



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 22 OF 2014**

**PATRIC MWAURA WAGATIRA.....PLAINTIFF**

**-VERSUS-**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**GABRIEL NDUNGU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. The Plaintiff's claim as per amended plaint dated 5<sup>th</sup> of December 2014 is for:-

**i. Kshs 40,000,000**

**ii. Costs**

**iii. Interest on both (a) and (b)**

2. The Plaintiff who was the registered owner of the land parcel reference number **Ruiru Kiu Block 2/4018** prior to June 2012 aver that the 2<sup>nd</sup> Defendant who held an account with the 1<sup>st</sup> Defendant received a loan of Kshs.150,000/= from the 1<sup>st</sup> Defendant which he guaranteed offering his property as security and surrendered the title to the 1<sup>st</sup> Defendant.

3. The Plaintiff's contention is that in the month of September 2005, the 1<sup>st</sup> Defendant with an attempt to secretly deprive him of the security offered a second loan of Kshs.200,000/= to the 2<sup>nd</sup> Defendant without consulting him.

4. It is the Plaintiff's evidence that in June 2012 the 1<sup>st</sup> Defendant secretly sold the parcel of land to a third party without following the law and common banking practice pertaining to realization of a security held by a financial institution.

5. The 1<sup>st</sup> Defendant entered appearance on the 2<sup>nd</sup> day of April 2014. They denied the contents of the plaint and sought dismissal of Plaintiff's claim.

6. The 2<sup>nd</sup> Defendant entered appearance and filed statement of defence dated 15<sup>th</sup> of April 2014. He denied Plaintiff's claim and stated that the monies advanced were credited into his account and were paid to the Plaintiff. 2<sup>nd</sup> Defendant aver that shortly after receiving the money, the Plaintiff disappeared and the 2<sup>nd</sup> Defendant's account was debited for loan repayments amounting to Kshs 150,000.

**PLAINTIFF'S EVIDENCE**

7. The Plaintiff testified that on the 27<sup>th</sup> July 2001, the 1<sup>st</sup> Defendant advanced a sum of Kshs.150,000/= to the 2<sup>nd</sup> Defendant which he guaranteed by offering his property known as land reference number **Ruiru Kiu 2/4018 measuring 0.500 hectares** as security. He testified that the 2<sup>nd</sup> Defendant is his cousin and he trusted that he would repay the loan within the stipulated time.

8. He testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to notify him on the defaulted payments, and as the guarantor he would have repaid the loan.

9. Plaintiff testified that in September 2005 the 2<sup>nd</sup> Defendant was advanced a second loan of Kshs. 200,000/= on the same security.

10. Plaintiff aver that the 2<sup>nd</sup> Defendant had the intentions of defrauding him of the security by failing to notify him of the defaulted payments and by allowing the 2<sup>nd</sup> defendant to take loan on the same security without his consent.

11. The Plaintiff testified that he was in constant communication with the 2<sup>nd</sup> Defendant and that he assured him that he was servicing the loan and promised to have his title discharged and handed over to him. He said that he made frequent visits to the 1<sup>st</sup> Defendant's branch to make inquiries about the repayment of the said loan but the 1<sup>st</sup> Defendant would not cooperate and refused to supply to him the 2<sup>nd</sup> Defendant's loan statement.

12. Plaintiff further stated that as at 5<sup>th</sup> February, 2012 when he registered a caution on his property, it had not been sold to a third party. He said that on the 26<sup>th</sup> February 2012 the Plaintiff visited the 1<sup>st</sup> Defendant's branch and requested for the 2<sup>nd</sup> Defendant's loan account since he was not handed back his title and the 2<sup>nd</sup> Defendant declined to pick the Plaintiff's calls.

13. He said that from the 2<sup>nd</sup> Defendant's loan statement, the Plaintiff learnt of the defaulted payments and the second loan advanced to the 2<sup>nd</sup> Defendant without his permission, and that the outstanding loan was Kshs.634,900/=. He said on making enquiry from the Credit Manager as to how he could save his security the Credit Manager one Purity advised him to find a buyer who would pay the loan and give him the remaining balance as he was in position to repay the loan.

