshs 20, 965.00, secured by Butsotso/Shikoti/3471, registered in the name of the deceased. The deceased repaid kshs 800, 000.00, and upon his death the insurers paid kshs 776, 630.00, bringing the total repayment to kshs 1, 600, 000.00. The plaintiff avers that the loan was repaid in full, and that the demand made by the defendant of kshs 1, 693, 581.00, was unlawful. She avers that the defendant sold the security, Butsotso/Shikoti/3471, fraudulently and unlawfully on May 4, 2006. She avers that the property was sold at kshs 1, 400, 000.00, which was an undervalue, and the defendant was unlawfully demanding kshs 293, 581.05 from the estate. She seeks the taking of an account and payment to the estate of the market value of Butsotso/Shikoti/3471, plus costs and interests.
2. In its defence, dated January 22, 2007, the defendant concedes the loan arrangement, and the insurance payment of kshs 774, 630.00, but denies that the deceased had repaid the loan in full and had redeemed the security, for the estate still owed a sum of kshs 1, 250, 426.54 as at December 30, 2001, and kshs 1, 693, 581.05 by May 5, 2006. It is averred that the deceased was an incessant and prominent defaulter, who was not meeting his obligations to the defendant as at the date of his death. It is denied that the sum of kshs 1,693, 581.00 or any other claimed by the defendant was unlawful, nor composed of interest not agreed upon, nor of bank charges levies or penalties not envisaged in the loan agreement or authorized by the Central Bank of Kenya or the *Banking Act*. It is further denied that the mortgage security was



unlawful nor fraudulent nor null and void. It is further denied that the security was undervalued, or sold at a throwaway price, and that the defendant was unlawfully demanding kshs 293, 581.05 from the plaintiff. It is averred that the claim by the plaintiff was misconceived, unmaintainable and the account sought was unobtainable. It is further averred that no cause of action was disclosed.

3. The plaintiff testified on January 24, 2022. She was the widow of the borrower. She affirmed that the deceased had taken a loan with the defendant. She stated that she had obtained representation to the estate. She said that her husband had repaid kshs 850, 000.00. She said although she had done her calculations, but could not tell exactly how much was paid. She said that she knew that the deceased was repaying the loan, and when he died, she took over. She said she had deposit slips as her evidence, although she said that some were lost when they moved residence. She said that in 1999, only 4, instead of 12, payments were made. No payments were made in 2000. She said in February 2001, The deceased was in arrears. She further said that the insurer paid kshs 774, 630.00. By December 2001, the balance was kshs 1, 000, 000.00. she approached the bank, and was allowed to pay kshs 10, 000.00 per month. She said that she was paying the debt regularly, but was facing challenges, and the loan kept increasing. She conceded that a statutory notice was addressed to the estate. She said that she did not get the property valued by a valuer of her own choice. She conceded that the deceased was in default, the insurer paid, but that did not clear the loan. She admitted getting the auctioneer's notice. She asserted that the property was insured, and when the person who had taken the loan and the insurance died, the insurer paid, and that should have cleared the loan. She stated that the insurance was meant to settle any outstanding amounts on the loan on the death of the insurer. The plaintiff produced a number of documents to support her case.
4. The defendant testified on February 23, 2022, through Jared Ouma Talo, its Kisumu branch manager. He said that there was a mortgage protection cover, meant to cover the borrower if he died before the facility was fully paid. In case of any arrears, the insurance was to prorate. He stated that it covered the outstanding amount subject to conditions. He explained that the facility was insured, and the insurance was paid by the bank , so long as the instalments were paid, for part of the instalments went to insurance. He explained that the bank stops paying as soon as the borrower falls in arrears. He stated that the insurance premiums were paid on condition that the borrower was up to date with the installments. He explained that the principal amount and the interest must be paid together, and where the loan goes into arrears penalties and levies would be charged, which would increase the amount owed. He explained that at the point of borrowing, the borrower enters into 2 contracts, the mortgage and the insurance. In the insurance contract the bank transfers its risks to the insurance company. He explained that the insurance policy is for the benefit of the bank. The witness produced a bundle of documents to support the case for the defendant.
5. At the close of the oral hearings, although both sides were required to file written submissions, only the plaintiff filed written submissions which I have read through and noted the arguments made.
6. In the plaint, the plaintiff seeks 2 principal prayers, accounts and the market value of the land.
7. With respect to the taking of accounts, the plaintiff alleged that the loan had been paid in full, but she had no documents to support that contention, saying that receipts or deposit slips were lost when she moved houses. She conceded that for certain years, 1999, 2000 and 2001, being examples, only partial payments were made. There is clear evidence, therefore, that the loan was not being adequately serviced, and the deceased had not cleared the same as alleged. Secondly, her case appears to be that the insurance policy covered the total outstanding amount, and the death of the deceased and payment of the assured amount meant that whatever was outstanding was settled in full. The insurance policy is predicated on the loan amount plus the interest charged, and logically covers the loaned amount plus the interest charged over the loan period, so long as the installments are paid timeously. It does



