



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 867 OF 2009

GEORGE MAINA KINGORI.....1ST PLAINTIFF

BRITE INTERNATIONAL LIMITED.....2ND PLAINTIFF

-VERSUS-

BANK OF BARODA (KENYA) LIMITED.....1ST DEFENDANT

SPORTLIGHT INTERCEPTS KENYA LIMITED.....2ND DEFENDANT

JUDGMENT

[1] The Plaintiffs, **George Maina Kingori** and **Brite International Limited**, filed this suit on the **26 November 2009** against the two Defendants, **Bank of Baroda (Kenya) Limited** and **Sportlight Intercepts Kenya Limited** praying for Judgment as hereunder:

[a] A Declaration that the 2nd Plaintiff has discharged all its obligations under the lending agreement between it and the 1st Defendant;

[b] A Permanent Injunction restraining the 1st Defendant, acting alone or through its agents and/or employees, from selling or disposing off or in any way interfering with the Plaintiffs rights and interest in the residential property comprised in **L.R. 209/10530/959 (Title No. 67940)** situate at **Siwaka, Nairobi**;

[c] An Order that the 1st Defendant delivers to the 1st Plaintiff, a duly executed discharge of Charge in respect of the property comprised in **L.R. No. 209/10530/959 (Title No. 67940)** situate at **Siwaka, Nairobi**;

[d] General and aggravated damages for breach of contract;

[e] Costs of the suit and interest thereon at court rates;

[f] Any other relief the Court may deem just to grant.

[2] The claim is premised on the contention that the 1st Plaintiff was, at all material times, the registered owner of the property comprised in **L.R. No.209/10530/959 (Title No. 67940)** situate at **Siwaka, Nairobi** whereon stands a 4 bedroomed maisonette ("**the Suit Property**"). It was pleaded in the Plaint that the 1st Plaintiff executed a Charge Instrument over the Suit Property dated **30 May 2003** in favour of the 1st Defendant to secure an overdraft facility not exceeding **Kshs. 1,800,000/=**, offered to the 2nd Plaintiff; and that, by a letter dated **22 August 2009**, the 2nd Defendant intimated that it had been instructed pursuant to the 1st Defendant's powers under the Charge to sell the Suit Property by public auction; yet the 2nd Plaintiff had repaid all sums advised as due, including Advocates fees and Auctioneers charges. The Plaintiffs further averred that the 2nd Defendant, as a limited liability company, is neither licensed nor capable of conducting business as an Auctioneer under the provisions of **Section 10 and 14** of the **Auctioneers Act, 1996**.

[3] The Plaintiff was filed contemporaneously with the Chamber Summons application dated **26 November 2009** wherein the Plaintiffs beseeched the Court to grant a temporary injunction to restrain the Defendants from selling, disposing of, or in any way alienating the Suit Property pending the hearing and determination of the suit. That application was allowed vide a Ruling that was delivered herein on **20 November 2012**. In the meantime, the Defendants had filed a joint Statement of Defence on **6 April 2010**, confirming that the 2nd Plaintiff requested for overdraft facilities in the sum of **Kshs. 1,800,000/=** from the 1st Defendant; which request was granted upon the 1st Plaintiff submitting the Suit Property as security for the facility. It was further the contention of the Defendants that on **18 February 2004**, the 2nd Plaintiff applied for additional temporary overdraft facilities on its loan account amounting to **Kshs. 400,000/=** which request was similarly granted on **30 March 2004** by the 1st Defendant; and that it was one of the terms and conditions of the facility that any sums outstanding and due to the 1st Defendant would attract interest at such rates and upon such terms as were set out in the Charge document.

[4] Thus, the 1st Defendant denied that the Plaintiffs had discharged their obligations under the terms of the overdraft facility as alleged; and added that by **June 2009**, when it instructed the 2nd Defendant to proceed with the sale of the Suit Property, the 2nd Plaintiff was still indebted to it. Accordingly, the Defendants denied that the Plaintiffs have fully repaid all sums under the Charge, as there was still outstanding an amount of **Kshs. 626,170/=** by way of accrued interest as at **January 2010**. It was further the Defendants' contention that valid Statutory Notices were duly served on the Plaintiffs at their last known address; and that they handled their business transactions with the Plaintiffs as well as the sale process with due diligence, utmost care and good faith; and consequently, the allegations of malice and *mala fides* were denied and the Plaintiffs put to strict proof thereof. And on the part of the 2nd Defendant, it was denied that it is a limited liability company as alleged in Paragraph 8 of the Plaintiff. The Defendants therefore prayed that the suit be dismissed with costs.

