REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISON

CIVIL SUIT NO. 231 OF 2006

MARTHA JEROTICHRUTO.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 3rd May 2006, seeking for judgment against the Defendant in the following terms:-

> *(a) an order issue restraining the Defendant from selling, alienating, disposing off or in any way interfering with her property known as, L.R. Uasin Gishu/Kimumu/351, and directing the Defendant to discharge and execute a discharge over the said property; and*
>
> *(b) costs of the suit*

2. The Plaintiff averred that, she offered the subject property; L.R. No. Uasin Gishu/Kimumu/351 (herein "the suit property"), as a security for a loan facility, in the sum of Kshs. 450,000, granted by the Defendant, to her daughter one Lena Jeptoo Chesum. The loan facility was governed by the terms and conditions agreed on by the parties

3. Subsequently, she executed a legal charge over the suit property in favour of the Defendant. In the year 2001, the Defendant notified her that the principal borrower was not servicing the loan regularly and therefore the Defendant was going to realise the security. She then filed a suit being Eldoret HCCC 115 of 2001 and obtained temporary orders restraining the Defendant from selling the suit property.

4. She then wrote to the Defendant and offered to settle the guaranteed sum of Kshs. 450,000, so that the Defendant could discharge the title to the suit property. The Defendant allowed her to make the payment and by September 2001 she had paid the said sum, and on the 12th November 2001, the suit was withdrawn and/or settled by the consent of the parties. In addition she paid the costs of the suit and the Auctioneer's charges arising out of the stopped sale. These charges were agreed on by consent of the parties.

5. She then requested the Defendant to discharge her property, but the Defendant declined and on or about 18th November 2004, the Defendant served her with a fourteen (14) days notice to pay all the outstanding sums. Despite her several correspondences and/or visits to the Defendant's offices for the discharge of the charge, they did not yield any fruits as the Defendant remained adamant. She then filed this suit.

6. However, the Defendant denied the Plaintiff's claim vide a statement of defence dated 29th March 2007, The Defendant averred that the Plaintiff guaranteed the entire loan amount in the sum of Kshs 450,000, together with compound interest at the rates specified in the charge and guarantee instruments executed by her.

7. That her offer to settle the debt as aforesaid was subject to the Defendant's approval on terms acceptable to it, and subsequently, by a letter dated 12th June 2001, the Defendant concisely and clearly notified her that her offer would only be considered if she paid the amount immediately and in any event not later than 31st July 200. However she did not comply with the terms and conditions contained in that letter therefore, the Defendant was not obliged to consider the offer for the discharge of the title to the suit property.

8. The Defendant further avers that, by 30th July 2001, the Plaintiff had only paid an amount of Kshs. 350,000, in breach of the terms and conditions contained in the aforesaid letter, as such, on 30th August 2001, the Defendant reiterated to her that, it would only consider her offer after she paid the outstanding balance of Kshs. 100,000, together with the outstanding legal fees on or before 5th September 2001. She paid the amount of Kshs. 100,000 28th September 2001, and the costs of the withdrawn suit on 25th March 2002, a period of six (6) months after the deadline set in the letter dated 30th August 2001.

9. Consequently, the Defendant advised her vide its letters dated 5th December 2001, 22nd July 2002 and 18th December 2004, that her offer had been considered and rejected. She was then requested her to make proposals for the repayment of the balance of the outstanding debt in the Defendant's books. The Defendant therefore, categorically denied that, it agreed to discharge and release the title documents to the suit property upon receiving an amount of Kshs. 450,000.00.

10. However, the Plaintiff filed a reply to the defence reiterating that she guaranteed the sum of Kshs. 450,000.00. She denied guaranteeing the loan amount with any compound interest or otherwise. She averred that the suit was only withdrawn after she settled the full amount of guarantee being Kshs. 450,000.00. Further, the offer for her to deposit Kshs. 450,000 and the payment thereof was not begged on any time limit. In any event, the Defendant was pleased with the progress she made after she had raised the initial deposit of Kshs. 350,000 and subsequently settled the costs and/or auctioneers fees.