14. He said he bought the idea and went to look for a buyer and returned to the bank after a month and he was informed by the Credit Manager Purity who that his property had been sold and they assured him that the bank would compensate him. He said he sought the services of a valuer who valued the property at 18,000,000/= at that time; thereafter he made a formal claim to the bank based on the said valuation.

15. The Plaintiff testified that in June 2013, he learnt that the 3<sup>rd</sup> party had started constructions of a permanent building on the property.

16. He testified that the 1<sup>st</sup> Defendant had an obligation to inform him of default by the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant ought to have obtained his consent before advancing a second loan to the 2<sup>nd</sup> Defendant.

17. Plaintiff informed the Court that he never received any notifications from the 1<sup>st</sup> Defendant; not even the 45 days notification of sale by the auctioneer. He confirmed that the Statutory Notice dated 10<sup>th</sup> April 2001 was not addressed nor copied to him and that it was only addressed to the 2<sup>nd</sup> Defendant.

18. Plaintiff further testified that, since the property was prime it would have fetched him 18,000,000 as at the year 2013 which would have been enough to pay off the principal sum and the accrued interest charged for six years as the 1<sup>st</sup> Defendant was time barred from demanding interest on the principal sum after six years.

19. He further stated that he made inquiries from the 1<sup>st</sup> Defendant and learnt that no Sale Notice was served upon him and the property wasn't sold through competitive public auction as it's required by law.

20. In Cross Examination, the Plaintiff admitted that he guaranteed the loan of Kshs.150,000/= that was given to the 2<sup>nd</sup> Defendant and that he understood his obligations as the guarantor in the event the 2<sup>nd</sup> Defendant failed to repay the loan. He said the 1<sup>st</sup> and 2<sup>nd</sup> Defendant never informed him of the delay in loan repayment.

21. He denied knowing Lilian Njuguna and did not even know the said advocates' office. He said that what the 2<sup>nd</sup> Defendant had said to the lawyers about him receiving the notifications was not true and there was no evidence to prove such. He denied authorizing the 2<sup>nd</sup> Defendant to take a second loan and said it was taken secretly. He said no transfer of the property was done in the year 2006, and that the property was sold in 2012. The plot was subdivided into two plots and recently a storeyed building was constructed. He said that the valuer said there are 10 plots in total and development started in 2012.

### **1<sup>ST</sup> DEFENANT'S CASE**

22. DW1 who was the Credit Manager at the 1<sup>st</sup> Defendants' Fourways Branch confirmed that the 2<sup>nd</sup> Defendant was advanced a loan of Kshs 150,000/= on the 13<sup>th</sup> July 2001 and that the loan was secured by a first ranking charge over the property **Title No Ruiru Kiu 2/4018**, the security was duly executed with the charger, the Plaintiff herein executing the guarantee to support the legal charge over the said property.

23. She testified that the borrower subsequently defaulted in repayment of the loan and a letter of demand was issued by the 1<sup>st</sup> Defendant through their Advocates Ms. Lilian Njuguna & Co. Advocates to the 2<sup>nd</sup> Defendant to the addresses they gave. The 2<sup>nd</sup> Defendant was issued with sufficient notice for the defaulted payments of the loan.

24. That further on the 4<sup>th</sup> April 2000, the first Defendant recalled the entire loan and instructed the firm of Lilian Njuguna & Co. Advocates to demand payment from the 2<sup>nd</sup> Defendant or allow the 1<sup>st</sup> Defendant exercise its statutory power of sale.