[5] In support of the Plaintiffs' case, the 1st Plaintiff, **George Maina Kingori (PW1)**, testified herein and basically adopted the Witness Statement made and signed by him dated **14 December 2012**. His evidence was that he is the registered proprietor of the Suit Property; and that on **30 May 2003**, he executed a Charge in favour of the 1st Defendant to secure an overdraft facility to the 2nd Plaintiff not exceeding **Kshs. 1,800,000/=**. He added that the repayments of the overdraft were to be made by the 2nd Plaintiff through its Account Number 0072100040, held with the 1st Defendant's Industrial Area Branch.

[6] It was conceded by **PW1** that, at the beginning of **2006**, the facility account was overdrawn to the extent of **Kshs. 2,756,698.70** and that the 1st Defendant had asked the 2nd Plaintiff to regularize the account and bring it down to its secured limit; whereupon the 2nd Plaintiff undertook to repay the overdue sums in the course of **2006**. According to **PW1** the payments made by the 2nd Plaintiff in the course of **2006** amounted to **Kshs. 750,000/=**, thereby reducing the overdraft account to **Kshs. 2,086,912.70** as at **23 August 2006**. He added that the Plaintiffs then continued with the repayment regime, with the indulgence of the 1st Defendant, and that as at **31 January 2008**, the sum due on account stood at **Kshs. 1,777,812.70**.

[7] It was therefore the testimony of **PW1** that he was shocked to see an advertisement in the Standard Newspaper, advertising the Suit Property for sale on **27 November 2009**, considering that the 2nd Defendant was about to finalize payments. He thus instructed his Advocates to demand from the 1st Defendant an indication of the sum due with a view of settlement; and that he later issued a cheque in full and final settlement of the overdraft; and sought to know whether there was any interest due, and if so, how much. **PW1** further stated that the 1st Defendant purported to charge interest at rates that had neither been disclosed to him nor the 2nd Plaintiff. He was thus of the contention that the Bank is estopped from clogging his right to redeem the Suit Property. He accordingly urged the Court to find in the Plaintiffs' favour and enter judgment against the Defendants as sought in the Plaintiff.

[8] The Defendants called two witnesses, namely: **David Ogega Nyaboga (DW1)**, a Manager of the 1st Defendant, and the Auctioneer, **Peter Njoroge Gichuki (DW2)**, trading as **Sportlight Intercepts Auctioneers**. The evidence of **DW1** was that, on the personal request of the 1st Plaintiff, the 1st Defendant agreed to advance to the 2nd Plaintiff an overdraft facility not exceeding **Kshs. 1,800,000/=**. He confirmed that the facility was secured by a Legal Charge over the Suit Property; which was then registered in the name of the 1st Plaintiff, and hence the 1st Plaintiff was a Guarantor of the 2nd Plaintiff. It was further the testimony of **DW1** that it was a term and condition of the facility that any outstanding sums would attract interest at the rate of 17.5% as set out in the Letter of Offer; and that any excess sum above the sanctioned limit would attract interest at the rate of 21.5%. He added that the Bank reserved the right to vary the rate of interest in accordance with the prevailing trends.

[9] It was further stated by **DW1** that, subsequently the 2nd Plaintiff, by a letter dated **18 February 2004**, requested for an excess overdraft of **Kshs. 400,000/=** over and above the sanctioned limit of **Kshs. 1,800,000/=**; which request was accepted by the 1st Defendant and the additional sums advanced on terms; but that the 2nd Plaintiff thereafter defaulted in servicing the facilities, thereby prompting the 1st Defendant to demand payment from the two Plaintiffs. **DW1's** evidence was that as of **June 2005**, the balance outstanding was **Kshs. 2,578,834.70**; and that subsequently, on **31 August 2005**, the 2nd Plaintiff's account was declared as non-performing. The facility was accordingly recalled and the Plaintiffs called upon to pay the entire outstanding amount with interest. **DW1** further testified that, on being threatened with recovery by way of sale of the Suit Property, the Plaintiffs made several payments towards clearing the loan, but that they did not pay the entire debt as proposed by them, as they would only make minimal payments which were not enough to off-set the debt.

