



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 22 OF 2013**

**PETER MAINA WAIHENYA.....1<sup>ST</sup> PLAINTIFF**

**KARATINA MARKET MALL LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE INDUSTRIAL AND COMMERCIAL**

**DEVELOPMENT CORPORATION (ICDC) LTD.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS .....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**Brief Facts**

1. The plaintiffs instituted this suit herein vide a plaint dated 13<sup>th</sup> August 2013 seeking that this Honourable Court issue a declaration that any proclamation and/or sale by the Defendants of the said building on Land Parcel Number KARATINA/TOWN/BLOCK1/182 (hereinafter referred to as the suit property) by public auction or otherwise is unlawful and untenable and that a permanent injunction do issue against the defendants barring them from selling the building on Land parcel Number KARATINA/TOWN/BLOCK1/182 by public auction.

**The Plaintiffs' Case**

2. It is the plaintiff's case that the 2<sup>nd</sup> plaintiff Waihenya Chemist Limited is a limited liability company and that the 1<sup>st</sup> plaintiff was a director. The 1<sup>st</sup> plaintiff took a loan of Kshs.4,000,000/- from the 1<sup>st</sup> defendant in November 1999. The 2<sup>nd</sup> plaintiff is a company with three directors of whom two passed on leaving the 1<sup>st</sup> plaintiff as the only director with a shareholding of 10%.

3. The 1<sup>st</sup> plaintiff testified that 2<sup>nd</sup> plaintiff repaid Kshs. 3,000,000/- to the 1<sup>st</sup> defendant leaving an outstanding balance of Kshs. 1,000,000/-. The 1<sup>st</sup> Plaintiff stated that he was a guarantor to the loan in which he gave his property L.R Number KARATINA/TOWN/BLOCK1/182 as security.

4. It was stated further that the outstanding sum was Kshs.60,000,000/= due to interest and penalties over the years that the bank had revised the loan to a negotiated sum of Kshs.8,000,000/- payable in eighteen(18) months. However the bank added internal cost of Kshs.2,200,000/- for legal fees and document handling fee raising the amount payable to the bank to Kshs.10,200,000/-.

5. It is the plaintiffs' case that the 2<sup>nd</sup> plaintiff was not aware of the negotiated loan arrangement between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant and it only came to know about the sale by auction vide an advertisement to sell the security. This is because he was not served with the relevant information by the 1<sup>st</sup> defendant.

6. The 1<sup>st</sup> plaintiff led evidence in court stating that he is still willing to repay the loan but was seeking for more time to do so. It was further stated that the defendants ought to have pursued 2<sup>nd</sup> plaintiff who was the principal debtor before pursuing the 1<sup>st</sup> plaintiff for he was only a guarantor.

7. The 1<sup>st</sup> plaintiff further testified that he has filed several cases against the 1<sup>st</sup> defendant being Nairobi HCCC No. 540 of 2010 which is still pending and Nyeri CMCC No. 512 of 2005 which was dismissed for want of prosecution.

## **The Defendants' Case**

8. The 1<sup>st</sup> Defendants led evidence in court through Ms. Esther Mongina Nyachenga, who is a Portfolio Officer with the 1<sup>st</sup> defendant to the effect that in 1996 the 1<sup>st</sup> plaintiff applied for a loan personally on behalf of his business, the 2<sup>nd</sup> plaintiff to finance the business. He guaranteed the loan using Land Parcel Number KARATINA/BLOCK 1/182 which is registered in his name. A legal charge was thus created by the 1<sup>st</sup> plaintiff and duly registered in favour of the 1<sup>st</sup> defendant. Subsequently, in July 1999 the 2<sup>nd</sup> plaintiff received an advance of Kshs.2,000,000/- and thereafter in August 1999, he was advanced a further kshs.2,000,000/-. The 1<sup>st</sup> plaintiff repaid back the loan leaving an outstanding sum of Kshs.1,000,000/-

9. The 1<sup>st</sup> defendant further testified that in 2012, the outstanding sum owed to it at the time of demand was Kshs.29,052,287.86/- whereas currently the sum stands at Kshs.82,1777,271.27/- due to interests and penalties.

