



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 17 OF 2014

SUNRISE HOMES LIMITEDPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED 1ST DEFENDANT

SPOTLIGHT INTERCEPTS AUCTIONEERS 2ND DEFENDANT

BY WAY OF COUNTERCLAIM

NATIONAL BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS

SUNRISE HOMES LIMITED1ST DEFENDANT

CHARLES WACHIRA NGUNDO 2ND DEFENDANT

MARTIN MUNYAO KIMEU 3RD DEFENDANT

BY WAY OF COUNTERCLAIM

MARTIN MUNYAO KIMEU..... 1ST PLAINTIFF

FLORENCE MUTHONI KIMEU 2ND PLAINTIFF

VERSUS

SUNRISE HOMES LIMITED 1ST DEFENDANT

UNITED WAY KENYA LIMITED.....2ND DEFENDANT

CHARLES WACHIRA NGUNDO3RD DEFENDANT

GRACE WAIRIMU WACHIRA.....4TH DEFENDANT

NATIONAL BANK OF KENYA LIMITED5TH DEFENDANT

JUDGMENT

1. Starting off as a suit between three parties, this matter attracted the participation of five others. Yet the dispute is not involved.

2. Sunrise Homes Limited (Sunrise or the company) was at all material times to this suit a customer of National Bank of Kenya Limited (NBK). It took a credit facility from NBK and charged KWALE/DIANI/1446 (The Charged Property) to the Bank. Over time, Sunrise defaulted in servicing the facility. And this is common cause.

3. The case for Sunrise is that it sought indulgence from NBK to redeem its indebtedness and it was granted. However, on 1st July 2013, NBK gave notice of intention to sale the charged property. It is asserted by Sunrise that consequent to change of its management, directorship and shareholding, new directors entered into an agreement with NBK to suspend the notice and to give Sunrise a chance to pay the debt.

4. It is alleged by Sunrise that through a letter of 6th September 2013, NBK requested for a proposal on repayment of the loan facility. Sunrise responded with the following proposal:-

i. Martin Munyao Kimeu be removed as a personal guarantor.

ii. There be an overhaul of the premises to improve its management.

iii. Sunrise having secured a lease, a monthly income of Kshs.1,000,000 be directed towards repayment of the debt.

5. It is contended by Sunrise that NBK had also permitted it to subdivide the charged property and to sell individual cottages thereon.

6. The grievance of Sunrise is that notwithstanding the indulgence and agreement reached, NBK advertised the charged property for sale by way of public auction on 24th January, 2014. The sale happened and that fact is not controversial.

7. Controversial, however, is the legality or otherwise of the notice preceding the sale and the sale itself. Sunrise alleges that in contravention of the provisions of the Land Registration Act, not all directors of its directors were served, nor were the previous directors who had sought to be removed as guarantors excused. Further that a valuation of the property was not undertaken before the sale.

8. In the end, Sunrise sought the following prayers in the plaint of 20th January 2014 and filed in 21st January 2014:-

a) An order that the 1st Defendant exercise of sale of the Plaintiffs Land known as KWALE/DIANI/1446 is irregular, illegal and in contravention of the provisions of the Land Registration Act, 2012 and the intended sale be declared null and void.

b) A permanent injunction restraining the Defendants jointly and severally from selling, alienating, charging and on any way whatsoever from interfering with the Plaintiff's property known as KWALE/DIANI/1446.

c) Costs of this suit be borne by the Defendants.

9. NBK rejects the claim and frames the Defence in pleadings filed on 17th November, 2015. That pleading is also a counter claim against Sunrise, Charles Wachira Ngundo (Ngundo) and Martin Munyao Kimeu (Kimeu). Needless to say the claim against Sunrise would be a counterclaim and as against Ngundo and Kimeu, who were not party to the original suit, it is a claim as permitted by the provisions of Order 7 Rules 8 and 9 of the Civil Procedure Rules.