[10] It was thus the evidence of **DW1** that, in the light of the foregoing, the 1st Defendant, vide a letter dated **23 June 2009**, instructed the 2nd Defendant to sell the Suit Property pursuant to its (1st Defendant's) statutory power of sale. He confirmed that, pursuant to those instructions, the 2nd Defendant did issue the 45 days Redemption Notice to the Plaintiffs; and that the Plaintiffs thereafter fully paid the principal sums owing as at **14 January 2010**, but failed to offset the unapplied interest which the 1st Defendant had leniently and fairly charged at the rate of 10% per annum.

[11] **DW2** similarly adopted the Witness Statement made by him, dated **7 February 2017**. He supplemented the evidence of **DW1** and confirmed that he is a licensed Auctioneer; and that he was instructed by the 1st Defendant to sell the Suit Property in exercise of the 1st Defendant's statutory power of sale. He confirmed that he proceeded to issue upon the 2nd Plaintiff a 45 days' Redemption Notice and

thereafter placed two advertisements in the Standard Newspaper dated **17 August 2009** and **31 August 2009** for the public auction of the Suit Property, to be held on **3 September 2009**. He added that the auction was cancelled on the instructions of the Bank and therefore that the property was not sold as scheduled. **DW1** asserted that he trades as **Sportlight Intercepts Auctioneers** in accordance with the dictates of **Auctioneers Act** and not as a limited liability company, as was advertised. He added that the advertisements in the name of **Sportlight Intercepts Kenya Limited** were made in error. Thus, both **DW1** and **DW2** urged the Court to dismiss the Plaintiffs' suit with costs.

[12] Having carefully considered the Pleadings and the evidence adduced in respect thereof, as well as the written submissions made herein by the parties, there is no dispute that the 2nd Plaintiff applied for and was granted an overdraft facility by the 1st Defendant on the **12 May 2003**. The Letter of Offer, produced in the Plaintiffs' Bundle of Documents at pages 16-18 thereof, confirms that the facility was limited to **Kshs. 1,800,000/=**; and that the security to be taken for it was the Suit Property, **L.R. No. 209/10530/95 Nairobi (I.R. 67940)**, as well as Personal Guarantees of the 1st Plaintiff, **George M. Kingori** and **Mrs. Lucy Maina Kingori**. In addition, the 1st Defendant also required appropriate board resolution for the borrowing and a Credit Agreement duly signed by the Directors of the 2nd Plaintiff. The parties were further in agreement that the facilities were advanced and the requisite security provided by the Plaintiffs. The Letter of Offer further confirms that the Plaintiffs accepted the terms of the facility and duly signed the Letter of Offer indicating their acceptance.

[13] It is also common ground that the 1st Plaintiff charged the Suit Property as security for the loan and in this regard, he signed the Charge Instrument dated **30 May 2003** which was exhibited at pages 2-15 of the Plaintiffs' Bundle of Documents and at page 1 of the Defendants List and Bundle of Documents. Thereafter, on the **18 February 2004**, the 2nd Plaintiff requested the 1st Defendant for a temporary overdraft facility of **Kshs. 400,000/=**, which was also granted in addition to the existing facility of **Kshs. 1,800,000/=**, and was to subsist for two months only upto **25 May 2004**. The letters to this effect were exhibited in the Defendants' Bundle of Documents at pages 2 and 3.

[14] There is similarly no dispute that the Plaintiffs did not keep up with the agreed repayment schedule. Correspondence exhibited by the Plaintiffs and the Defendants confirm that the Plaintiffs were in default and that as a result several attempts were made by the 1st Defendant to realize the security; and further that the 1st Defendant would then magnanimously accord the Plaintiffs time to pay. The 1st Defendant appears to have reached its wits end, as it were, in **June 2009** when it instructed the 2nd Defendant to proceed and sell the Suit Property. Accordingly, the 2nd Defendant served the Plaintiffs with the Redemption Notice dated **29 June 2009** a copy whereof was exhibited herein and marked "**DON 10**" in the Defendants Bundle of Documents. The property was thereafter advertised for sale as confirmed by the documents at pages 56 to 60 of the Plaintiffs' Bundle of Documents. The advertisement at Page 58 of the Plaintiffs Bundle is what triggered the filing of this suit and the Orders of the Court dated **26 November 2009** and **20 November 2012**. Thus, as at **25 November 2009** when this suit was filed, the contention of the Plaintiffs was that they had fully discharged their obligation to the 1st Defendant, and therefore that the Defendants had no right to clog the 1st Plaintiff's right to redeem the Suit Property.