10. It is the 1<sup>st</sup> defendant's contention that though it has demanded the outstanding sums severally from the 1<sup>st</sup> plaintiff, no demand notice was issued to the 2<sup>nd</sup> plaintiff because it was just a business name of the 1<sup>st</sup> Plaintiff. The defendants further stated that they have issued several notices to the 1<sup>st</sup> plaintiff informing him of their intention to sell the security.

11. Further, the defendants contend that vide a letter dated 21/03/2018, they gave the 1<sup>st</sup> plaintiff an offer to pay Kshs. 10,257,806/- which comprised of Kshs. 8,000,000/- as the principal amount, Kshs. 2,239,806/- as legal fees and Kshs. 18,000/- as documentation handling fee. However up to date, the 1<sup>st</sup> plaintiff has not made any attempt to repay the said sum or any part thereof.

12. The defence witness further stated that the 1<sup>st</sup> plaintiff has obtained injunctive orders against the bank in Nairobi HCCC No. 540 of 2010 and in Nyeri HCCC No. 10 of 2015 and had also filed another case Nyeri CMCC No. 512 of 2005. The defence witness concluded by stating that the 1<sup>st</sup> defendant is still desirous of selling the security in satisfaction of the outstanding amount.

## **Plaintiffs' Submissions**

13. The plaintiffs submit that the defendants ought to be estopped from making good their effort to dispose off the suit property because they never issued a single demand notice to the 2<sup>nd</sup> plaintiff being the principal debtor. The defendants indeed acted in haste to make good the sale of the plaintiff land. It was further argued that the principal debtor was a limited liability company with a known physical address and location and therefore ought to have been served with the notices. The 1<sup>st</sup> plaintiff further contends that the demand notice issued to him on behalf of the borrower was never produced in court as evidence.

14. The 1<sup>st</sup> plaintiff argued that the defendants never did any valuation of the property which is contrary to the provisions of the Auctioneers Act and that no valuation report prior to the intended exercise of statutory right of sale was availed. Consequently, the court was urged to bar the defendants from exercising its statutory right of sale.

15. The Plaintiffs further submit that the defendants are in contravention of the in duplum rule because they have charged interests that have exceeded the principal amount. Further the 1<sup>st</sup> defendant never produced into court any evidence to show authority from the Central Bank to allow it to charge interest over and above the principal sum or to alter the interest charged on the facility. Additionally, no tabulation was produced in court to demonstrate how the outstanding amount claimed was arrived at.

16. The 1<sup>st</sup> plaintiff states that they had an agreement with the 1<sup>st</sup> defendant to settle the outstanding sum at Kshs. 8,000,000/- however the 1<sup>st</sup> defendant negated on the agreement and further frustrated the efforts of the 1<sup>st</sup> plaintiff to repay back the said sum. The 1<sup>st</sup> Plaintiff humbly submits to the court to prevail upon the 1<sup>st</sup> Defendant and allow him to settle the amount as agreed with the defendants.

17. The plaintiffs submit that the defendants have acted in bad faith and have circumvented vital legal procedures that ought to be followed by a bank claiming to exercise its statutory power of sale. The 1<sup>st</sup> defendant ought to have exhausted its right over the principal debtor and demand payment from it and upon failure of the principal debtor to repay the outstanding sum, the 1<sup>st</sup> defendant ought to have sold the security.

18. The 1<sup>st</sup> Plaintiff concludes his submissions by stating that he is willing to pay the balance of the loan facility at the sum of Kshs. 8,000,000/- and requests the court to give him 60 months due to the current pandemic. He stated that he is however willing to make a down payment of Kshs. 500,000/-.

19. The plaintiffs submit that the court should find that the defendants acted in bad faith and took advantage of the plaintiffs and should dismiss their defence as consisting of mere denial of facts.

## **Defendants' Submissions**

20. The defendants submitted that the 1<sup>st</sup> plaintiff had knowledge that if the principal debtor, the chemist, defaulted in payment of the loan, the charged property would be sold to realize the debt outstanding. The 1<sup>st</sup> plaintiff admitted on cross examination that out of the rental income he received from letting out the premises in the 1<sup>st</sup> term, Kshs. 3,150,000/- and the 2<sup>nd</sup> term, Kshs. 7,200,000/-, he did not pay a single penny towards repayment of the loan owed to the 1<sup>st</sup> defendant.

