



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 51 OF 2018

PETER NGUNGI NG'ANG'A.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

PAWABA AUCTIONEERS.....2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff herein (**Peter Ngugi Nga'ng'a**) took out a loan from the 1st Defendant (**Family Bank Limited**) in the year 2012. The loan amount was Kshs. 2, 700,000.00. It was secured by charging Land Parcel Nos. Eldoret Municipality/Block 27/1209, Eldoret Municipality/Block 21 (King'ongo'o)/3444, Kapsabet/Kapsaret/Block 1 (Yamumbi)/563 and Eldoret Municipality/Block 21 (King'ong'o)/574 (the suit properties herein)) to the 1st Defendant.

2. The Plaintiff is the registered owner of parcel numbers Eldoret Municipality/Block 27/1209 and Eldoret Municipality/Block 21(King'ongo'o)/3444 respectively. Land parcel number Kapsabet/Kapsaret/Block 1 (Yamumbi)/563 is registered in the name of Samwel Ngugu Wambuchi deceased whereas land parcel number Eldoret Municipality/Block 21 (King'ong'o)/ 574 is registered in the name of Ng'ang'a Njuguna.

3. Both the Plaintiff and 1st Defendant agree that at some point the Plaintiff fell in arrears and the 1st defendant through the 2nd defendant, advertised for sale of three of the said four parcels of land.

4. The Plaintiff vide his amended plaint dated 16th January 2019 avers that the 1st Defendant has not complied with all the due processes prior to instructing the 2nd Defendant to advertise for sale of the said parcels. The Plaintiff further contends that the value of the said suit properties has since appreciated and are now way beyond the amount owing to the 1st Defendant.

5. The Plaintiff pleads that the 1st Defendant has not pursued alternative and less drastic remedies than the one at hand, and neither has it given the Plaintiff due consideration as per the terms of engagement.

6. The Plaintiff therefore seeks the following reliefs;

a) An order that notification for the sale of the then intended auction against the suit parcels of land without the due process and consideration, is unconstitutional, unfair, unlawful, illegal, null and void.

b) Orders in terms of paragraphs 24, 25, 26A, 26B and 26C.

c) A permanent injunction to issue against the Defendants restraining them from interfering, offering or selling, transferring, alienating, or dealing in any manner whatsoever with suit parcels.

d) An order directing the 1st Defendant to release the title deeds and discharge documents to the suit properties used as security for the advancement of the loan.

e) A declaration that the Plaintiff had duly cleared the loan to warrant discharge of the security on the properties.

f) A declaration that the defendants have a legal duty and mandate to discharge and release the title documents belonging the deceased.

g) Cost of this suit.

h) Any other or further relief as the court may be pleased to grant.

7. The 1st Defendant filed a statement of defence dated 16th April, 2019 which is, in essence, a total denial of the claim. The 1st Defendant admits to having advanced a loan facility of Kshs. 2,700,000/= to the Plaintiff upon securing the same with aforementioned suit properties. The 1st Defendant contends that the Plaintiff defaulted in repaying the monthly instalments and was served with a statutory notice pursuant to Section 90 of the Land Act on 19th July 2014. It was the 1st Defendant's case that its right to sell the suit properties had accrued and that the Plaintiff was only trying to evade his contractual obligations.

Plaintiff's evidence

8. The Plaintiff testified that on 28th October, 2020, the 1st Defendant offered him a loan facility of Kshs. 2,700,000/= which was secured by (4) title deeds for the following parcels of land; Eldoret Municipality/Block 127/209, Eldoret Municipality/Block 21 (King'ongo'o)/3444, Kapsabet/Kapsaret/Block 1 (Yamumbi)/563 and Eldoret Municipality/Block 21 (King'ong'o)/ 574.

9. The Plaintiff produced a copy of his bank statements for the period between 3rd May, 2012 to June 2012 as PEX1. The Plaintiff testified that he has been servicing the said loan at the interest rate of 24.5% and an additional 5% whose basis he did not know.

10. The Plaintiff testified that before seeking this court's intervention he had paid a total sum of Kshs. 1, 700,000/=. He further testified that notification for sale by auction had been made by the 1st Defendant without considering the Plaintiff's proposals and request which had been vide the letter dated 3rd February, 2014. In the said letter the Plaintiff had requested the 1st defendant bank to issue him with an evaluation letter as it had sent him a notification of sale by advertisement in December, 2013.

11. The Plaintiff submitted that he was pleading with the bank to consider amicable remedies to repaying the loan. However, the bank never responded to the said letter and the plaintiff contends that the bank proceeded to gazette the suit properties for sale by auction without due notice.

12. The Plaintiff further testified that vide an advert in the Daily Nation newspaper published on 17th February, 2014 the bank through the 2nd Defendant listed the following parcels of land for auction; Eldoret Municipality/Block 21 (King'ong'o)/ 574, Kapsabet/Kapsaret/Block 1 (Yamumbi)/563 and Eldoret Municipality/Block 27/1209. The Plaintiff produced an extract of the Daily Nation newspaper as PEX3.