[15] In the premises, the issues that the parties crafted for determination, and which I endorse for consideration in the light of the evidence adduced herein are:

- [a] Whether the Plaintiffs have discharged their obligation to the 1st Defendant under the Charge Instrument;
- [b] Whether the requisite statutory notices, including the notice under **Rule 15** of the **Auctioneers Rules, 1997** were validly issued.
- [c] Whether the Plaintiff is entitled to general and aggravated damages for breach of contract.

On Whether the Plaintiffs have discharged their Obligation to the Defendant:

[16] The testimony of **PW1**, on behalf of the Plaintiffs, was that although the 2nd Defendant fell into arrears in repaying the subject facility, it had fully paid the principal sum by the time the Redemption Notice was served by the 2nd Defendant. **PW1** referred the Court to the correspondence at pages 62 to 70 and a copy of a cheque exhibited at page 71 of the Plaintiffs' Bundle of Documents to show that it ascertained what was then due and issued a cheque for **Kshs. 92,012.70** in full and final settlement of the facility. Indeed, **DW1** conceded that the principal sum was fully repaid. This is clearly admitted at paragraph 1 on page 4 of **DW1's** Witness Statement dated **17 March 2012**. Thus, the 1st Defendant's posturing was that the 2nd Plaintiff is still indebted to it in respect of unapplied interest.

[17] In this regard, a dispute emerged when the 2nd Plaintiff wrote to the 1st Defendant on **28 August 2009** giving assurance of its commitment to fully settle the debt. According to the 2nd Plaintiff, only **Kshs. 892,012/=** was due at the time, which it proposed to clear in 3 instalments of **Kshs. 250,000/=** and one instalment of **Kshs. 140,000/=**. The 2nd Plaintiff further pleaded with the 1st Defendant to suspend any intended precipitate action pending such payment. The 1st Defendant's response through its Advocates, **Mwaura & Wachira Advocates** was vide the letter dated **8 September 2009** (at page 19 of the Defendants' Bundle of Documents), by which the Plaintiffs were notified, *inter alia*, that:

"...the actual sums due and owing to the bank from yourselves as at **31st August 2009** stood at **Kenya Shillings One Million Five Hundred and Sixteen Thousand Nine Hundred and Eighty Two Cents Seventy (Kshs. 1,516,982.70)** constituting the following sums:

i) Outstanding sums on account - **Kshs. 922,982.70**

ii) Unapplied interest as at the **31st August 2009** calculated at the rate of **10%** - **Kshs. 594,000/=**

The said sums continue to accrue interest at the rate of **10% per annum** until payment in full..."

[18] It is evident that the Plaintiffs ignored the communication aforementioned and through their Advocates, **M/s Njenga Mbugua & Nyanjua Advocates**, they forwarded a banker's cheque for **Kshs. 92,012.70** vide a letter dated **12 November 2009** (at page 21 of the Defendant's Bundle of Documents) "**in full and final settlement**" of the facility. Accordingly, the question to pose at this point is whether the 1st Defendant was entitled to charge interest on the overdraft; and the answer is to be found in the Letter of Offer dated **12 May 2003** wherein it was made clear by the 1st Defendant that interest would be charged on the overdraft of **Kshs. 1,800,000** at the rate of 17.5% per annum; and in Clause 3 of the said Letter of Offer, the 1st Defendant was explicit that:

"Interest will accrue on a daily basis at the rate indicated against each facility above and will be applied at the end of each month. Excess rate of 21.5% will be applied for any balance above the sanctioned limits. The Bank reserves the right to charge such rate or rates as it may in its sole discretion from time to time, decide."