21. It is the defendants' submission that the 2<sup>nd</sup> Plaintiff alleges that it has a right to come to court to protect its leasehold interests on the

charge to which the plaintiffs never sought its consent as required under the agreement. The defendants further submitted that the 1<sup>st</sup> plaintiff has added new evidence to his claim on raising issues that do with failure to do valuation of the suit property; not realizing the debt amount from the principal debtor first; violation of the in duplum rule by the 1<sup>st</sup> Defendant and not presenting any evidence in court to show that Central Bank allowed the 1<sup>st</sup> defendant to charge interest over and above the principal sum.

22. The defendants submit that the principal debtor and the 1<sup>st</sup> plaintiff have persistently defaulted on servicing the loan advanced to him prompting the 1<sup>st</sup> defendant to exercise its statutory power of sale for which it issued the requisite statutory notices thereby crystallizing the statutory right. It thereafter instructed the 2<sup>nd</sup> defendant to realise the charge as the loan amount was still due and outstanding.

23. The defendants further submitted that the plaintiffs have filed a plethora of cases in different courts to frustrate the 1<sup>st</sup> defendant's effort in exercising its statutory right of sale despite the fact that the 1<sup>st</sup> plaintiff and the principal debtor failing to pay the loan amount or redeem the charge.

24. The defendants submitted that the alleged unregistered lease agreement dated 31<sup>st</sup> December 2003, between the plaintiffs is a contract between the plaintiffs and a 3<sup>rd</sup> party and cannot be enforced against the 1<sup>st</sup> defendant. Further the said lease agreement did not create an estate in the charged property and thus cannot defeat the 1<sup>st</sup> defendant's registered charge over the property dated 11/12/1998, which takes priority over any subsequent transactions. Indeed, the 1<sup>st</sup> plaintiff did not have a good title or interest to pass to the 2<sup>nd</sup> plaintiff and thus the 2<sup>nd</sup> plaintiff has no enforceable right against the 1<sup>st</sup> defendant.

25. The 1<sup>st</sup> defendant submitted that the appearance of the name of the 2<sup>nd</sup> defendant or lack of it in the notification of sale does not invalidate the said notification and neither does it invalidate the 1<sup>st</sup> defendant's right over the suit land.

26. The defendants further argued that for the plaintiffs to seek an injunction, which is an equitable remedy, they ought to come to court with clean hands and further the claim in which they rely on must be a legitimate one. In this case the plaintiffs' claim is based on a lease agreement dated 31/12/2003 to which the 1<sup>st</sup> defendant is not privy to and further the 1<sup>st</sup> Plaintiff's conduct is unbecoming of a litigant seeking equity.

27. Making reference to the case of **Bii vs Kenya Commercial Bank Limited (2001) KLR 458** the defendants submitted that once a property is offered as security, it becomes a commodity of sale whose loss can be quantified and compensated adequately in damages. Thus the 1<sup>st</sup> plaintiff knew too well that by offering the suit property as collateral, the suit security was subject to sale in the event of default of payment of the loan. Therefore if the injunction is granted it will prevent the 1<sup>st</sup> defendant from exercising its statutory powers of sale guaranteed under Section 96 of the Land Act No. 6 of 2012.

28. The defendants further submit that the plaintiffs have not made out a case to warrant being enjoined. Relying on the case of **Mrao Limited vs First American Bank of Kenya Ltd (2003) eKLR**. The defendants further contend that they are not in breach of the contract nor have they infringed on the 1<sup>st</sup> plaintiff's contractual or statutory rights and that they do not owe any contractual obligation to the 2<sup>nd</sup> plaintiff.

29. The defendants state that the plaintiffs are seeking to alter the terms of the lending contract as between the 1<sup>st</sup> plaintiff and defendant thereby discharging the 1<sup>st</sup> plaintiff from completing his obligation to repay back the loan. The defendants relied on the case of **Christopher Ndolo** where the court stated that it cannot rewrite the agreement or contract between the parties.

