



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL SUIT NO. 6 OF 2014

HELLEN ATIENG WANYAMA.....PLAINTIFF

VERSUS

COOPERATIVE BANK OF KENYA.....DEFENDANT

J U D G M E N T

By a plaint dated 7th April, 2014, the plaintiff prays for judgement against the defendant for:-

1. A declaration that she does not owe the defendant the sums of money alleged either by way of a charge or otherwise and that the purported sale is irregular and unlawful and she is entitled to damages.
2. A permanent injunction restraining the defendant whether by themselves, their servants, agents and or any other persons whomsoever and howsoever from attaching the plaintiff's parcel of land No. EAST BUKUSU/NORTH KANDUYI/3011 or any other property of the plaintiff in its statutory power of sale.
3. Costs of the suit.

The plaintiff states that she is the registered owner of the whole of that parcel of land known as EAST BUKUSU/NORTH KANDUYI/3011 (hereinafter the suit property). She states that on the 2nd February, 2014, the defendant issued a notification of sale of the suit property purportedly to recover Kshs 744, 944 owing to the defendant pursuant to a purported charge over the suit property.

She contends that she does not owe the defendant the amount aforesaid and that she has neither executed any legal charge in favour of the defendant to warrant such attachment and that the defendant failed to act with diligence to ascertain the authenticity of the title deed because she is in possession of the original title deed.

The defendant filed its statement of defence pleading that the issuance of the notification of sale over the suit property is an act it was legally entitled to. That the legal charge was a valid legal charge duly executed and registered.

It is further pleaded that the plaintiff being a guarantor in respect of a loan advanced to her husband one **Alfred Wafula Wanyama** and being the charger, she is obligated under the deed of guarantee and the legal charge to settle liabilities of her husband. The defendant avers that it is not aware that the plaintiff is in possession of any other original title deed other than the one it is holding over the suit property.

The plaintiff testified as PW-1. She adopted her statement dated 11th February, 2016 as her evidence in chief. She stated that she started getting demands from the defendant that she had guaranteed the said Alfred to secure a sum of Kshs 500,000/= using her title deed. That it is true that her title deed is with the defendant bank. That sometimes in August 2011, she realized that her title deed was lost which she duly reported at Bungoma Police Station under OB No. 6 of 16/8/2011. She was advised to report the loss to the lands office. That the said Alfred died later on.

She stated that later on she found the title deed with Rose Matere of PATS Agencies and was told that her late husband had used the said title deed to secure the sum of Kshs 160,000/= which sum she paid and retrieved the title deed. She forwarded her signatures for verification. She did not sign any document before any advocate.

PW-2 was Emmanuel Karisa Kenga. He stated that he is a retired commissioner of police and a document examiner with 28 years experience. He stated that he received a number of documents from J.O Makali Advocate for examination. That he was tasked with examining and comparing disputed signatures and stamp impression with known signatures and stamp impressions. His findings are contained in a report dated 29/4/2019 produced as Pexh 4. The plaintiff closed its case.

DW-1 was Shadrack Kiplangat Chirchir. He testified that he is a business banker with the defendant. He stated that the plaintiff was a

guarantor and executed a charge signed by the borrower before advocate Ocharo Kebira and registered on 12/11/2011. The plaintiff was the charger. He stated that the defendant is holding the original title. He further stated that at the time of the borrower's death, the loan was in arrears and the guarantor was to take over and repay the loan.

DW-2 Ocharo Kebira-Advocate. He stated that he prepared the legal charge over the suit parcel of land pursuant to instructions by the defendant. Both the charger and the borrower appeared before him for execution of the charge and he identified them by their identity cards.

That after execution, he caused the registration of the charge on 12/9/2011 after satisfying himself through a search that the parcel was indeed in the charger's name. He later surrendered the original title deed Serial Number 155288 to the bank.

By consent, a report by the Land Registrar Kakamega dated 9/4/2021 was adopted as defence evidence.

By their submissions, the plaintiff raised the following issues for determination.

1. *Whether the charge registered over the suit property was valid.*
2. *Whether the defendant was entitled to exercise its statutory power of sale over the plaintiff's title.*
3. *Whether the plaintiff is entitled to the reliefs sought.*

On the first issue, counsel for plaintiff submitted that the plaintiff did not take a loan, received any monies or guaranteed any person any loan. He submits that PW2's report and the land registrar's report shows that the title deed used and the known signatures of the plaintiff were a forgery.

