



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
MISCELLANEOUS APPL. NO. 5 OF 2019 (OS)
IN THE MATTER OF THE ESTATE OF
THE LATE AYUB HEZEKIAH MAKANA NYAKUNDI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION BY LUCIA MAKANA NYAKUNDI

LUCIA MAKANA NYAKUNDI.....APPLICANT

VERSUS

OMARIBA NYAKUNDI.....1ST RESPONDENT

NATIONAL BANK LTD.....2ND RESPONDENT

JUDGMENT

The Applicant, **LUCIA MAKANA NYAKUNDI**, is the Administrator of the Estate of the late **HEZEKIAH MAKANA NYAKUNDI**.

1. She lodged this Originating Summons, asking the court to determine the following 3 questions;

“1. WHETHER it is proper that the

Respondents should still be holding

the title deed to the parcel number

KISUMU/MANYATTA ‘B’/1295 several

years after the applicant has cleared

the loan on the charged property.

2. WHETHER the 2nd Respondent should not be ordered to release the title deed.

3. WHETHER respondents should not be ordered to pay the costs of the suit.”

2. The Applicant asserted that the 1st Respondent, **OMARIBA NYAKUNDI** (who is a brother to the late Hezekiah Makana Nyakundi) had taken a loan from the Respondent, **NATIONAL BANK LIMITED**.

3. It was her case that her late husband was the guarantor for the loan.

4. She asserted, on oath, that the Respondents had conspired to sell the suit property without giving her any information about

“any developments and arrangements

they had made with reference to this.”

5. As proof the alleged attempt to sell-off the suit property, the Applicant provided a copy of a letter from **SADIQUE ENTERPRISES** dated 15th June 2008.

6. The said Sadique Enterprises were an auctioneering firm, and by their letter dated 15th June 2008, they issued Notification of the intention to sell the suit property by public auction.

7. The Applicant told the court that she severally wrote to the 2nd Respondent, (hereinafter “*the Bank*”), making known her

“ intentions to offset the loan owed

due to my husband’s guarantee to the

1st respondent herein.”

8. The Applicant said that the Bank ought to be compelled to release to her, the title document in respect to the suit property, as the debt owed to the said Bank had been fully settled.

9. Notwithstanding written demands for the release of the title deed, the Bank had declined to comply.

10. As the Applicant believes that the debt owed to the Bank had been settled in full, she asked the court to order the Bank to release the title deed of the suit property to the Administrator of the Estate of the late Ayub Hezekiah Makana Nyakundi.

11. In answer to the application, the Bank first pointed out that the person who had been granted a loan facility was Ayub Makana Nyakundi, and not Omariba Nyakundi.

12. The Bank exhibited the Letter of Offer dated 7th November 1990, which showed that the loan facility of Kshs 400,000/= was addressed to Ayub Hezekiah Makana Nyakundi.

13. It is common ground that the borrower, (Ayub Hezekiah Makana Nyakundi) passed away in February 1991.

14. The Bank’s case was that by the time of his demise, the borrower had not serviced the loan at all.

15. Following the demise of the borrower, the Bank received written proposals from **JEFETAR OMARIBA, DAVID MOSETI MAKANA** and the Applicant, all of whom expressed a desire to have the issue of the outstanding debt resolved amicably. Copies of the various letters were exhibited by the Bank, through the Replying Affidavit sworn by its Regional Collection Manager, **TITUS F. ANENE**. The letters are dated 28th September 2005; 30th May 2006; and 18th September 2008.

16. Whereas the Bank gave its conditions for accepting the offer relayed through the letter dated 18th September 2008, the bank contends that the Applicant failed to meet the conditions. As a result of the said failure, the Bank stated that the outstanding balance as at May 2019 was Kshs 9,672,964.15.

17. By a letter dated 28th May 2019, the Bank issued a 40 days’ Notice of its intention to sell the suit property; and it is in that said Notice that the quantum of the outstanding balance was cited.

18. Finally, the Bank categorically stated that they were complete strangers to the 1st Respondent, Omariba Nyakundi.

19. When canvassing the application, the Applicant submitted that the Bank’s attempt to sell the suit land was illegal for failure to serve the Plaintiff with a Notice under **Section 65** of the **Registered Land Act**.

20. The Applicant further submitted as follows;

“ the 2nd defendant should have

demanded from the plaintiff under

that section, the amount due, before

servicing her with a statutory notice

under Section 74 of the Registered

Land Act which was never served.”