30. The defendants further submit that the plaintiffs are bound by their pleadings and cannot add flesh to their pleadings. The defendants further contend that as per the plaint, the plaintiffs' cause of action does not go beyond the unlawfulness of the intended auction in view of the lease agreement and the proclamation notice issued by the 2<sup>nd</sup> defendant. In saying so the defendants make reference to the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**. Further, the Plaintiffs purported to address other issues in the witness statement which is in contravention to the holding in the case of **Vishva Stone Suppliers Company Ltd vs RSR Stone 2006 Limited [2018] eKLR** where the court held that a witness statement cannot be substituted for any pleadings nor can it be taken as a pleading.

31. The defendants state that the plaintiffs are guilty of abuse of the court process because they have filed multiple suits amounting to forum shopping. The plaintiffs have not disclosed to the court all material or important facts or documents which have a bearing on the adjudication of the issues raised in the case.

32. The defendants further submit that although the plaintiffs have not pleaded damages, the value of the charged property is ascertainable and the 1<sup>st</sup> plaintiff can be compensated by way of damages.

### **Issues for determination**

- a) Whether the plaintiffs are entitled to a declaration that the intended sale by public auction is unlawful and untenable
- b) Whether the plaintiffs have established a case for a permanent injunction against the defendant.
- c) Who between the parties should pay the costs of the suit

### **The Law**

33. It is important to establish the validity of the charge as against the plaintiffs. According to the plaintiffs, the 2<sup>nd</sup> plaintiff entered into a loan agreement with the 1<sup>st</sup> defendant and the 1<sup>st</sup> plaintiff became the guarantor for 1<sup>st</sup> plaintiff on the facility. The 1<sup>st</sup> plaintiff offered his property L.R Number KARATINA/TOWN BLOCK1/182 as a collateral. The defendants on the other hand state that the 1<sup>st</sup> plaintiff applied for the loan in person on behalf of his business, which was a limited liability company.

34. On scrutiny, the loan agreement, I note that the parties are Wahenya Chemist Limited named as the borrower and Industrial and Commercial Development corporation the 1<sup>st</sup> defendant. L.R KARATINA TOWN/BLOCK 1/182 was charged as security for the facility through a charge created and registered as required by the law. The 1<sup>st</sup> plaintiff executed a personal guarantee with the rate of interest at 26% p.a.

35. In the event of default of the loan, the personal guarantee form provides in **Clause 3(1)**:-

**“Whenever the Principal Debtor shall make default in the payment of any instalment on the principal sum for the time being outstanding interest thereon and other moneys’ due and payable by him to the Corporation for the space of fourteen days the guarantor(s) of either of them will within seven days after demand in writing pay to the Corporation the amount of the principal sum for the time being outstanding interest thereon and other monies so unpaid.”**

36. From the foregoing, it is clear that either the principal debtor or the guarantor could be pursued in the event of default upon being served with requisite notices. Thus the bank was within its purview in pursuing the 1<sup>st</sup> Plaintiff to recover the outstanding sum.

37. It is also noteworthy that the 1<sup>st</sup> plaintiff is both the guarantor and the chargor. Accordingly pursuant to the charge, he has bound himself to repay back the loan amount in the event of default by the principal debtor.

38. The law applicable in this case is stipulated in **Sections 72, 74 and 77** of the **Registered Land Act** (now repealed).

39. Section 72 provides for the right of redemption of the security before the land is sold **“upon fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the charge.”**

40. Additionally, the chargee who is the 1<sup>st</sup> defendant herein was obligated to give three months notice to the chargor of his intention to sell the security in exercise of its rights of redemption.

41. Section 74 provides that in case of default, the chargee shall serve the chargor in writing with **“the notice to pay the money owing or to perform and observe the agreement, as the case may be.”** In the event the chargor does not comply within three months of the date of service of the notice served herein the chargee may sell the charged property.

42. Section 77 grants the chargee the power of sale. The section provides that the chargee has power to exercise the power of sale acting in good faith to the chargor and sell the security by public auction to recover the unpaid sums, costs and interest.