13. The Plaintiff submitted that he was never furnished with any valuation report prior to the said advertisement. He also testified that the 1st Defendant did not act in good faith when it gazetted his guarantors' properties instead of his own as one of his parcels of land had the highest value at the time.

14. The Plaintiff also produced copies of the valuation reports for the suit properties marked as PEX4 which he testified were as at 11th April, 2011. The Plaintiff further contended that the suit properties have since appreciated in value.

15. The Plaintiff testified that the court had earlier on granted him orders for stay on condition that he pays the 1st Defendant a sum Kshs. 400,000/= into two instalments of Kshs. 200,000/= which he claims to have paid. The Plaintiff produced his statements of account from Family Bank dated 14th February, 2014 and 28th April 2014 respectively as proof that he continued servicing the loan. The same were marked as PEX5A and PEX5B. He also produced three copies of bank cheques dated 18th May, 2015 as evidence that he deposited Kshs. 400,000/=, Kshs.500,000/= and Kshs. 300,000/= with the 1st Defendant in an effort to repay the loan. The same marked as PEX6.

16. The Plaintiff further testified that Kshs. 200,000/= being payment made toward the loan was never reflected in his loan repayment account and that there were deductions being made by 1st Defendant that he was not aware of.

17. The Plaintiff also testified that on 28th April, 2015 the 1st Defendant made a second advert for sale of Block 1/563 through Cleverline Auctioneers in the Daily Nation Newspaper. He produced an extract of the said newspaper as exhibit PEX7.

18. The Plaintiff also contends that after the Kshs. 2,700,000/= was disbursed in his account, he noticed that a deduction had been made towards the repayment of a previous unsecured loan that the plaintiff had taken earlier on.

19. The Plaintiff also testified that the Kshs. 2,700,000/= advanced to him was for a secured loan whose loan repayment period was three years and that at the time when the advertisement was being made the loan repayment period had not lapsed.

20. According to the Plaintiff he has paid the loan in full to the tune of Kshs. 3, 628,337/= which sum includes Kshs. 200,000/= which had been deducted without any explanation by the 1st Defendant.

21. The Plaintiff urged the court to find that he has fulfilled his obligations by repaying the loan advanced to him in full together with the interest thereon. He also prayed that the Defendants herein be compelled to pay costs.

1st Defendant's evidence

22. Penina Wekesa Mulanda, a relationship branch manager with the 1st Defendant testified that the Plaintiff had approached the bank for a loan facility of Kshs. 2,700,000/= which was to be paid within 3years. She testified that the Plaintiff had made the repayments well for sometime before defaulting and as at 2017 the amount owed to the bank was about 1,489,859/=. She also testified that the Plaintiff only made a bulk payment of Kshs. 1,100,000/=. She produced bank statements of account as exhibits DEX1.

23. She further testified that when a client defaults, the bank informs him through a phone call and if default continues a demand notice is served on the defaulter stating the amount due. If this fails, the bank issues statutory notices and undertakes to sell the security. The bank will then advertise with the view of auctioning the properties so as to recover the loan facility advanced to the Plaintiff. This she claims was done.

24. During cross-examination she confirmed that the Plaintiff had made a repayment of Kshs. 1,100,000/= towards the loan. She also admitted that at the time when the bank was advertising these properties it relied on the valuation report that had been done prior to issuance of the loan facility. She also admitted that she did not have a copy of the said report.

25. On further cross-examination she admitted that the loan repayment period was (3) years. She further admitted that at the time when the bank gazetted the suit properties for sale the loan repayment period had not lapsed but the Plaintiff had already defaulted.

26. Both the Plaintiff and 1st Defendant filed their respective written submissions.

Determination

27. I have considered the pleadings, the evidence, submissions and the authorities relied on by parties and find that the main issues for determination are:

- a) **What is the obligation imposed by law with regard to valuation reports?**
- b) **Whether proper accounts were rendered by 1st Defendant?**
- c) **Whether the Plaintiff complied with the consent order of 5th May, 2014?**
- d) **Whether the Plaintiff is in default of loan repayment?**

What is the obligation imposed by law with regard to valuation reports?

28. The Plaintiff faulted the 1st Defendant for not undertaking a valuation of suit properties before gazetting them for sale by public auction. The Plaintiff further contended that the 1st Defendant has never furnished him with any valuation report whatsoever. The Plaintiff further argued that the 1st Defendant is under an obligation in law, to conduct valuation and to obtain a favourable price for the securities. During cross-examination DW1 admitted that the bank had relied on the previous valuation reports that were undertaken prior to issuance of the loan facility at the time of advertising. She however did not tender any valuation report before court to confirm whether the bank valued any of the suit properties before advertising them for sale.

29. Section 97(1) and (2) of the Land Act provide:

“A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer”

30. Section 97 above, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than ***“to obtain the best price reasonably obtainable at the time of sale.”*** Section 97 (2) requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The 1st Defendant has not placed any evidence whatsoever before this court to show a pre-sale valuation of the suit properties was undertaken before the same were listed for sale by public auction.