10. NBK's defence is that Sunrise was in default and on 1st July, 2013 it issued a notice of intention to sale the charged property.

This notice was issued under the provisions of the repealed Registered Land Act. Another statutory notice under the provisions of Section 90(1) of the Land Act is said to have been issued on 1st February 2013. On 25th June 2013, the Bank valued the charged property for purposes of establishing the open market and forced sale values.

11. NBK pleads further compliance with the law. That, on 1st July 2013, it issued the second notice that is required by Section 96 (2) of the Land Act and on 11th October 2013 its auctioneers issued a notification of sale and redemption notice upon the Sunrise. The property was advertised for sale on 9th January 2014 and 21st January 2014. The property was sold on 24th January 2014 after Sunrise had failed to injunct the process through an application filed herein.

12. It is the Plaintiff's case that having sold the charged property for Kshs.60,000,000, Sunrise still owes it the sum of Kshs.41,352,143.17 plus interest thereon at 22% per month until payment in full. This amount is also sought against Ngundo and Kimeu as guarantors of the principal debt.

13. Enter Kimeu and his wife Florene Muthoni Kimeu (*Florence*). Theirs is a longer story. That in a meeting convened (held?) on 20th March 2013, a decision was reached in which Kimeu and Florence were to sell and transfer their shareholdings in Sunrise to United Way Kenya Limited (United Way) at a consideration of Kshs.10,750,000. It was also agreed that Ngundo, one Grace Wairimu Wachira (*Grace*) and the directors of Sunrise would assume and take over the liabilities arising out of the personal guarantees in respect to the debt by Sunrise at NBK. That arrangement was reduced into a sale agreement dated 25th March 2013.

14. Other than the take over of the guarantees, the case by Kimeu and Florence is that Sunrise would assume responsibility for all debts owed by the Company including the debt to NBK. The two assert that NBK was made aware of the arrangement and the Bank is not entitled to any relief from Kimeu.

15. Kimeu and Florence then launched a counter claim. In somewhat convoluted pleadings, this court understands Kimeu and Florence to be asserting that Ngundo and **Grace** have reneged on their promise to pay off the debt to NBK. Kimeu and Florence in fact allege fraud and misrepresentation on the part of two. The particulars are reproduced below:

- i. *Duping the 1st and 2nd Plaintiffs to transfer their full shareholdings in the 1st Defendant to their other private company the 2nd Defendant misrepresenting to them that they would obtain good consideration.*
- ii. *Registering the transfers with the Registrar of Companies and obtaining CR. 12 before contemporaneously giving any consideration for the value of the said shares.*
- iii. *Totally failing to pay any single dime or installments to the Plaintiff 'the bank' since such transfer.*
- iv. *Totally failing to retransfer the said shares back to its previous ownership/vendors the 1st and 2nd Plaintiffs respectively.*
- v. *Fronting their 'decoy' company as vehicle to unlawfully acquire the 1st and 2nd Plaintiffs shares.*
- vi. *Failing to render true and actual inventory of the 1st Defendant's financial affairs including the debtors accounts since 2011 to 14.3.2013 (date of transfer).*
- vii. *Duping the Vendors 1st and 2nd Plaintiffs to transfer their shareholding with a promise that they would give in exchange an acceptable guarantee to the 5th Defendant (Bank).*
- viii. *Failure to pay the Purchase price of the shares to the 1st and 2nd Plaintiffs in the sum of Kenya Shillings Ten Million Seven Fifty Thousand (Kshs.10,750,000).*
- ix. *Duping the 1st and 2nd Plaintiffs that they would release a fixed deposit held by Imperial Bank Kenya Limited of Kshs.10,000,000 plus the accrued interest at 9% per annum from date of deposit 3.10.2011 to date of maturity 2.12.2012 of Kshs.228,376.86 to them.*
- x. *Jeopardizing the 1st and 2nd Plaintiffs financial and business reputation credit worthiness in the eyes of the Plaintiff ('the bank') and other financial and banking world.*
- xi. *Penultimate exposure the 1st and 2nd Plaintiffs to financial risks including expensive litigation and time waste.*
- xii. *Misrepresenting to the 1st and 2nd Plaintiffs that the 3rd Defendant was the person of 'connections' and had a cobweb of business connections in banking world and that he would be in a position to obtain expediently another loan facility in the tune of over One Hundred Million (Kshs.100,000,000) from either Kenya Commercial Bank (KCB), Equity Bank and/or Bank of Baroda to clear the 5th Defendant (bank loan).*
- xiii. *Unable to honour its contractual obligation after the auction in paying payoff the outstanding debt of Kshs.41,352,143.17.*