43. The 1<sup>st</sup> plaintiff is both the charger and guarantor in the agreement in that he charged his land KARATINA TOWN/BLOCK 1/182 in favour of the principal debtor and the borrower the 2<sup>nd</sup> plaintiff.

44. It is not in dispute that the loan of Kshs.4,000,000/- was advanced in the year 1999 to the 2<sup>nd</sup> defendant and that the interest was at the rate of 26% per annum. It is also not in dispute that the loan has not been fully paid and there is still a substantial amount owing to the 1<sup>st</sup> defendant.

45. The personal guarantee dated 11<sup>th</sup> December 1998 executed by the 1<sup>st</sup> plaintiff provides in clause 3(2) as follows:-

**“For all purposes the liability of the Guarantor(s) to the Corporation under this Guarantee (including in particular but without prejudice to the generality of the foregoing for all purposes the liability of the Guarantor(s) for interest) every sum of money which may now be or which hereafter may from time to time become due or owing to the Corporation as aforesaid by the Principal debtor shall be deemed to continue due and owing to the Corporation as aforesaid by the principal debtor until the same shall be actually paid to the Corporation notwithstanding the bankruptcy of the principal debtor or any other event whatsoever.”**

46. Accordingly, the legal charge in Clause 6(a) and (c) on page 5 states:-

**(a) “If the chargor shall make default in the payment of interest on the days hereinbefore provided or shall fail to pay any of the instalments on the days hereinbefore provided for or within ten days of grace thereafter then and in such case the whole principal amount with interest then remaining due and owing by the Chargor under this security shall immediately become due and payable and the Corporation shall be entitled to recover the same forthwith.”**

**(b) “The Chargee’s statutory power of sale and its power of appointment of a Receiver as provided for by the Registered Land Act (Cap 300) shall be deemed to have been incorporated herein and shall apply to these presents so far as circumstances permit.”**

47. In view of the foregoing clauses in the guarantee and the legal charge, the documents are explicit that the 1<sup>st</sup> plaintiff entered into an

agreement on matters pertaining to the loan facility on behalf of the 2<sup>nd</sup> plaintiff. In the event of default, the 1<sup>st</sup> plaintiff covenanted with the 1<sup>st</sup> defendant to pay all the amounts payable by the 2<sup>nd</sup> plaintiff and thereby by executing the charge and guarantee.

48. It is my considered view that there is a legally enforceable contract between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant.

49. The loan agreement between the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> defendant was made on 15/08/1999 and the personal guarantee by the 1<sup>st</sup> plaintiff was executed on 14/12/1998. The charge was registered on 11/12/1998. The plaintiffs annexed to the plaint dated 31<sup>st</sup> December 2003 the lease agreement between 1<sup>st</sup> plaintiff and Karatina Market Mall Ltd. leasing all that building on L.R Karatina Town/Block 1/182. The lease was for a period of five(5) years and three months commencing in March 2009 for a monthly rent of Kshs.50,000/-. The lease was renewable upon mutual agreement of the parties and was not registered with the lands office as required by law.

50. By the time of the lease, the charge over L.R Karatina Town/Block 1/182 was in force. The charge had alien over the security so long as the loan advance by the 1<sup>st</sup> defendant remained outstanding. The 1<sup>st</sup> defendant's right in the loan agreement and the charge could not be affected by any subsequent agreement between the charger and a 3<sup>rd</sup> party. The 1<sup>st</sup> plaintiff was at liberty to lease or rent out his premises so long as he does not interfere with the collateral. the 2<sup>nd</sup> plaintiff cannot then come to court to defend its interest as against that of the 1<sup>st</sup> defendant.