11. She argued that her request for discharge of the title to the suit property was made on the 11th may 2001 and was not rejected until four years thereafter, on 18th December 2004, and after correspondences to and making several visits and the Defendant's offices.

12. The case proceeded to a full hearing on 27th May, 2015, when the Plaintiff gave evidence in support of her case. She adopted her statement dated 6th June 2011 and the documents filed in court in support of the case. The Defendant's case was supported by the evidence of Paul Chelangat, who also relied on the witness statement he filed in court and the documents filed as evidence.

13. At the pre-trail stage the parties agreed to and filed the following issues for determination as here below reproduce:-

a) Did the Plaintiff guarantee one Lena Jeptoo Chesum for a loan of Kshs. 450,000;

b) Did the Plaintiff sign a guarantee of Kshs. 450,000 and if so, was she obliged to stand guarantee for a sum more than that of Kshs. 450,000;

c) Who is holding the original and duplicate of charge instrument;

d) Is the Plaintiff obligated as a guarantor to pay more than she guaranteed in the letter of offer dated 7th July 1995;

e) Was the Defendant's offer to the Plaintiff to pay a sum of Kshs. 450,000 conditional and if so, did the Plaintiff perform her part of the offer;

f) Who was supposed to pay to the Defendant any extra costs, charges and interest;

g) Is the Defendant obliged to discharge the Plaintiff's property after she repaid the Kshs. 450,000 plus costs;

h) By the Plaintiff and the Defendant settling Eldoret High court civil suit No. 115 of 2001, was the Defendant still entitled to any further sums from the *Plaintiff;*

i) Is the Defendant justified in demanding a sum of Kshs. 1,569,729.10 on part thereof; and

j) Who is to meet the costs of the suit.

14. The parties filed their final submissions whereby the Plaintiff denied signing the charge instrument herein dated 17th July 1995 and/or ever appearing before Mr. Salim Machio Advocate, who allegedly witnessed and attested to her signature thereon. She argued that, despite denying the same, the Defendant did not bother to avail the said Mr. Salim Machio, to rebut her assertion, or even produced the charge document allegedly executed by her. That the expert report to verify that the signature appearing on the charge belongs to her was also not produced. She relied on the case of; *Ali Mohammed Sunkal vs Diamond Trust Bank Limited (2011) EKLR*, where an inference was made that, the Plaintiff did not sign a transfer, as the denial thereof was not challenged.

15. The Plaintiff further submitted that, on the 30th August 2012, the Defendant's Branch Manager notified her that, if she fails to collect the title within sixty (60) days, from the date of service of the said letter, the title was to be surrendered to the Unclaimed Assets Authority (UAA) at her cost. The Defendant has not cancelled or revoked this letter. Therefore the letter clearly demonstrates that, the Defendants have no reason why they continuing to hold the title to the suit property.

16. However, the Defendant submitted that, the extent of the Plaintiff's liability for the borrowing is captured at paragraph 3 of the charge instrument which the Plaintiff signed and which reads as follows: -

'' the charge debt for which this Charge constitutes a security shall not at any time exceed the sum of Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000/=) together with interest at the rate or rates aforesaid from the time of the charge debt becoming payable until actual payment thereof PROVIDED HOWEVER that the security hereby constituted shall be a continuing security for the payment of the said sum of Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000) or so much thereof as may from time to time be outstanding notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the bank prior to the execution hereof relating to any security which the bank may now or at any time hereafter hold in respect of the Charge debt or any part thereof.

17. The Defendant submitted that, the charge instrument read together with the guarantee documents are evident that they secured the borrowing of; Kenya Shillings Four Hundred and Fifty Thousand (Kshs.450,000) plus interest rate at 22% per annum, and that the charge instrument gave the bank the discretion to determine the rate of interest from time to time. The bank was not obliged to advise the chargor or the borrower prior to any change in the rate of interest applicable. In addition "any amounts outstanding from time to time" including any penalties due to default and interest on the penalty on default to service the loan as agreed, was covered by the securities.