16. Kimeu talks of an effort to persuade the NBK to resolve the matter by accepting half payment of debt but which the Bank declined.

17. Kimeu and Florence seek judgment against Sunrise, United Way, Ngundo and Grace for Kshs.41,352,143.17 being the loan outstanding as at 22nd February, 2015 plus interest at 22% per month until payment in full in the event the Court pass judgment in favour of NBK. The two also seek payment of the purchase price of Kshs.10,750,000 plus interest.

18. Almost outdoing the verbosity of their main pleadings, the two seek the following multiple prayers:-

- a) *Orders of specific performance against the 1st and 2nd Defendants to perform their contractual part of their bargain in paying off the outstanding loan facility due to the 5th Defendant ('the bank) without whatsoever involving the 1st and 2nd Plaintiffs*
- b) *A declaration exonerating the 1st Plaintiff from any liability in regard to his personal guarantees and joint and several guarantee thereof.*
- c) *Alternatively if order No. (a) is not granted then summary judgment be entered against the 1st, 2nd, 3rd and 4th Defendants as follows:-*
 - i. *Kshs.41,352,143.17 being outstanding loan of the 4th Defendant bank.*
 - ii. *Interest as 22% per annum on Kshs.41,352,143.17 until payment in full.*
- d) *Summary judgment be entered against the 2nd, 3rd and 4th Defendants for the sum of Kshs.10,750,000 plus the accrued interest at 9% per annum from date of deposit 3.10.2011 to date of maturity 2.12.2012 of Kshs.228,376.86 being the purchase price of the 1st and 2nd Plaintiffs shareholdings in the 1st Defendant company.*

e) Piercing the corporate veil of the 2nd Defendant Company to expose its 3rd and 4th Defendants directors to personal liability of both debts as pleaded in (c) and (d) above respectively.

f) A declaration against the 5th Defendant 'the bank' be estopped that due to its laches and acquiescence conduct towards the 1st Plaintiff in frustrating him from settling moiety of his fair share of the debt nothing in due and owing to it at all but as against the 1st, 2nd, 3rd and 4th Defendants respectively.

g) Costs of the counter claim.

h) The 5th Defendant counterclaim as against the 1st Plaintiff be dismissed.

i) Costs of the suit in the counterclaim.

j) Interest on items (a), (c) and (e) above at court rates until payment in full.

k) Any other or further relief that this Honourable Court may deem fit and just to grant.

19. At the hearing sunrise did not present any evidence. NBK presented Morris Tiema as a witness and between Florence and Kimeu, they chose Kimeu to testify. The evidence was brief and shall be evaluated in so far as it is relevant to the issues that require determination. Those issues, in my view, are:-

a) Did NBK properly and legally exercise its power to sale KWALE/DIANI/1446?

b) Is sunrise still indebted to NBK?

c) Are Ngundo and Kimeu still liable for that debt as guarantors or at all?

d) If the answer to (b) and (c) are in the affirmative, should Sunrise, United Way, Ngundo and Wachira indemnify Kimeu?

e) Is the claim by Florence and Kimeu sustainable?

f) What is appropriate order on costs?