25. She testified that the 1<sup>st</sup> Defendant's advocate wrote a letter dated 28<sup>th</sup> June, 2002 to **Equity Buildings Society** to inform them that the 2<sup>nd</sup> Defendant acknowledged receiving the said Statutory Notice of sale. On 4<sup>th</sup> September, 2002; the 1<sup>st</sup> Defendant instructed their advocate to instruct **Josrick Auctioneers** to advertise and sell the said property through public auction. She said that Josrick Auctioneers issued a notice of sale on 27<sup>th</sup> September, 2002 but no further feedback was however received from the auctioneers.

26. Later on 16<sup>th</sup> March, 2004, 1<sup>st</sup> Defendant instructed **Valley Auctioneers** through their advocates to advertise and sell the property by public auction. She said a notification of sale and a 45 days' notice was issued to the 2<sup>nd</sup> Defendant on 24<sup>th</sup> March, 2004, the auction was conducted on 3<sup>rd</sup> June, 2004 two bids were made and the 1<sup>st</sup> Defendant declined the bids as they were below the reserved price.

27. Later on the 1<sup>st</sup> Defendant instructed **Shelfo Auctioneers** to advertise and sell the property, a notification of sale was issued to the 1<sup>st</sup> Defendant on 23<sup>rd</sup> November, 2004 and advertised twice on the Daily Newspaper, 11<sup>th</sup> January, 2005 and 26<sup>th</sup> July, 2005. She said the property was auctioned and sold on 10<sup>th</sup> August, 2005 to **Joseph Chege Wanjih** and a transfer executed and registered in favour of the 3<sup>rd</sup> party. She said the 1<sup>st</sup> Defendant followed due diligence in issuing the Notices of defaulted payments and notice of sale to the 2<sup>nd</sup> Defendant and the Plaintiff and at no time did the 1<sup>st</sup> Defendant receive a Notice of Change of address from either parties.

28. She further testified that by the time the Plaintiff placed a caution on the said land Ruiru Kiu 2/4018 on 5<sup>th</sup> February, 2012, a transfer had already been executed and sealed by the 1<sup>st</sup> Defendant on 15<sup>th</sup> December, 2005. She said the auction and sale was done within the law and due process was followed. That the notices were sent four times once by the 1<sup>st</sup> defendant and the other times by auctioneers

29. DW1 testified that the plaintiff and 2<sup>nd</sup> Defendant cannot purport to say no enough notice was issued. That by the letter dated 28<sup>th</sup> February, 2002 the 2<sup>nd</sup> Defendant confirmed that Statutory Notice of sale by the 2<sup>nd</sup> Defendant in which he said he had discussed the failed payments with the Plaintiff who promised to make arrangements on the same.

30. In Cross examination, DW1 confirmed that a loan of Kshs.150,000/= was advanced to the 2<sup>nd</sup> Defendant back in 2001 and that in the year 2002 he defaulted in repayment and a Notice of Default and a Notice of Sale was sent to the 2<sup>nd</sup> Defendant and the Plaintiff.

31. He testified that the guarantor was to pay the loan balance that was in the Business savings account and that the balance was transferred to loan account credit to reduce auctioneers fee. He said the said amount of Kshs.200,000/= was a bankers cheque from the person who purchased the property, she said the auction took place in 2005 and property was sold to Joseph.

32. She admitted that there was no evidence that the statutory notice was served to the Plaintiff. The only evidence coming near is the one contained in the letter by Lilian Njuguna Advocate where the Advocate stated that the 2<sup>nd</sup> Defendant had discussed with the Plaintiff about the notification. There was no proof that the notices were sent by registered post and that no postage registration certificates were available. He said no second loan was advanced to the 2<sup>nd</sup> Defendant.

## 2<sup>ND</sup> DEFENDANT'S CASE

33. The DW 2 testified that in 2001 the Plaintiff wanted to apply for a loan but he had no bank account; that the Plaintiff requested the 1<sup>st</sup> defendant to allow him borrow money through his account. He said he visited the 1<sup>st</sup> Defendant's branch at Fourway Towers with the Plaintiff and upon discussions with the manager, the Plaintiff entered into a loan agreement to borrow Kshs.150,000/= which was to be repaid in instalments of Kshs.7,000/=. He testified that the Plaintiff furnished the bank with security and the money was credited to the 2<sup>nd</sup> defendants account.