18. That more specifically, clause 2(b) of the charge instrument provides that:-

"During the continuance of the security the chargor shall pay to the Bank as well after as before any judgement obtained interest on the principal sum of Kenya Shillings Four Hundred and Fifty

Thousand (Kshs. 450,000) or on so much thereof as shall for the time being remain owing (hereinafter called "the charge debt") at such rate or rates (subject to a minimum of Twenty-Two per centum (22%) per annum) as the Bank shall in its sole discretion from time to time decide with full power to the Bank to charge different rates for different accounts such interest to be calculated on daily balances and computed with monthly rests the interest owing so as to form one aggregate sum……..."

19. The Defendant therefore submitted that, the Plaintiff cannot demand release of her title documents just by the payment of the principal sum of Kshs. 450,000.00 without addressing the issue of interest. That at the time the litigation herein commenced, the account was in serious arrears, in terms of the principal loan and huge interest accrued thereon, which ought to be settled.

20. The Defendant relied on the case of; *Orion East Africa Ltd vs. Housing Finance Co. of Kenya Ltd Nairobi HCCC No. 914 of 2001* where the court held that, when any loan account goes into arrears, penalty interest is normally chargeable.

21. It was submitted that, it is absolutely dishonest for the Plaintiff to merely clutch on straws to escape settling her liability to the bank by alleging that, she did not sign the charge document, yet it is from the charge document that the borrowing was secured in consideration of the loan to Lena Jeptoo Chesum and the subject property was encumbered to secure the payment of the principal sum together with the interest and from which her liability derives. Even though the Plaintiff did not call a handwriting expert to prove that the disputed signature is not hers.

22. Further, the charge was registered on 18th July 1995 and the title detained by the bank since then on account of the borrowing. If the Plaintiff never signed the charge, then it means the title was being illegally retained by the Defendant yet she has never reported the loss of the same to the police. Even then, she nevertheless executed the guarantee for repayment of the principal amount of Kshs. 450,000.00, together with interest on the same.

23. That, the correspondences between the parties and the two letters from the Defendant responding to her request, do not amount to a promise or an undertaking by the Defendant to discharge the property, upon payment of Kshs. 450,000. The Defendant was going consider her request for discharge of the title and did not concede to her request, as observed in the ruling herein by the Hon. Fred A. Ochieng, delivered on 8th November 2006, at page 7 paragraphs 1 and 2 as follows: -

"in the light of those two letters, the Plaintiff now says that the Defendant had offered to accept the sum of Kshs. 450,000, after which it would discharge the security……. In my understanding, the said two letters do not go as far as the Plaintiff has said they do."

26. Finally the Defendant submitted that, nothing has been exhibited showing the terms of consent in the case withdrawn. If anything, it was not a term of the consent that upon withdrawal of the matter the property would be discharged. If this were the position, the Plaintiff has moved back to Eldoret High Court to enforce the terms of the consent.

28. I have considered the pleadings herein alongside the evidence adduced and the submissions and I find that the following issues have arisen for consideration:-

a) what were the terms and conditions of the charge and guarantee and instruments, that governed the relationship between the parties herein, in particular the extent of the Plaintiff's liability?

b) did the Plaintiff comply with these terms and/or did the Defendant discharge the Plaintiff from liability herein?

c) is the plaintiff entitled to the prayers sought?

29. As regards the first issue, I find from the documents produced, that the Principal Debtor on 22nd June

1995 applied for the loan facility of Kshs 500,000.00 and the Defendant agreed to and advanced her a sum of Kshs450,000 vide a letter of offer dated 7th July 1995. That letter clearly indicates that the security for the facility is; "a guarantee for Kshs 450,000 duly executed by the Plaintiff and supported by a legal charge over the suit property."