20. Sunrise does not contest that it defaulted in payment of the loan facility granted to it vide the letter of offer of 25th May 2007 (D Exhibit page 4-6). It is also common cause that a legal charge over KWALE/DIANI/1446 was created and registered so as to secure the debt. That property was registered in the name of Sunrise.

21. Owing to default, NBK's right to exercise a statutory remedy available to chargors had accrued. The charged property was registered under the now repealed Registered Land Act and there is evidence that NBK issued a statutory notice of intention to sale dated 11th August 2010 upon the Plaintiff. The notice was a three (3) months notice and was issued pursuant to the provisions of Section 65(2) of the repealed Act which provided:-

65 A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.

22. There is also evidence that the Bank issued another notice under the provisions of Section 90(1) of the Lands Act 2012. That notice is dated 3rd February 2013 (D Exhibit 10). Thereafter, on 1st July 2013 (D Exhibit 38), the Bank issued the 40 day notice required by Section 96 (2) of the Land Act.

23. The Plaintiff does not deny receipt of the statutory notice (see paragraph 6 of the *Plaint*). It, however, faults the Bank for not serving the notice on all the new directors. In this regard I set out the provisions of Section 90(1) and 96 (2) of the Lands Act which read:-

(90) Remedies of a chargee

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

96. (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.

24. The chargor in the matter is the Plaintiff. The Plaintiff as well as Charles, Florence, Grace and Kimeu were duly served. That said the only obligation placed by the law on the charge was to serve the charger. There was no duty to serve the directors of the Plaintiff. The

grievance is without merit.

25. The second complaint is that NBK did not cause a valuation to be undertaken by a professional valuer before selling the property. There is evidence that the charged property was sold on 24th January 2014 and prior to the sale a valuation of the property was undertaken by Njihia Muoka Rashid co-valuers on 25th June 2013 (*D Exhibit 11-34*). The valuation was specifically undertaken by Rashid H. Shake who returned the following report:-

Current market value – Kshs.69,000,000

Forced sale value – Kshs.48,300,000

Insurance value Kshs.50,000,000

The practising certificate of Shake was produced in Court (*P. Exhibit D. 33*).

26. There is therefore evidence that valuation was duly undertaken by a valuer and for the fact that it was carried out just 7 months before the sale, the valuation was recent. In this regard, for purposes of a public auction, Rule 11 (b)(x) of the Auctioneers Rules sets out what amounts to a current valuation as follows;

Rule 11 (b) (x) The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.

27. The property was sold at ksh 60,000,000.00 which was above 75% of the market value (being ksh 51,750,000.00). In that way NBK had complied with the provisions of Section 97 (1) of the Lands Act which reads:-

97. Duty of chargee exercising power of sale

(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

28. I now turn to the complaint which is set out in paragraphs 9,10, 11 and 12 and 13 of the Plaintiff as follows:-

9. The new directors immediately entered into an agreement with the 1st Defendant to suspect the notice and allow the Plaintiff to redeem the loan accounts.

10. To the Plaintiff's surprise, vide the 1st Defendant's letter dated 6th September 2013, the 1st Defendant requested for a proposal as the repayment of the loan facility.

11. Upon receipt of the letter, the Plaintiff informed the 1st Defendant that it had taken over the outstanding dues and made the following proposal:-

a) The removal of Martin Munyao Kimeu as a personal guarantor.

b) The overhaul of the premises to improve management.

c) The Plaintiff had secured a lease and a monthly income of Kshs.1,000,000 was to be directed towards the repayment of the loan facility.

12. The 1st Defendant had also given the Plaintiff (earlier) permission to subdivide the cottages and sell each one off and pay the loan facility.

13. In breach of the agreement above and in particular in breach of the agreement that the Plaintiff subdivided the cottages and to sell each one of them to pay the loan the Defendant went ahead and instructed the 2nd Defendant to advertise the Plaintiff's charged property for sale by public auction on 24th January 2014 as contained in the newspaper of 9th January 2014.

