



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.95 OF 2013

NYAMBANE NYAKWARA.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

1. The plaintiff Nyambane Nyakwara through a plaint dated 14th March 2013 filed on even date sued the defendant M/s National Bank of Kenya Limited seeking judgment as follows:-

- a) A permanent injunction restraining the defendant, its Agents, servants, employees and whomsoever acting on its instructions from selling, disposing, alienating, auctioning, transferring or in any manner whatsoever from dealing with TITLE NO.KISII/MAJOGE/BOSOTI/1455.
- b) A declaration that any registered Charge/Further Charge over TITLE No.KISII/MAJOGE/BOSOTI/1455 in favour of the defendant is illegal and void Abinitio.
- c) A declaration order discharging any Charge/Further Charge over the TITLE NO. KISII/MAJOGE/BOSOTI/1455 registered in favour of the defendant as against the plaintiff.
- d) Costs.
- e) Any such other reliefs the Honourable Court shall deem fit to grant for purposes of protecting the plaintiffs proprietary rights over TITLE NO. KISII/MAJOGE/BOSOTI/1455.

2. The defendant filed defence dated 3rd June 2014 on 9th June 2014 praying that the plaintiff's suit be dismissed with costs.

Plaintiff's Case

3. At all material time the plaintiff was and is the registered proprietor of that parcel of land known and situated at **Kisii/Majoge/Bosoti/1455**. The defendant through a notification of sale issued through its agents scheduled to sell the plaintiff's property on 27/3/2013 purportedly in realization of a debt secured by a charge/further charge over the said property for which the plaintiff purports he has no contractual and/or legal relationship with the defendant as he denies ever borrowing and/or entering into any financial arrangement with the defendant nor executing any charge/further charge over his property nor appearing before an Advocate or the Bank for the purposes of witnessing/attesting of the purported charge/further charge. He stated he is not a borrower or a guarantor. The plaintiff contends the intended sale is illegal and nullity as no statutory notice or demand has been served upon him by the defendant. It is further urged the charge over the plaintiff's property was secured fraudulently.

Defence Case

4. The defence case is that the plaintiff created the charge and further charge in favour of the defendant to secure overdraft facilities advanced to one Pius Nyambane Nyakwara Trading as **PIMER AGENCIES**. The defendant's Advocate perfected and registered a charge over the plaintiff's property void of any fraud. That the charge and further charge over plaintiff's property were executed by the plaintiff and registered free from any fraud on the part of the defendant or it's Advocate and as such the plaintiff is contractually and legally bound by the terms and conditions of the charge registered in favour of the bank over the plaintiff's property.

5. I have very carefully considered the plaint, defence, parties statements, parties evidence adduced before court, counsel respective

submissions dated 6th December 2018 and 22nd January 2019 respectively, and from the same the issues arising thereto for determination are as follows:-

a) Whether the plaintiff has proved the alleged fraud as against the defendant as pleaded in the plaint?

b) What orders is the plaintiff entitled to?

A) Whether the plaintiff has proved the alleged fraud as against the defendant as pleaded in the plaint?

6. The plaintiff in support of his claim gave evidence as **PW1** and called no other witness, whereas the defendant called one witness in support of its defence.

7. The plaintiff under paragraph 11 of the plaint has given the particulars of fraud in support of his claim; that the defendant fraudulently prepared the charge/further charge over title number **Kisii/Majoge/Bosoti/1405** without plaintiff consent and involvement and that it caused the charge to be executed by persons other than the plaintiff; that it fraudulently caused the charge to be witnessed/attested before an Advocate without knowledge of the plaintiff; that it fraudulently caused the charge to be registered as security for money not borrowed by the plaintiff or consented to by the plaintiff and fraudulently intended to sell the plaintiff's property without issuing any statutory notice. The plaintiff further contends there was no contractual agreement between the plaintiff and the defendant hence the charge/further charge over **Kisii/Majoge/Bosoti/1455** is void, unenforceable and a breach of law.

8. The plaintiff gave evidence as **PW1**. He testified that he is 81 years old farmer and resides at Majoge Chache in Kisii County. He confirmed that he is the registered proprietor of **L.R. Kisii/Majoge/Bosoti/1455** measuring 2.63 hectares, where he resides with his children. He adopted his witness statement dated 14th March 2015 as his evidence in chief (**Exhibit P-1**). He testified that when he got his title deed he gave it to his son, one Pius Nyambane for safe custody as he thought it could get lost. I find that this is not uncommon with old illiterate parents to entrust their valuable properties in safe custody with their favourite and trusted sons or daughters. As such I agree with **PW1's** evidence, that the title was given to his son, Pius Nyambane not for any other purpose other than keeping the same in safe custody.

9. **PW1** on being referred to various documents in the defendant's list of bundle such as a letter of consent of the Land Control Board dated 7/5/1992, he testified he had not seen it before and averred that he did not attend the Land Control Board to have his identity card changed and averred that he knows nothing about the consent. On the charge over title **Kisii/Majoge/Bosoti/1455** on pages 14-26 of the defendant's documents he denied knowing the firm of the advocates known as Waruige & Waruige Advocates, who prepared the charge and further denied having appeared before any of the said Advocates. He denied further having appeared before G.J. Mainye Advocate and stated he does not know the said Advocate. He disowned the signature on page 24 purported to be his. On page 13 of the plaintiff's documents on further charge dated 11/5/1994 (**see page 13 – 22**) on page 20 he testified he does not know G. N. Gichohi Advocate of Nairobi and stated he had never been to his office. He denied the signature thereto and stated it was not his own signature. He denied having signed the charge.