51. Section 74 required the 1<sup>st</sup> defendant in case of default to serve the plaintiffs with requisite statutory notice of its intention to redeem. The 1<sup>st</sup> defendant testified and produced documentary evidence of service of the notices dated 8<sup>th</sup> July 2010. Then upon being instructed by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant, the auctioneer issued to the charger a redemption notice (dated 16<sup>th</sup> July 2010) giving the charger forty five(45) days to redeem the property by paying the sum of Kshs.17,696,436.94/- failure to which the property would be sold by way of public auction. In an affidavit sworn on 6<sup>th</sup> August 2010 by the 1<sup>st</sup> plaintiff in HCC No. 540 of 2010 between the parties, he admitted having been served with the requisite notices on 17<sup>th</sup> July 2010. The 1<sup>st</sup> plaintiff attached the said notice to his supporting affidavit while the defendant produced them in evidence. As such, the 1<sup>st</sup> defendant complied with Section 74 of the Registered Land Act (now repealed) whose provisions are replicated in the Land Act, 2012.

52. I am satisfied that the defendant was not in breach of his statutory duty in dealing with the 1<sup>st</sup> plaintiff.

53. The 1<sup>st</sup> plaintiff raised the issue that the statutory notice was not served on the 2<sup>nd</sup> plaintiff. As I have already pointed out earlier in this judgement, the 1<sup>st</sup> plaintiff is the one who executed all the legal documents including the personal guarantee. As such the 1<sup>st</sup> defendant was entitled to serve any of the plaintiffs or both of them with the statutory notices. The failure to serve the 2<sup>nd</sup> plaintiff by the 1<sup>st</sup> defendant does not invalidate the said notice or render the intended sale by public auction unlawful.

54. On perusal of the plaint, the plaintiff has not sought any orders as to the 1<sup>st</sup> defendant being ordered to render the accounts in regard to the outstanding amount. In the 1<sup>st</sup> plaintiff submissions, the issue of the duplum in addition to other new issues were raised. It was argued that the duplum rule was not followed in computation of interests on the loan. I am of the considered view that this is an extraneous matter that the 1<sup>st</sup> defendant or the court was not notified of in advance. The prayers in the plaint are restricted to the issue of a permanent injunction and the validity of the redemption of the security.

55. The plaintiffs are seeking a permanent injunction which is an equitable order from this court. It is trite law that a party who seeks equity must do equity. The 1<sup>st</sup> plaintiff herein has not come to court with clean hands for he has failed to remit outstanding loan balances despite receiving income from leasing out the building on the collateral. It is not in dispute that the plaintiffs owe the 1<sup>st</sup> defendant a substantial amount being the outstanding loan plus interests and penalties. The parties entered into a contract namely the loan agreement as to what ought to happen in case of default. The parties are bound by their contract and there is no way any of them can depart from it until each has fulfilled its obligations.

56. The loan is still outstanding and the terms of the loan agreement ought to apply. The plaintiffs are looking for an escape route by seeking a permanent injunction which they are well aware that the remedy is not available to them since the contract between them and the 1<sup>st</sup> defendant still subsists.

57. The plaintiff also seeks for orders that the intended sale of the security by the 1<sup>st</sup> defendant be declared unlawful and untenable. I repeat that it is trite law that parties are bound by the terms of their contract. The plaintiff does not allege breach of any clause by the 1<sup>st</sup> defendant or any infringement of his right. The steps taken by the 1<sup>st</sup> defendant to recover the outstanding amount are in accordance with the contract. How then, can this court declare the actions of the 1<sup>st</sup> defendant unlawful and untenable unless the 1<sup>st</sup> defendant is in breach?

58. The plaintiffs have filed multiple suits in various courts on this very subject matter. This was admitted by the 1<sup>st</sup> plaintiff and evidence was produced by the 1<sup>st</sup> defendant. In some of the cases injunctive orders were given and later vacated. Some of the suits have been dismissed for want of prosecution. The 1<sup>st</sup> plaintiff did not disclose these facts to the court in filing this suit. I am in agreement with the 1<sup>st</sup> defendant that the filing of the multiple suits on the same subject and between the parties as well as the non-disclosure to the court amount to an abuse of the court process.

59. In conclusion, I find that the plaintiffs have failed to prove on the balance of probabilities that they deserve the orders sought. The burden of proof has not been discharged as required by law.

60. Consequently, this suit is hereby dismissed with costs.

61. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 18<sup>TH</sup> DAY OF MARCH, 2021.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 18<sup>th</sup> day of March 2021.**