29. What the Plaintiff has not demonstrated is that there was a promise by the Bank to indulge the Plaintiff. There is no evidence to prove that by allowing the Plaintiff to subdivide the property and to sell each subdivided portion, the Bank had waived its right not to insist on remedies available to it as a chargee.

30. The Courts attention then turns to whether Ngundo and Kimeu can be exonerated from their duties as guarantors. It is not in contest that the two had separately executed personal guarantors in favour of the Bank (*P. Exhibit pages 63 - 76*). The separate and joint guarantors of 2nd June 2009 was a promise by the two to pay and satisfy to the Bank, on demand, all moneys that would be due and owing by the principal debtor being the Plaintiff on account of the facility of Kshs.60,000,000.00. Neither of the guarantees have been discharged.

31. There is evidence that after the sale of the suit property some amount remained outstanding and is still due to the Bank. On 6th January

2017 (D. Exhibit 175) the Bank demanded payment of the sum of Kshs.40,561,655.12 from the principal debtor. This letter was copied to the guarantors, that is Ngundo and Kimeu.

32. The nature of a guarantee was described by the Court of Appeal in **Robert Njoka Muthara & another vs Barclays Bank of Kenya Limited Anor [2017]Eklr** as follows:-

23. A guarantee by definition is a pledge by a person (guarantor), other than a party upon whom the contractual or other legal obligation is imposed, to the effect that if the party so bound (principal) fails to perform the act in question, the guarantor, will either perform or make good any loss or claim arising from the non-performance. The pledge is ordinarily made to a creditor. The essence is that the guarantor agrees not to discharge the liability in any event, but to do so only if the principal debtor fails to honour his duty. Geraldine Andrews & Richard Millet succinctly described the nature of a guarantee in “The Law of Guarantees” (supra) at page 156 as herein under:- “A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.” Emphasis added.

33. I agree with the submissions by Counsel for NBK that the liability of Kimeu and Ngundo arose upon default by the Plaintiff under the loan agreement. Although the two had attempted to have the new directors step into their shoes, the Bank did not accede. The two are not exempt from their obligations as sureties for the debt merely because of change of Directorship.

34. The witness for the Bank produced statements showing that the debt of Sunrise stood at Kshs.41,352,143.17 as at 24th February 2015 (D. Exhibit Pages 72 – 174). That debt and the interest rate charged has not been contested by the Plaintiff and the guarantors. I have to find that the Bank has proved its case against them on a balance of probabilities.

35. This Court now turns to consider the claim by Kimeu and Florence against Sunrise, United Way, Ngundo and Wachira.

36. There is evidence that United Way bought 50% of the shares of Kimeu and Florence. In a Board meeting of the Company held on 20th March 2013 (D2 Exhibit Page 16 and 17), it was resolved, *inter alia*, that Kimeu and Florence would resign from the directorship of the Company and transfer their shares to United Way. It was further resolved that the new Directors would take full responsibility for the liabilities of the Company in respect of the outstanding loan with NBK. This was captured in a sale agreement entered between the parties (D2 Exhibit pages 23-25). Subsequently, Kimeu and Florence executed transfer of share forms in favour of United Way (D2 Exhibit pages 20 and 21). The transfers were effected and as at 5th July 2013 (D2 Exhibit 54) the directorship and shareholding of the Company was;

Grace Wairimu Wachira Director - 2 shares

Charles Wachira Ngundo Director - 2 shares

United Way Kenya Director - 4 shares

37. It would seem that United Way not only failed to pay the Purchase price of the shares being Kshs.10,250,000 but also to take up the loan obligation. Kimeu and Florence allege that the United, Ngundo and Wachira have been fraudulent and are guilty of misrepresentation. The particulars of the alleged fraudulent conduct have been set out in paragraph 25 of the plaint.