not cover any penalties or levies charged upon default, for those amounts are not certain as at the time the insurance contract is entered into. It is admitted that the borrower was in default, for the loan repayments were not being made as required under the contract. No doubt, penalties and levies applied, increasing the amount outstanding beyond the contracted amount, which meant that the amount above the contracted amount was not insured. Consequently, the payment of the insured amount did not clear the loan and the interest outstanding.

8. It is the plaintiff who is challenging the amounts claimed by the defendant. The duty was on her to prove that the loan had been paid in full. She is the one demanding the taking of accounts. The defendant has stated the amount said to be outstanding, it would be incumbent on the plaintiff to place on record documents showing how the loan was falls settled according to her, to counter what the defendant is claiming. The defendant has placed a statement on record, the plaintiff has not provided documents to prove that payments were made to the defendant, beyond what is reflected in the statement. She said that her records were lost. The party who alleges is expected to prove. The burden was on her to establish that the loan was repaid, and that nothing was outstanding to warrant sale of Butsotso/Shikoti/3471. She did not prove that the principal amount had been paid in full. The taking of accounts would require that she places material on record to show the settlement of the loan plus interest, whereupon the burden would shift to the defendant to show otherwise. That is what taking of accounts should be about.
9. The second element is with respect to the foreclosure of Butsotso/Shikoti/3471. Her case is that the sale of that property was not lawful as it was sold after the loan had been paid in full, following the alleged payment of kshs 800, 000.00 by the deceased and the kshs 776, 630.00 paid by the insurer. There is no evidence that the loan and interest had been paid in full, in view of what I have stated above, hence the issue of the sale of Butsotso/Shikoti/3471 being unlawful does not arise. On the matter of the property being sold at an undervalue, I note that the plaintiff did not place before the court a valuation report to indicate the amount she is claiming was the current market value. She appears to rely on the report placed on record by the defendant, done by Highlands Valuers Limited, dated November 28, 2005, which put the market value at kshs 2, 150, 000.00. However, that report has 3 other valuations, being a mortgage value of kshs 1, 720, 000.00, a forced sale value of kshs 1, 290, 000.00 and insurance value of kshs 1, 750, 000.00. The property was apparently sold at the forced sale value, which conformed with that valuation done by Highlands Valuers Limited. It was the plaintiff claiming the sale was at an undervalue, the burden was on her to establish that the sale price was an undervalue based on her own valuation.
10. Overall, the plaintiff has not established the case for grant of the orders that she seeks in her plaint, for taking of accounts, and to be paid the market value for Butsotso/Shikoti/3471. The suit is without merit, and I hereby dismiss it. The defendant shall have the costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 23RD DAY OF DECEMBER, 2022.

WM MUSYOKA

JUDGE

Erick Zalo, court assistant.

Mr Athung'a, instructed by Athung'a & Co, Advocates, for the plaintiff.

Ms Onsongo, instructed by Owiti Otieno & Ragot, Advocates, for the defendant.