10. **PW1**, informed the court someone came to him, purporting that his land had taken loan and he told him, he would ask his son Pius Nyambane, who on being asked told **PW1**, he will tell him but upto now he has not been told anything. **PW1** averred he was told by the defendant, it wanted to sell his land because of the outstanding loan. He testified upon been show the postal address in both the charge and further charge being Box No.41753, Nairobi, the box number is not his and urged no letter would reach him if the box number thereto is used. He stated he never gave the box number to the defendant. He referred to consent letter dated 7/5/1995, charge dated 14/5/1992 and further charge dated 11/5/1994 and testified that they are all forgeries. He added that he does not know whether his son used his title to get a loan, stating he has no peace at home as his other children beat him for allegedly having given the title to his son for safe custody. He testified that he never authorized his son to take loan with the title nor did he stand as a guarantor for his son and further that he did not seek loan from the defendant nor did he apply for the consent from the Land Control Board.

11. The Defendant through **DW1**, Paul Chelanga, the Recovery Manger, who relied on his statement dated 12/3/2015, and which he adopted as his evidence in chief (**Exhibit D-1**) and list of documents (**Exhibit D-2**); testified that the borrower is a company known as Pimer Agencies, through one Pius Nyambane. **DW1** testified, Pius Nyambane told him he used a family land to borrow the loan and he did not want problem. On issue of fraud raised by the plaintiff, **DW1** testified that **PW1** did not write to them before filing the suit or thereafter and they have the title in their custody. **DW1** admitted he had not seen the plaintiff before nor his identity card before. He concluded by stating the plaintiff's prayers are not proper as the defendant acted properly and followed all the procedure.

12. On cross-examination, **DW1**, testified that the defendant has no evidence, that the plaintiff was informed, that a loan was being given to Pimer Agencies and, that he was required to visit the bank or Bank's lawyers. He confirmed the continued guarantee on pages 28 – 31 of the defendants documents had no date. He further confirmed that he does not know G.J. Mainye Advocate and, that the Bank do not have letters from any of the advocates purportedly before whom the plaintiff executed the charge to confirm indeed the plaintiff appeared before them nor do the Bank have searches to confirm the owner of Pimer Agencies. **DW1** further confirmed, that there was no application form for consent of the Land Control Board. **DW1** further testified though they were aware of the claim of fraud they did not carry out any investigation.

13. I have considered the plaintiff's evidence on fraud on part of the defendant and note the defendant has not controverted the plaintiff's evidence. The plaintiff struck me as an honest old person, who was not in anyway involved in the charging/further charging of his property with the Bank herein, which was under obligation before charging the property to do due diligence; verify the true identity of the borrower or person seeking to borrow money and further verify the documents availed to them. The bank acted in a very casual manner and were neglected in processing the loan without seeing the plaintiff, who is alleged to have been a guarantor. I am upon considering the plaintiff's and defendant's evidence satisfied that the plaintiff has on balance of probability proved the particulars of the fraud against the defendant as pleaded in the plaint.

B) What orders is the plaintiff entitled to?

14. The plaintiff is seeking various orders as pleaded in the plaint. That before any orders can be granted in a civil matter, the plaintiff has to prove his claim. The plaintiff's claim is mainly that the charge and further charge were fraudulently procured by the Bank and that the bank was negligent in the manner in which the charge were procured. From the evidence of **PW1** and **DW1**, I find that the particulars of fraud were clearly set out and strictly proved. The fraud were occasioned by the defendant by it's failure to verify the true identity of the borrower and failure to verify the correctness of various documents, and in failing to prepare an application for consent of the Land Control and further by failing to have its agent attend Land Control Board for consent. It also failed to have the plaintiff appear in person before it for the purposes of processing loan application hence it acted neglectily and fraudulently. The bank and it's Advocate who were in control of the transactions and execution of the documents did not do any due diligence before granting loan and by their very own failure to act diligently they perpetuated fraud and/or acted fraudulently. The fact that the plaintiff did not report fraud cannot be used as a basis to absolve the defendant from liability as urged by the defendant. That the defendant were urging the document in their possession were signed by the plaintiff, who denied it. The defendant who asserted the signature was that of the plaintiff, was supposed to call evidence to that effect. I am upon considering the evidence adduced before me of the view that the plaintiff substantiated his averments of fraud against the Bank and proved that the Bank perpetuated the fraud. I am further satisfied the plaintiff in seeking the equitable remedies, and based on his action, he was able to demonstrate to the court, that he came to the court with clean hands and is deserving the orders sought in the plaint. Upon considering the circumstances surrounding the charge/further charge and considering the legal inference that can be made, I find it reasonable to drawn, an inference that as the entire process was under control and/or management of the defendant, who had not bothered to have the plaintiff appear before it, to confirm he had given his title and agreed to offer his title as security and verify on his true identity, I find the whole process amounted to nothing more than fraud on the part of the Bank, it's Advocate and its agents.

15. The upshot is that I enter judgement for the plaintiff as follows:-

a) A permanent injunction be and is HEREBY entered in favour of the plaintiff restraining the defendant, its Agents, servants, employees and whomsoever acting on its instructions from selling, disposing, alienating, auctioning, transferring or in any manner whatsoever from dealing with TITLE.NO.KISII/MAJOGE/BOSOTI/1455

b) A declaration be and is HEREBY made declaring the registered Charge/Further Charge over TITLE No.KISII/MAJOGE/BOSOTI in favour of the defendant is illegal and void Abinitio.

c) A declaration order be and is HEREBY made discharging any Charge/Further Charge over the TITLE NO. KISII/MAJOGE/BOSITI/1455 registered in favour of the defendant as against the plaintiff.

d) Cost of the suit to the plaintiff.

Dated, signed and delivered at Nairobi this 28th day of March, 2019.

J .A. MAKAU

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JUDGE