



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 640 OF 2007

WILLIAM PETER MAYAKA.....PLAINTIFF

-VERSUS-

KENYA REINSURANCE CORPORATION LIMITED....DEFENDANT

JUDGMENT

1. WILLIAM PETER MAYAKA the plaintiff has sued **Kenya Reinsurance Corporation Limited** as the 1st defendant and **Wangai t/a Sannex Enterprises Auctioneers** as the 2nd defendant.

2. The plaintiff by his plaint acknowledges as follows:

“The plaintiff states that by a charge dated 17 June 2005 between himself and the 1st Defendant registered over suit property LR. No. 209/10275, the 1st Defendant advanced to the plaintiff Ksh 8,697,841.50 together with agreed interest at 5% per annum to be repaid at the rate of Ksh 231,999 monthly over a period of 54 months or 5 years.”

3. The plaintiff's grievance which led him to file this suit was the receipt of a demand letter dated 6th September 2007 from the 1st defendant's lawyer which demanded from him payment of Ksh 3,415,974 and receipt of subsequent notification of sale dated 6th November 2017 served upon him by the 2nd defendant which indicated that the amount he owed the 1st defendant was Ksh 8,310,250.75. The plaintiff further pleaded:

“The Defendants by their letters and notice aforesaid variously allege that the plaintiff owes Kshs 3,415,974 or Ksh 8,310,250.75 as at 1st August 2007. This is confusing and erroneous as the plaintiff has been making payments and/or denies being in such debt and/or demands an accurate statement of accounts.

The plaintiff contends that the letters of demand for payment of the loan arrears and the notice are illegal, unlawful, unjustified and misleading on account of the fact that they do not conform to the charge and/or the operative law.”

4. The plaintiff by his plaint prayed for permanent injunction restraining the defendants from advertising, selling alienating and/or transferring his property L.R. No. 209/10275 Kileleshwa, Nairobi, which was charged to 1st defendant, and a prayer for declaration that the demand and that the notification of sale are null and void.

5. The defendants by their defence pleaded that the plaintiff had indeed executed a charge dated 17th June 2005 over L.R. No. 209/0275 (the suit property). The amount lent to plaintiff on 17th June 2005 was Ksh 8,697,841.50. That amount was accruing interest at 5% per annum. The defendants further pleaded:

“The Defendants deny that the amount owing to the 1st Defendant is confusing and erroneous and shall aver that the amount owing as at 1st July 2007 had the loan been serviced according to the Agreement constituting the charge (ie monthly repayment of Ksh 231,991/=) was Ksh 3,415,974/=. The 1st defendant had also for the breach of the agreement, the option of demanding the full amount of the principal amount together with the interest owing of Ksh 8,310,250/75 as at 1st August 2007 and legally moving to realize the security to recover the same. The 1st Defendant shall specifically aver that the plaintiff had made inconsistent and few intermittent payments which were clearly in breach of the Agreement constituting the charge.

Furthermore by his advocate's letter of 27 September 2007 he specifically admitted the debt."

ANALYSIS

6. It is trite that parties are bound by their pleadings. This has been restated many times over. In the case **Zacharia Orwa Ondoro v South Nyanza Sugar Co. Ltd (2018) eKLR. Justice A.C. Mrima** considered that principle thus:

".....a court can only decide on issues that arise from the filed pleadings, the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Sylvester Umaru Onu, JSC stated that: -

'...It is settled law that it is not for the courts to make a case of its own or to formulate its own from the evidence before it and thereafter proceed to give a decision based upon its own postulation quite separate from the case the parties made before it.....'

It is settled law that parties are bound by their pleadings.....the court below was in error when it raised the issue contrary to the pleadings of the parties.'

20. Adereji, JSC in the same case expressed himself thus on the importance and place of pleadings: -

'....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....'

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'

7. The plaintiff's case is simply that the defendants issued him with a demand letter and notification for sale with variant amounts cited. It is on the basis of that the plaintiff seeks a restraining order and declaration.

8. Despite the constraints of those pleadings the plaintiff, both during trial and in his written submission dealt with issues that were beyond the bounds of his pleadings. such issues are that the charge was undated in the clause that stated when the repayment of the loan should commence, that the defendant could not state with certainty when the loan was disbursed, and that the account statements, of the plaintiff were uncertified. My response to those issues is one, the plaintiff is not permitted to transverse beyond what he has pleaded and what is his case at bar is.

9. The only issue to determine is whether the plaintiff should be granted the injunction and declaration orders.

10. As can be seen above the plaintiff admitted obtaining a loan, from the 1st defendant, which was secured by a charge over his immovable property. He has not proved that he has fully repaid that loan.

11. The defendants by their evidence, through Nicodemus Gekone, the investment manager showed, through bank statement, that the plaintiff as at 1st August 2007 was in arrears in his repayment of his loan. That when a demand letter dated 6th September 2007 demanding Ksh 3,415,974/= was sent to the plaintiff, the plaintiff through his advocate responded by letter dated 27th September whereby he acknowledges receipt and sought time to settle the amount demanded.

12. I have looked at the plaintiff's statement of account of from 1st January 2002. That statement shows the monthly working of amount due and the amount due and the amount of Ksh 3,415,974/= is reflected as due on 1st September 2007. The demand of Ksh 8,310,250.75 was not sufficiently explained by defendant but I am of the view it is not a basis for granting a permanent injunction. The defendant witness referred to it as redeemable balance.

13. I am of the view that the plaintiff has failed to prove his case on a balance of probability and the case therefore fails. On costs I will order each party to pay their own costs.

14. I am of the view that because of passage of time since the filing of this case that the 1st defendant should serve the plaintiff with statutory notice of sale, before exercising its right of sale which will be in compliance with the present Land Law. It is also in the interest of Justice that the 1st defendant be permitted to access the plaintiff's property for purpose of carrying out valuation of that property, as required before the exercise of statutory power of sale.

DECISION

15. The judgment of the court is as follows:

a. The plaintiff's suit is dismissed with costs to the defendants.

b. The 1st defendant shall issue the plaintiff with legally compliant statutory notice of sale by auction of property LR. No. 209/10275 Kileleshwa, Nairobi.

c. The plaintiff is ordered to grant access to the 1st defendant and/or its agent to property LR No. 209/10275 Kileleshwa, Nairobi, in order to carry out valuation of that property, in default the Officer Commanding Station at Kileleshwa Police Station shall provide the defendant and or its agents on the property LR. No. 209/10275 Kileleshwa for purpose of carrying out a valuation thereof.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30th** day of **April, 2020**.

MARY KASANGO

JUDGE