



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 63 OF 2005

JIMMY NURU ANGWENYI PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LIMITEDDEFENDANT

JUDGMENT

1. Jimmy Nuru Angwenyi (the Plaintiff or Angwenyi) brings an action against Development Bank of Kenya Limited (DBK or the Defendant) on the basis of amended pleadings dated 27th August 2012 and filed on 19th October 2012.
2. At all material times to the suit, Angwenyi was a customer of the Bank and was granted overdraft facilities. This was expressly admitted by Angwenyi in his evidence to Court. Although he had in his pleadings averred that his request for an overdraft was not formally responded to and that the terms of the facility not agreed and that he did not execute the letter of offer, a copy of a letter of offer dated 19th November 1998 and duly accepted by Angwenyi through signature was produced by the Bank (D. Exhibit Pages 2 and 3).
3. Anyhow, the Plaintiff avers that there was no communication from the Bank concerning the perfection of security, no statutory notices were “administered” (i suppose served on him) and that the Bank sold his prime land for a paltry Kshs.600,000/=.
4. He alleges fraud in the sale, the particulars being:-
 - (a) Selling the properties in collusion with others and at such low prices as to infer fraud.
 - (b) Selling the properties without any proper notice to the Plaintiff or at all.
 - (c) Withholding information from the Plaintiff about the sales.
5. The Plaintiff seeks the following prayers:-
 - (a) An injunction to restrain the Bank from taking any action against the Plaintiff purporting to recover any alleged arrears.
 - (b) A declaration that the sales conducted in respect of the Plaintiff’s properties were fraudulent and the Defendant cannot in law and equity have any claims against the Plaintiff and a further order that the property LR No. 4953/2804 do revert to the Plaintiff. In the alternative the Bank pays him such sums as the Court may determine as the current value of the suit property with interest thereon at Court rates.
 - (c) Any or further relief as the justice of the case will demand.
 - (d) Costs of the suit and interest thereon.
6. In the amended Defence dated 29th May 2013, the Bank resists the claim. It states that the Plaintiff’s property was sold by it (as chargee) at a public auction in exercise of its statutory power of sale and proceeds credited to the Plaintiff’s account. Further that shares, also offered as security for the money advance, were sold at the prevailing prices and proceeds also credited to the Plaintiff’s account.

7. The Bank asserts that both sales were conducted properly after the customer had failed to pay the amount outstanding even after he was served with a statutory notice. Fraud or impropriety was denied.

8. The Bank further contends that even after crediting the proceeds of sale to his account, there was a substantial amount due to it from the customer and which stood at Kshs.3,029,891.75 as at 14th September 2004 with interest accruing at the rate of 20% p.a.

9. Angwenyi and Wainaina Kironyo (PW2) testified in support of the Plaintiff's case while Magdaline Muhia (DW1) and Olga Leila Sechero testified for the Bank. Their evidence as is relevant in determining the following issues shall be discussed:-

- (i) Did the Bank communicate to the Plaintiff about perfection of security?
- (ii) Did the Bank serve the Plaintiff with statutory notices before the sale?
- (iii) Was the sale of the property at an under value?
- (iv) Did the Bank withhold information from the Plaintiff about the sales?
- (v) Is the Plaintiff entitled to the prayers sought?
- (vi) What is the appropriate order as to costs?

10. The evidence before Court is that the Plaintiff was granted an overdraft facility by the Bank through a letter of offer dated 19th November 1998 (D. Exhibit Page 2 and 3). The securities in support of the facility were to be a first legal charge for Kshs.1,000,000/= over L.R No. 4953/2804 in the name of the Plaintiff and pledge of 350 Standard Bank shares, 1000 HFCK shares and 2125 NBK shares. The opening words of Angwenyi's written statement of 22nd February 2012 are telling. He says:-

"I am the Plaintiff herein, I was a customer of the Defendant who extended banking facilities to me in 1999, upon security of my property within the Central Business District of Thika Municipality measuring five acres being L.R No. 4953/2804 valued conservatively then at Kshs.5 Million."

11. The Plaintiff's case in respect to the perfection of the security was that he received no communication from the Bank about the perfection of security. The case was never that the security in respect to the land was not perfected. These are two different things. Yet, the Plaintiff's Counsel spent considerable energy in his final submissions making the argument that no formal security or security by way of deposit of title was created and registered pursuant to Sections 32 and 66 of the Registration of Titles Act. That is a remarkable shift in the nature of the case. This Court will not allow that shift and is unable to hold that the security over L.R No. 4953/2804 was not perfected when that was not the pleaded case.

12. As to whether he never received communication from the Bank about the perfection of security, the Plaintiff's evidence was singular silent on this. The allegation was never proved and simply remained an allegation.

13. The second issue revolves around service of statutory notices before the sale. In the amended plaint the Plaintiff is not specific about which statutory notice was not issued. Being land registered under the now Repealed Registration of Titles Act, was it the notice required under Section 69A of the Indian Transfer of Property Act (1882) or was it the 45 days notification required by Rule 15(2) of Auctioneers Rules?

14. The Bank's defence is that it served the notice required under the Indian Transfer of Property Act through a statutory notice of 22nd February 2001 (D. Exhibit Pages 10 & 12). Angwenyi was confronted with this letter in cross-examination and he stated:-

"I did not receive this."

15. There is then Angwenyi's letter of 14th February 2001 (D. Exhibit Page 12) in which he acknowledges receipt of the Bank's letter of 24th January 2001 (SFT/900/50) when asked about this acknowledgement, he states:-

"Page 9 I was responding to this letter."