38. One of the allegations of fraud is that the Ngundo and Wachira have created a decoy Company to unlawfully acquire the shares of Kimeu and Florence. This motivates Kimeu and Florence to seek the lifting of the corporate veil of United Way so as to make the two Directors personally liable.

39. The Court of Appeal in *Bruce Joseph Bockle-vs- Coquero Limited (2014) eKLR* made observations in respect to the burden to be shouldered by a party alleging fraud.

The Courts of justice have been very hesitant to let a party who pleads fraud or misrepresentation to benefit from their lack of diligence and have normally held that the defendant must build a structure showing that there was fraud, construct a prima facie case of fraud or illegality. The court acts on it and gives leave to defend only after a defendant has presented a prima facie case of fraud or illegality.

40. In respect to the threshold to be reached, it is one higher than a balance of probabilities yet not as high as beyond reasonable doubt.

41. The Court has given regard to the entire evidence led by Kimeu. And although not controverted, what the evidence establishes is that United Way had breached the share purchase contract. The purchaser had failed to pay the purchase price and it's directors had failed to take up the NBK loan. What, however, Kimeu and Florence failed to prove is that the Ngundo and Wachira acted fraudulently. The failure to pay the purchase price and to take up the loan cannot be equated to an act of fraud.

42. In respect to the transfer of the shares, it is not said that transfer documents are forged documents. Then on the question of transfer, clauses 1 and 2 of the share purchase agreement are relevant. Under those clauses, it is not provided that the shares could only be transferred upon the purchaser fulfilling its side of the bargain. This Court is therefore unable to find that the two are guilty of fraud because of transferring the shares before paying the purchase price or failing assuming the responsibility for the NBK debt.

43. It is of course true that;

“.....the Court have refused to permit the logic of the principle laid down in Salomon’s case to apply where it is too flagrantly opposed to justice, convenience or the interests of the Revenue (sic) (Gower – 4th Edition, Page 112) and will disregard the fundamental principle of corporate personality if justice warrants it. Equity will not permit a statute or indeed the law to be a cloak for fraud”.

(Mbaluto J in Milimani Commercial Civil Case No. 1135 of 1998 Careland Limited –vs- Dolphin Holdings Limited & Another)

44. Yet in the matter before Court, Kimeu and Florence have failed to demonstrate that the Ngundo and Wachira are hiding behind the cloak of the incorporation of United Way to defraud them. There is no reason for this Court to lift the corporate veil of United Way. The Court will treat the failure of United Way to meet its obligation under the terms of the contract as an ordinary breach. Had the parties intended that the directors of United Way would undergird the company’s obligations then they would have said so in the share purchase agreement and made Ngundo and Wachira liable as sureties thereunder.

45. The outcome.

45.1. The suit by Sunrise Homes Limited is hereby dismissed with costs.

45.2. The Counter Claim by National Bank of Kenya against Sunrise Homes Limited, Charles Wachira Ngundo and Martin Munyao Kimeu succeeds as prayed for in the counterclaim dated 4th September 2015 and filed on 12th November 2015.

45.3. The claim by Martin Munyao Kimeu and Florence Muthoni Kimeu against Sunset Homes Limited, Charles Wachira Ngundo and Grace Wairimu Wachira and National Bank of Kenya is hereby dismissed with costs.

45.4. The claim by Martin Munyao Kimeu and Florence Muthoni Kimeu succeeds against United Way Kenya Limited only to the extent that United Way Kenya Limited shall indemnify the two for any payment they shall make to National Bank Ltd pursuant to Order 45.2 above.

45.5 Costs of the claim by Martin Munyao Kimeu and Florence Muthoni Kimeu shall be paid by United Way Kenya Limited.

Dated, Signed and Delivered in Court at Nairobi this 9th Day of August 2019

F. TUIYOTT

JUDGE

PRESENT:

Awanzo holding brief Sisule for 1st Defendant

No appearance for Plaintiff

No appearance for Respondent

Nixon: Court Assistant