



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL CASE NO. 32 OF 2001**

**BONFACE MAGENI OBUYU.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA.....DEFENDANT**

**JUDGMENT**

1. Bonface Mageni Obuyu the plaintiff herein sued the defendant and sought the following reliefs:

a) A declaration that the charges over title number Bukhayo/Mundika/2346 and Bukhayo /Mundika 2585 are null and void and are not valid security for the loan nor for interest claimed by the defendant, thus rendering the threatened sale illegal.

b) Costs of this suit.

c) Any other relieve which this honourable court may deem just and fit to grant.

2. The contention by the plaintiff is that on 18<sup>th</sup> November 1985 he entered into a money lending contract. The loan was to be secured by a charge on the plaintiff's land parcels number Bukhayo/Mundika/2346 & 2585.

3. On 22<sup>nd</sup> November 1985 both parties executed a charge over the said parcels of land to secure the repayment of Kshs. 100, 000/= loan. The plaintiff argues that the charge was illegal for it did not receive the requisite consent by the Land Control Board. He contended that the contract was incomplete for there was no agreement on the rate of interest payable.

4. The plaintiff contended that he was not served with the statutory notice of sale and he had repaid the principal sum at the time of the intended sale.

5. The defendant in the statement of defence contended that a loan of Kshs.130, 000/= was secured by a charge over land parcel number Bukhayo/Mundika/2585 while land parcel number Bukhayo/Mundika/2346 was for a loan of Kshs. 20,000/=.

6. The defendant further contended that there was no legal obligation to seek the Land Control Board's consent.

7. It was denied that the plaintiff had paid the principal sum in full.

8. The issues for determination are:

a) Whether or not the consent from the Land Control Board was a prerequisite for the charge of the plaintiff's property;

b) Whether the plaintiff charged his two parcels of land for one or two different loans; and

c) Whether the plaintiff has repaid the loan(s) advanced to him.

9. The Land Control Act provides for controlled transactions in agricultural land. The transactions affecting agricultural land which are controlled are specified in Section 6(1) of the Act and include, sale, transfer, lease, mortgage, partition, sub-division and sale of shares in a private company or co-operative society which owns land. Section 6 (1) (c) provides:

**the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the**

**land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

In the instant case, Mary Conex Barasa the widow of the plaintiff, and who substituted him after his demise, described the disputed property as a plot. At no time did she plead nor testify that the two parcels of land were agricultural land.

10. The defendant contended that the land was not subject to the consent by the land control Board.

11. Ordinarily it would have been the duty of the plaintiff, being the proprietor, to apply for the consent where such a consent was a prerequisite. He cannot turn around and claim that the transaction was illegal for want of the consent if he did not bother to apply for one.

12. In the absence of pleading and evidence that the land was agricultural land, I will not be persuaded by the submissions made for the plaintiff. Submissions cannot amend pleadings nor can they substitute evidence. I will take judicial note of the meaning attached to the word "plot" in Kenya while referring to land and make a finding that this was not an agricultural land and therefore the consent by the Land Control Board was not a prerequisite.

13. Whether the plaintiff charge his property for two separate loans is neither here or there. Both parties agree that the overdraft was for KShs.130, 000/= which was later converted to a normal loan. The case cannot turn on this issue.

14. The plaintiff contended that he was not given the statutory notice before the defendant sought to realize the outstanding loan and interest. However the evidence on record indicate that the Notice was sent to him using the address he had supplied in the charge documents.

If he had changed his address, he had the duty to inform the defendant. Since he did not do so, he cannot complain that he did not receive the Notice.

15. From the foregoing, the claim by the plaintiff cannot succeed. The same is dismissed with costs. If the loan has not been repaid, the defendant be at liberty to complete the process of realizing the same. Right of appeal 30 days.

**DELIVERED and SIGNED at BUSIA this 27<sup>th</sup> day of January, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**