On the second issue, he submitted that since the charge was null and void for being secured by a forged title deed, the defendant could not in law exercise a valid statutory power of sale over an illegal document. Counsel has relied in the decisions in ***Jonathan Namulala Nyongesa Vs Multi Business Shooters Investors Ltd & 3 Others (2017) eKLR*** and ***Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others (2015)eKLR***.

The defendant on their part submits that the plaintiff stated that she lost her title deed only to find it in the hands of money lenders who dealt with the title. That the plaintiff could not produce the police abstract showing that she actually reported the loss of her title deed.

Counsel submits that the plaintiff indeed admitted her late husband was the beneficiary of the loan and that the claims of the title having been lost were made after the defendant demanded repayment of its loan.

It is submitted that the plaintiff appeared with her husband to sign the charge documents before DW-2 and she committed to repay the loan in the event of default by the borrower. It is finally submitted that the plaintiff conspired with the borrower to defraud the defendant since the land registrar denied the signature on the title deed.

Analysis and determination

From the above summary of the parties' case, the issue that comes up for determination is whether the charge over the suit parcel of land was properly created and if so, whether the defendant is entitled to exercise its statutory power of sale.

From the pleadings, the centre of dispute is a charge over the suit parcel of land. The plaintiff asserts her proprietary rights over the parcel of land. She denies knowledge of an alleged charge in favour of the defendant. She states that her title deed got lost and she later found it in the hands of a money lender wherein she paid sums allegedly advanced to her late husband.

The defendant on the other hand claims it has the original title to the parcel of land. The authenticity of the title document is the subject of 2 expert opinions. The first is by PW-2 Emmanuel Karisa Kenga. His report was produced as Pexh 4. His findings are contained in Page of his report. According to him, the signature of the land registrar contained in the title deed serial number 155288 allegedly charged by the defendant and the signature contained in title deed serial number 290387 held by the plaintiff are different and authored by a different author.

This findings is buttressed by the report of one George G. Ogotu, the land registrar whose signature was under examination. He filed his report dated 9/4/2021 produced by consent of the parties. According to him, the parcel of land was registered during his tenure in Bungoma. His report so far as is relevant states in part;

The title deed which was used to secure a loan from the cooperative bank is not genuine and that the signature it bears is not mine neither is the stamp. The said title deed is a forgery.

PW-2 was also required to examine the specimen signatures of the plaintiff contained in various specimens provided. His findings were that the signatures were also authored by a different author.

The third comparison was in the stamp impression of the said G.O Ogotu contained in the title serial number 155288 and title deed serial number 290387. Upon comparison, he found no agreement between the stamp impression and his conclusion was that the impression was made by a different instrument.

From the above analysis, this court comes to the conclusion that the two titles are different. The title deed held by the bank unfortunately is a

forgery. The defendant is a victim of fraudulent scheme and the title it is holding unfortunately is a fake one which cannot stand before a court of law.

Another conclusion that can be drawn is that the people who appeared before DW-2 must have impersonated the plaintiff and her late husband. Unfortunately one again, the identity documents produced before him were not produced for scrutiny by the court.

Unfortunately the bank did not produce the statement of account showing how the money was disbursed or into whose account. DW-2 was stood down to avail the title deed allegedly used to secure the loan. He did not produce.

As to whether the charge created over the plaintiff's parcel of land is valid, the answer is in negative. Having found that the title held by the bank is a forgery, there can be no way a valid charge can be created over the title capable of being enforced against the plaintiff.

In the circumstances, the plaintiffs claim against the defendant succeeds and the court makes the following orders.

1. The title deed held by the defendant over parcel of land known as EAST BUKUSU/SOUTH KANDUYI/3011 allegedly registered in the plaintiff's name is a forgery incapable of vesting any interest.
2. A declaration is hereby issued that the plaintiff does not owe the defendant the sums of money alleged either by way of a charge or otherwise and that the intended statutory power of sale comprised in Title number EAST BUKUSU/SOUTH KANDUYI/3011 is irregular.
3. A permanent injunction is hereby issued restraining the defendant whether by themselves, their servants, agents and or any other persons whomsoever and howsoever from selling the plaintiff's parcel of land No. EAST BUKUSU/NORTH KANDUYI/3011 in exercise of its statutory power of sale.
4. The plaintiff shall have costs of the suit.

DATED AND SIGNED AT BUNGOMA THIS 30TH DAY JULY, 2021.

S N RIECHI

JUDGE