16. The letter at Page 9 is the Bank's letter of 24th January 2001 in which the Bank demanded regularization of the account within 15 days but is without doubt not a statutory notice.

17. The Plaintiff stood firm that he did not receive any notices. The onus was therefore on the Bank to prove service of the statutory notices. The Bank simply produced a copy of the notice without attempting to prove service. On the face of the letter, it would seem that the notice was served by Registered Post. However, the Bank did not produce a copy of the certificate of posting and so service of this important notice was not proved.

18. Was the property sold at an under value? As correctly submitted by the Defendant's counsel the law then was that for a valuation to be considered as current for purposes of a sale it would have to be conducted less than 12 months before the date of sale (Rule 16(8) of the Auctioneers Rule). The Bank complied with this requirement of the law by commissioning a valuation by Bageine Karanja Mbuu Limited

which returned an opinion on 19th June 2001 which would be just under 12 months of the date of the auction on 2nd May 2002. In that valuation (D. Exhibit Pages 18 to 25), the valuer returns an opinion of a forced sale value of Kshs.1,200,000/= as against an open market value of Kshs.2,000,000/=.

19. It emerges that the property was sold at the sum of Kshs.650,000/=, slightly more than half its forced sale value of Kshs.1,200,000/=. This is an apparent sale at under value. The Bank's witness attempts to justify this as the best possible available bid but does not demonstrate sufficient effort made to achieve the forced sale value. The evidence of a single previous auction does not adequately prove that it was the best price reasonable attainable at the time of sale. The price being less than the forced sale price, it was a sale at under value.

20. This discussion then turns to the remedies that the Plaintiff deserves. This is the place to consider the evidence of the two valuers who testified herein.

21. Wainaina Kironyo (PW2) is a valuer practicing under the name and style of Bel Air Properties Limited. He was instructed by the Plaintiff to value the subject land. He prepared two reports. The first is dated 24th December 2012 (P. Exhibit 3) in which he returned an opinion that the market value of the property in the year 2004 was Kshs.20,000,000/= with a forced sale value of Kshs.15,000,000/=. The other is a more recent report dated 24th January 2019 (P. Exhibit 4) with an open market value of Kshs.120,000,000/= and a forced sale value of Kshs.90,000,000/=. In cross-examination he stated that the basis of his opinion in the latter report was market comparables but he did not get comparable for his opinion in regard to his opinion of 2004 values. This shall attract some comments from the Court.

22. For the Bank, Magdaline Muhia (DW1) of Royal Valuers produced a report of 13th February 2019. She reached the following conclusion;

(a) The open market value of Kshs.2,000,000/= on 17th November 1999 was acceptable to all parties.

(b) The open market value of Kshs.2,000,000/= on 19th June 2002 appeared high since quarrying activities by strangers was taking place.

23. In her view the opinion of June 2001 should be reduced by 50% in view of the risk of having to remove the squatters. The June 2001 opinion is that commissioned by the Bank prior to the auction in which Bageine Karanja Mbuu Limited returned an open value market value of Kshs.2,000,000/= and a forced sale value of Kshs.1,200,000/.

24. Now this Court has found that the sale of 2nd May 2002 was not only irregular because it was a sale at an under value but was a nullity as the Bank has not proved that it served the notice of 22nd February 2001. If the sale was faulty only because of an under sale then the remedy to the Plaintiff is simply the difference between the forced sale value and the amount at which the property was actually sold. However, where the sale is a nullity then the Plaintiff deserves an award of damages. This is what the Plaintiff here deserves.

25. As to what is the appropriate amount in damages, the Plaintiff seeks the current market value of the property. In the final submissions the Plaintiff prays of Kshs.120,000,000 relying on the valuation of Bel Air Properties. The Defendant on the other hand had limited its arguments as though the sale was irregular for an under price.

26. The Court has anxiously considered the matter of damages. It observes that there could very well have been a lapse on the part of the Defence in failing to present to Court the certificate of posting and thereby opening itself to liability. However, there is ample evidence that at the time the purported statutory notice was served and the sale conducted, the Plaintiff was in default. One piece of evidence is the admission of the Plaintiff contained in his letter of 14th February 2001. So it is not as though the Bank was not entitled to enforce the remedies available to it under the charge. To that extent the lapse on the part of the Defendant Bank is not as gross or blatant as a chargee who extinguishes the equity of redemption of a chargor even when there is no default of any kind. Secondly, the Bank had in fact made a demand of regularization of the account. These two must count in favour of the Defendant in assessing how much damages it should suffer for its oversight.

27. In the end the Court opts to award damages to the Plaintiff equivalent to the market value of the property at the time of sale. The value which has not been faulted is that of Bageine Karanja Mbuu Limited which returned an open market value of Kshs.2,000,000/=. An attempt by the Plaintiff's valuer to fault this opinion may have not been successful because, although he attempts to justify his opinion on comparable market prices, he quickly confessed that he did not bother to obtain comparable prices for the relevant period (2001 and 2002).

28. The Court is aware that the Bank's case is that the Plaintiff is still indebted to it but the Bank has not made a counterclaim. Had it done so then any damages granted by the Court would first be applied towards offsetting the debt.

29. In the end I enter judgment for the Plaintiff for damages of Kshs.2,000,000/= with interest thereon at court rates from the date of this Judgment until payment in full. The Plaintiff shall also have costs of the suit.

Dated, Signed and Delivered in Court at Eldoret this 26th Day of May 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mungai for the Plaintiff.

Kiura for the Defendant.