31. Be that as it may, not obtaining a valuation report prior to listing the suit properties for sale by public auction, cannot preclude a chargee from exercising its statutory power of sale. (See **Jashvantsing L. Solanki v Diamond Trust Bank Ltd [2014] eKLR**).

Whether proper accounts were rendered by 1st Defendant?

32. The Plaintiff has faulted the 1st Defendant for failing to give proper and/or accurate accounts of the total amount due under the loan facility. The Plaintiff contends that it is a cardinal rule that the 1st Defendant makes disclosures to Plaintiff as it is the one charged with keeping proper books of accounts. It was the Plaintiff case that he repaid the loan advanced to him by the 1st Defendant to the tune of Kshs. 3, 628, 337/= whereas it was the 1st Defendant's case that the Plaintiff defaulted in repaying the loan and consequently it imposed penalty

charges which continued to attract interest to the tune of Kshs. 1,489,859/=.

33. From evidence on record, it is clear that Plaintiff's statements of account for the period between 3rd May, 2012 and 4th July 2017 indicate that the amount owed by Plaintiff in arrears is Kshs. 1,489,859/=. It is also evident from the Plaintiff's exhibit marked as PEX6 that he made a total payment of Kshs. 1,200,000/= to the 1st Defendant on 18th May, 2015. The Plaintiff alleges to have repaid the loan in full to the tune of Kshs. 3,628,337/=. The question which then arises is whether a dispute over the amount due under the facility is a ground for stopping the chargee from exercising his statutory power of sale.

34. I find that the position adopted by the courts and indeed the law is that the court should not stop a chargee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due. Halsbury's Laws of England Vol.32 4th Edition states:

“The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed in Court, that is, the amount the mortgagee claims to be due him, unless, on the terms of the mortgage, the claim is excessive.”

Whether the Plaintiff complied with the consent order of 5th May, 2014?

35. It was the Plaintiff's case that the 1st Defendant frustrated the compliance with the orders of 5th May, 2014 by not disclosing the amount of arrears owed by the Plaintiff. The 1st Defendant on the other hand contended that the Plaintiff only complied with the first limb of the said orders and that the second limb has never been complied with to date.

36. In **Kenya Commercial Bank Ltd V Specialized Engineering Company Ltd [1982] e KLR 485** the court held that:

“The making by the Court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied by consent or on one or either of the recognized grounds.”

37. In this case the Plaintiff admits to having defaulted in the loan repayment. It is evident from the court's record that the parties herein recorded a consent order on 5th May, 2014. It is also evident from the Plaintiff's submissions that pursuant to the said orders the Plaintiff only made deposit of Kshs. 200,000/= towards the repayment of the loan facility. The Plaintiff has alleged that the 1st Defendant herein frustrated his effort with regard to complying with the said orders. It is trite law that he who alleges must prove. The Plaintiff has not demonstrated to court how the 1st Defendant frustrated his efforts in line with complying with said orders. Further, the Plaintiff has not tendered any evidence before the court to show that he in fact came up with a concrete proposal on how to liquidate the debt with 14 days as had been agreed.

38. It is my finding that the orders of 5th May, 2014 have never been varied or set aside by the parties herein. The Plaintiff herein failed to comply with the conditions of the consent order dated 5th May, 2014.

Whether the Plaintiff is in default of loan repayment?

39. It is manifestly clear that the Plaintiff enjoyed a bank facility of which he has continued to be in default prompting the 1st Defendant to issue demand notices for payment as well as statutory notices as required under the Land Act 2012. The Plaintiff has not paid the outstanding arrears of Kshs. 1,489,859/= owed to the bank. Statutory notices were properly issued and served on the Plaintiff and invariably, the same have not been contested by the Plaintiff.

40. The Plaintiff freely and voluntarily charged the suit properties and was clearly aware that in the event of default in servicing the debt the properties would be liable to be sold. The Plaintiff in this case is bound by the agreement it entered into with the 1st Defendant on the interest that was to be paid on the loan amount that was advanced to him by the 1st Defendant.

41. In case of **Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd (2006) eKLR** the court held as follows;

“Whenever the Applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.”

42. By offering the suit properties as security the chargor was equating them to a commodity which the chargee may dispose of, so as to recover the loan together with interest thereon. Therefore, if the chargee were to sell off the suit properties, the chargor's loss could be calculable on the basis of the real market value of the said property.

43. The upshot of all the above analysis is this; the Plaintiff has not proved his case against the 1st Defendant on a balance of probability. I find and hold that damages would be adequate remedy in the circumstances. The 1st Defendant's right to exercise its power of sale has accrued and I find no basis to restrain the same. I also take the position that if the 1st Defendant wishes to exercise its statutory power of sale, it must ensure an updated valuation report is prepared as required by the law. Accordingly, I hereby dismiss this suit with costs to the

Defendants.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF DECEMBER 2021.

E. O. OGOLA

JUDGE