30. However, the Plaintiff denies executing the charge document and the purported signature thereon. In that regard I have considered the averment in the plaint and I note that, at paragraph 3 thereof, the Plaintiff avers that she gave the suit property as security for the loan facility. At paragraph 6 thereof, she avers that, she paid the sum of Kshs 450,000.00 for the Defendant to "discharge her property and in her final prayers under paragraph 12 of the plaint she prays that the Defendant execute a "discharge of charge" over the suit property. The question is: How can what is not charged be discharged? It also suffices to not that she has not pleaded that the charge is invalid. Finally she avers that, the copy of the charge document has not been provided but I saw it among the Defendants supplementary list of documents. In my considered opinion the denial of the charge is an afterthought and dishonest.

31. To revert back to the subject matter herein, I find that, there is no dispute that subsequently to the grant of the facility, the principal debtor defaulted on the repayment of the loan and the Plaintiff offered to repay the amount of the loan. However, the entire matter rests on the letter dated 10th May 2001, the Plaintiff wrote offering to pay the sum of Kshs 450,000 and be released from liability. This letter was forwarded to the Defendant under a cover letter written by the firm of; Ngala and Co, Advocates dated 11th May 2001.

32. The Defendant responded to the letter vide a letter dated 12th June, 2001, directing her to make the deposit to enable them consider her request for discharge. It is clear from the response letter that, the Defendant did not reject the Plaintiff's proposal/request out-rightly nor accepted it expressly. Neither did the Defendant comment on the indication that; the principal debtor would pay the other outstanding sums. Even then, the Defendant accepted the payment made by the Plaintiff into the debtor's account.

33. However although the Defendant argues that the payment was made out of time, it indicated that the deposit was to be made before 31st July, 2001, when the case No, HCC 115 OF 2001, was scheduled for hearing. In that regard it suffices to note that, the payments were made, vide bankers' drafts of Kshs 350,000 on 30th July, 2001 and Kshs 100,000 on 27th September, 2001, thus the last payment was made after the 31st July, 2001. But the Defendant accepted the payment, without any indication that the same was being accepted on "on without prejudice basis" or out of time. Neither did the Defendant indicate there was any outstanding sum.

34. Further, the conduct of the Defendant of; accepting the payment after time set, (if any), subsequently, having the suit withdrawn before the full payment, (as seems to have been the case), demanding costs of Kshs 47,123.00 incurred into pursuit of the debt and a sum of Kshs 60,000.00 as its costs in the suit withdrawn without demanding or even alluding to the outstanding sums (if any), would lead any person to believe that the debt was settled and the Plaintiff should have been discharged from liability. The defence of estoppels would arise in favour of the Plaintiff.

35. Indeed Estoppel is a judicial device in common law legal systems whereby a court may prevent, or "estop" a person from making assertions or from going back on his or her word; the person being sanctioned is "estopped" (Wikipedia).

36. It is a bar or impediment (obstruction) which precludes a person from asserting a fact or a right or prevents one from denying a fact. Such a hindrance is due to a person's actions, conduct, statements, admissions, failure to act or judgment against the person in an identical legal case. Estoppel includes being barred by false representation or concealment (equitable estoppel), failure to take legal action until the other party is prejudiced by the delay (estoppel by laches), and a court ruling against the party on the same matter in a different case (collateral estoppel).

37. The Defendant's conduct is also wanting in this matter. On the 27th August 2001, the Plaintiff wrote

to the Defendant and indicated that she had paid the Kshs 450,000.00 and the outstanding sum, was the Auctioneer's fees of Kshs, 48,000.00. She requested to pay a sum Kshs 24,000.00 in final and full settlement of the sum. Four years later she wrote to the Defendant, a further letter dated 16th April, 2004, informing the Defendant that she had paid all the dues being; the loan amount of Kshs 450,000, the costs of the suit and the Auctioneer's fees and sought for the release of her title. She persisted and wrote another letter dated 6th December, 2004. The Defendant did not respond to these letters until 18th November 2004, when they informed her that her request to be released from liability and the discharge of her title had been declined. It is noteworthy that, the Defendant did even indicate there was any outstanding amount in this matter.