21. The Applicant went on to submit that the Bank’s advocates, who had attested the signature of the chargor, had failed to explain to him, the consequences of **Section 74** and **Section 79** of the **Registered Land Act**.
22. A third submission made by the Applicant was that the Charge Instrument had not been drawn up in a form that is approved by the Registrar of Lands. In the light of that contention, the Applicant submitted that the instrument of Charge was null and void.
23. It was the understanding of the Applicant that a statutory power of sale cannot have arisen from a Charge that was a nullity. Consequently, the Applicant submitted that the chargor’s attempt to realize the security was wrongful.
24. I have given due consideration to the pleadings, the factual evidence and the submissions on record.
25. First, I note that the 1st Respondent did not challenge the application.
26. But, at the same time it is noted that the main complaints raised by the Applicant are directed against the Bank.
27. Although the Applicant asserted that her late husband had simply been a guarantor for a loan facility which the Bank provided to the 1st Respondent, I find that the Applicant completely failed to prove that assertion. If anything, the Applicant’s advocate, by a letter dated 7th February 2019, stated, inter alia, as follows;

“That on or about the 7th November 1990

you extended a loan facility to the late

Ayub Makana Nyakundi for Kshs 400,00/=

and as security you were to hold a legal

charge for Kshs 400,000/= over his

property LR NO. Kisumu/Manyatta/”B”

1295. The said Ayub Makana Nyakundi

died sometimes in the year 1991 and the

widow took over the facility and has

since paid the same in full.”

28. The evidence tendered by the Applicant is inconsistent with the case she pleaded, as the evidence supports the Bank’s contention that it was Ayub Hezekiah Makana Nyakundi who was the borrower.
29. The Applicant did not provide any evidence to advance the case about the alleged borrowing by Omariba Nyakundi.
30. Pleadings are the formal presentation by a litigant of factual and legal assertions, which constitute the foundation and structure of the case which the Applicant intends to prove against the other party or parties.
31. Pursuant to **Order 2 Rule 1** of the **Civil Procedure Rules**;

“Every pleading in civil proceedings

including proceedings against the

Government shall contain information

as to the circumstances in which it is

alleged that liability has arisen and,

in the case of the Government the

departments and officers concerned.”

32. In this case, the information as to the circumstances in which it is alleged that liability had arisen was, firstly, that Ayub Hezekiah Makana Nyakundi, was not the borrower. He was allegedly a guarantor.
33. That narrative has been shown to be inaccurate.
34. Secondly, the Applicant alleged that the loan had been paid in full, in the year 2016.
35. The Applicant did not provide proof of the alleged full payment. She has shown proof that she paid a total of Kshs 840,000/=.
36. It would appear that the said payment could have constituted a substantial portion of the negotiated settlement amount, if the Applicant had met the other conditions of the said negotiated settlement.
37. However, on a prima facie basis, it appears that the Applicant did not meet the other terms of the said negotiated settlement. I believe that that is the reason why the Applicant did not pursue that line of her case, when she was making submissions.
38. The said submissions dwelt largely on issues such as the alleged failure by the Bank to serve the Applicant with a Notice under **Section 65** of the **Registered Land Act**; the failure by the Bank to explain to the Chargor about the consequences of **Section 74** and **79** of the **Registered Land Act**; and the alleged failure by the Bank to draw up the Charge instrument in a Form that was approved by the Registrar of Lands.
39. I find that none of those legal issues had been pleaded by the Applicant.
40. Effectively therefore, the submissions which were not founded upon the Applicant's pleadings cannot advance the Applicant's case. Such submissions are, in my considered opinion hypothetical.
41. The court is not called upon to determine hypothetical cases. The court has a duty to determine issues arising from pleadings. And issues can only arise when one party put forward, in his pleadings, an assertion which gives rise to the liability of another party.
42. If the party against whom the liability has allegedly arisen does not deny the information and circumstances as pleaded, no issue would arise for determination.
43. However, when the information and circumstances pleaded are denied by the other party, an issue or issues would arise; and the court would be obliged to determine the same.
44. As the Applicant did not raise matters pertaining to the validity of either the Charge instrument or the Notices issued by the chargee; through her pleadings, the Respondents had no reason to give their answers thereto.
45. Accordingly, no issues arose therefrom, for determination by the court.
46. In the result, I find no merit in the case put forward by the Applicant. Therefore, the Originating Summons is dismissed, with costs to the 2nd Respondent.
47. As relates to the 1st Respondent, I make no order as to costs, as he did not participate in these proceedings.

DATED, SIGNED at DELIVERED at KISUMU This 28th day of September 2020

FRED A. OCHIENG

JUDGE