34. The 2<sup>nd</sup> Defendant testified that he issued cheques to the Plaintiff in August 2001 and the bank debited his account for professional and valuation fees and he gave the Plaintiff Kshs.6,000/= to pay for insurance cover for the motor vehicle a Toyota Saloon he had bought in Mombasa. Shortly after 20<sup>th</sup> August 2001 he issued the Plaintiff with the last cheque for Kshs.36,000/= .

35. He said the Plaintiff defaulted on the loan repayment and they lost contact till 2012. The bank debited his account for Kshs.15,000/= as loan repayment and he later stopped using the account. He said the Plaintiff reappeared in February 2012 where he needed his help to get employment as a taxi driver and he later informed 2<sup>nd</sup> defendant that he had a buyer for the said land. He requested the 2<sup>nd</sup> Defendant to accompany him to collect his title deed from the bank. Upon visiting the bank, they learnt that the bank had foreclosed on the property due to the defaulted payments by the Plaintiff.

36. In Cross Examination 2<sup>nd</sup> Defendant agreed that he was the borrower named in the loan agreement and the Plaintiff was the guarantor and that he signed the loan documents as the borrower. He agrees to receiving the loan of Kshs.150,000/= to his account and he withdrew the money and gave the Plaintiff. He however has no evidence that he actually gave the Plaintiff the money. He first identified the Plaintiff as his neighbour and on further cross-examination he said they were cousins.

37. He admitted that he did repay the loan on the ground that the loan was taken by the Plaintiff. He denies any knowledge of Lilian Njuguna Advocates and confirmed that he did not call the firm to confirm that he had received the notice of sale letter and he did not inform the Plaintiff about it.

38. He said that the only law firm he knew was Maina Rogoi & Co. Advocates for the 1<sup>st</sup> Defendant. He said he never received any statutory notices of sale from the 1<sup>st</sup> Defendant's appointed auctioneers. He further stated that he never received the money himself and the counterfoils show the money was paid to Mwaura, and the counterfoils did not prove that the money was paid to the Plaintiff.

### **ANALYSIS AND DETERMINATION**

39. There is no dispute that there was bank customer relationship between 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 2<sup>nd</sup> Defendant had an account in the Defendant's Four Ways Branch. It is not also disputed that the 2<sup>nd</sup> Defendant's account with 1<sup>st</sup> Defendant's bank was credited with a loan of Kshs.150,000 and that the loan was guaranteed by the plaintiff who deposited his title deed for LR number Ruiru Kiu Block 2/4018. I wish to consider the following issues:-

**i. What I wish to consider is whether a second loan was advanced to 2<sup>nd</sup> Defendant without Plaintiff's consent.**

**ii. Whether Plaintiff was notified of default and sale of property.**

**iii. Whether Plaintiff is entitled to refund.**

40. The 2<sup>nd</sup> Defendant argues that he took the money for the Plaintiff. He said upon being paid he gave the money to Plaintiff. There is however no evidence adduced to confirm that money advanced was for the Plaintiff or whether it was actually given to the Plaintiff; and even if that was the case, there would have been an arrangement between 2<sup>nd</sup> Defendant and Plaintiff. The Plaintiff however confirmed that he guaranteed the loan of Kshs.150,000. Though the Plaintiff said that the 1<sup>st</sup> Defendant went ahead to advance a second loan of Kshs.200,000 without his consent, statement does not show it as a loan. It is shown as bankers cheque deposited in the 2<sup>nd</sup> Defendant's account on 12<sup>th</sup> September 2005. This is followed by debit in the account of Kshs.40,000 indicated as Auctioneer fee. There is therefore no second loan advanced to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant confirmed that he never repaid the loan. The reason he gave is that he expected the plaintiff to repay.