38. On 24th January 2005, the Plaintiff again wrote to the Defendant followed by her lawyer's letter dated 8th March, 2005, the Defendant responded to these on 21st March, 2005, notifying the sale of the suit property, following her failure to comply with the statutory demand served on her.

39. The Defendant's conduct crystallized on the letter dated 30th August 2012, where the Defendant informs the Plaintiff that, the title to her suit property was "lying unclaimed" at their Eldoret Branch, Credit Department and then gave the Plaintiff sixty (60 days to collect it or the same be referred to Unclaimed Assets Authority as an Unclaimed Asset. The question is: What informed the contents of this letter? Had the Defendant released the Plaintiff from liability? Is so, why then does the Defendant write two years later on 18th April 2004, that, they have rejected the Plaintiff's offer on how to repay the loan and redeem her property?

40. However, the Plaintiff has been sued as a Guarantor. Her liability is secondary in nature after the principal debtor's liability. The nature of the Plaintiff's guarantee herein is important. In that regard, I have taken note of the contents of the guarantee produced by the Defendant which the Plaintiff signed. The Defendant relies on paragraph 2 thereof which states:-

> "Par 2: *This Guarantee is to be a continuing security for the whole amount now due or owing to you or which may hereafter at any time become due or owing to you as aforesaid by the principal (including any further advances made by you to the principal during the three calendar months period next hereiafter referred to and all interest and bank charges on and in connection with such further advances."*

41. The Defendant further relies on paragraph 3 and 2b of the charge. However, it suffices to note that, the letter of offer to the Plaintiff/Debtor states as follows on security:

> *"We shall hold a guarantee for Kshs. 450,000.00 duly executed by Martha Jerotich Ruto supported by a legal charge over property L.R. No. Uasin Gishu/Kimumu/351 registered in the names of Martha Jetorich Ruto."*

42. From the content of the letter of offer, the security was deemed to be a continuing security, but the liability of the Plaintiff and the chargor was limited to Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000.00).

43. Be that as it were, even if the Defendant is entitled to the interest on the principal loan amount, its conduct as herebelow stated, at the risk of repeating myself, first and foremost, they did expressly reject the Plaintiff's offer, secondly, they accepted the Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000.00), even outside their own time limit set of 31st July 2001, when the matter was due for hearing without dispute or reservation. Thirdly, after they accepted the sum of Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000.00), they did not write to the Plaintiff immediately thereafter seeking for any balance of the amount outstanding instead they, withdrew or settled the suit and demanded the costs and auctioneers fees. Fourthly, they ignored all the correspondences the Plaintiff wrote thereafter to release her title deed. Fifth, they only came to demand for the outstanding amount and served a demand notice on 24th January 2015. This is over four (4) years since the Defendant received the last payment of Kenya shillings one hundred thousand (Kshs. 100,000.00) on 27th September 2001. Why

did the Defendant take so long to demand the arrears if any? Who is therefore responsible for the interest that accrued during this period? Sixth, in the meantime as aforesaid, the Defendant wrote to the Plaintiff on 30th June 2002, stating she had failed to collect her title deed which became unclaimed assets.

44. Finally, if the Defendant has a genuine claim against the Plaintiff, the Defendant would have filed a counter-claim for the same. It does appear therefore that the parties' rights were determined in Eldoret HCCC No. 115 of 2001 and there are no further claims.

45. In the given circumstances, I find that, the Plaintiff has fully extinguished her liability under the charge and guarantee documents and deserves to have her title deed discharged and released accordingly.

46. I therefore allow the prayers in the Plaint as pleaded. The costs of the suit are awarded to the Plaintiff.

47. It is so ordered.

Dated, delivered and signed in an open court this 23rd day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of

Mr. Nyaberi for the Plaintiff

Mr. Mungai holding brief for Mr. Ochwa for the Defendant

Dennis .....Court Assistant