41. On the interest charged, the statement attached to Plaintiff's document shows the borrower defaulted from October 2001 which was 2 months after receiving the loan. Interest was suspended from 30<sup>th</sup> November 2002 about a year after default.

42. As to whether Plaintiff was notified of default notified of 2<sup>nd</sup> defendant's default the 1<sup>st</sup> Defendant's witness talked of notification being sent to the borrower 2<sup>nd</sup> Defendant by registered post.

43. It is true that there was default in loan repayment shortly after the loan facility was taken by 2<sup>nd</sup> Defendant and guaranteed by the Plaintiff. The Plaintiff having guaranteed the loan and offered his property as security, the 1<sup>st</sup> Defendant was required to notify him of default and he also ought to have been notified of the intended sale. The 1<sup>st</sup> Defendant witness said the 1<sup>st</sup> Defendant relied on information from 2<sup>nd</sup> Defendant that he had informed Plaintiff. There is no confirmation that information of default and sale reached the Plaintiff.

44. The 1<sup>st</sup> Defendant admitted that there was no evidence that the statutory notice was served to the Plaintiff. The only evidence coming near is the one contained in the letter by **Lilian Njuguna Advocate** where the Advocate stated that the 2<sup>nd</sup> Defendant had discussed with the Plaintiff about the notification. This cannot be considered as sufficient notice to the Plaintiff.

45. On value of property, its market value was Kshs.450,000 and forced value Kshs.350,000 as per valuation report dated 5<sup>th</sup> July 2001 which was done at the time loan was advanced. Valuation report by **Ragon Auctioneers** on 30<sup>th</sup> April 2004 showed that the market value was Kshs.350,000 and forced value Kshs.350,000. The property was auctioned on 8<sup>th</sup> August 2005. In my view there was undervaluation before the sale. The property could not have gone down in value but higher.

46. From **Zanconsult valuers** report dated 27<sup>th</sup> June 2013 the property was valued at Kshs.18,000,000. From the report the plot measures 0.5 Ha and can be subdivided into 9 plots of 50 by 100 each. The report indicates plots in the neighbourhood subdivided into 50 by 100 were valued at about Kshs.2,000,000. From the report the plot herein at the time would have been Kshs.18,000,000. The valuer gave value of land minus developments.

47. The Plaintiff said he went to the bank in 2012 to enquire about the loan and after getting the statements he offered to sell the property by private treaty. He however learnt that the property had been sold. The 1<sup>st</sup> Defendant's evidence is that it was sold in the year 2005.

48. The bank however had a duty to notify the plaintiff of default and intention to sell the property. There is no proof that the bank served the Plaintiff with notices. DW1 an employee to the 1<sup>st</sup> Defendant confirmed that there is no proof that notices were sent by registered post.

49. The 2<sup>nd</sup> Defendant did not come out as an honest person, initially he said he had no relationship with the Plaintiff and that he did not know his whereabouts but later in cross examination, he admitted that the Plaintiff is his cousin. It is therefore difficult to believe that he actually informed Plaintiff of the notices from the bank.

50. The 1<sup>st</sup> defendant therefore failed to follow the right procedure in realising security and ought to compensate the plaintiff.

51. The property having been sold to an innocent 3<sup>rd</sup> party who is not a party to this suit, I direct that the 1<sup>st</sup> Defendant compensate the Plaintiff its value as at 2012 when he opted to sell by private treaty. Value of property at the time as per Plaintiff's valuation was

Kshs.18,000,000 less Ksh. 634,900 that he admitted was in arrears.

52. **FINAL ORDERS**

**i. I hereby enter Judgment for Plaintiff against the Defendants for kshs 17,365,100.**

**ii. Costs of this suit to be paid by the Defendants to the Plaintiff.**

**Judgment dated, signed and delivered at Nairobi this 21<sup>st</sup> day of February, 2020.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

Langat: Court Assistant

Kimani h/b for Onyango for 2<sup>nd</sup> Defendant.

Mageto for Plaintiff

No appearance for 1<sup>st</sup> Defendant