[19] Similarly, the 1st Plaintiff committed itself to ensuring that the sums due to the 1st Defendant from the 2nd Plaintiff were duly paid, including interest, by executing the Charge Instrument dated **30 May 2003**. The Defendant exhibited correspondence to show that it took the trouble to notify the Plaintiffs of the variations in interest rate. An example is the letter dated **9 December 2004**, exhibited at page 4 of the Defendant's Bundle of Documents. In any case, by **Clause 2(a)** of the Charge, the Bank reserved for itself the right to vary the interest rates without any prior notice to the Chargor (the 1st Plaintiff) or the Borrower (the 2nd Plaintiff). That Clause further provides that failure by the Bank to advise the Chargor or the Borrower of any such change would not **"...prejudice in any way howsoever the recovery by the Bank of interest charged subsequent to any such change."**

[20] There being no dispute that the 2nd Plaintiff defaulted in servicing the facility, it is manifest therefore that its obligation was not limited to paying only the principal debt; but that it was also obliged to pay the accrued interest thereon. It is now trite that parties are bound by the terms of their agreements. In **Harital & Company & Another vs. The Standard Bank Limited [1967] EA 512**, this point was underscored thus:

"...the Plaintiffs borrowed some money from the bank and defaulted in payment. They made use of this money and must surely pay back...in these transactions of borrowing and lending each party must comply with the conditions of contract ... A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

[21] Similarly, in **National Bank of Kenya vs. Pipeplastic Samkolit (K) Ltd [2001] KLR 112** the Court of Appeal had the following to say on the point:

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

As was stated by Shah JA in the case of **Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported)**:

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

[22] Accordingly, having covenanted to pay the principal sum lent together with interest, and having conceded that it was in default in servicing the overdraft facility, the Court is far from satisfied that the Plaintiffs have fully discharged their obligation to the 1st Defendant.

On Whether the requisite statutory notices, including the notice under Rule 15 of the Auctioneers Rules, 1997 were validly issued.

[23] The Charge herein was drawn pursuant to the **Registration of Titles Act, Chapter 281** of the **Laws of Kenya**, and in the Defendants' Bundle of Documents are various notices exhibited at pages 5, 13, 14, and 15 to demonstrate that the requisite notices, including a Redemption Notice under **Rule 15 of the Auctioneers Rules**, were duly served and that the Plaintiffs were accorded quite a wide measure of latitude by the 1st Defendant to pay off the principal debt; which it ultimately did. There would therefore be no valid reason for the Plaintiffs to complain about service of the notices, which have the Certificates of Posting appended thereto.

[24] The foregoing notwithstanding, the Plaintiffs challenged the competence of the 2nd Defendant to issue the Redemption Notice, and proceed with the sale, granted that it is a limited liability company. In their written submissions before the Court, the Plaintiffs drew the Court's attention to documents at pages 19, 56, 57, 58, 59, and 60 of the Plaintiffs' Bundle of Documents in which the Auctioneers name is reflected as **Sportlight Intercepts Kenya Limited**, which is expressly prohibited by dint of **Section 14** of the **Auctioneers Act, No. 5 of 1996**. Needless to say that **Section 14(2)** of the **Auctioneers Act**, does provide that:

"A licensed auctioneer shall carry on business in his own name or in the name of a firm all of whose partners are licensed auctioneers."

[25] There is no gainsaying therefore that limited liability companies are accordingly prohibited from conducting business as auctioneers. Hence, in **Abubakar A.H. Mohamed vs. Ahmed Mohamed Al Moody & 2 Others [2010] eKLR** it was held that:

"There is no provision in the Act for a limited liability company being licensed to carry out the business of an auctioneer. If the 3rd Respondent was a limited liability company as was purported in the plaint, it is unlikely that the 3rd Respondent would have been licensed. We are satisfied that the 2nd Respondent or any other party involved with the 3rd Respondent was

merely trading in the firm name of the 3rd Respondent..."

[26] The 2nd Defendant attempted to explain away the limited liability tag by saying that it was an error; which is unbelievable. Unbelievable because at page 19 of the Plaintiff's Bundle is a letter written on the 2nd Defendant's letter head that was duly signed by **DW2**. That was deliberate communication, and it is incredible that the same mistake could have been repeated in the advertisements that followed as shown on pages 56, 57, 58, 59, and 60 of the Plaintiff's Bundle of Documents, without being detected. Nevertheless, it is instructive that on the licence for the year **2009**, which is material for purposes of the intended sale, the Auctioneer's name is shown as **Peter Njoroge Gichuki** trading as **Sportlight Enterprises**. A copy thereof was exhibited as **Exhibit "DON 9"** in the Defendants' Bundle of Documents. It therefore dispels any assertion that **DW2** was not a licenced Auctioneer or that the Auctioneer in this instance was a limited liability company. In the premises, I am satisfied that the requisite statutory notices, including the notice under **Rule 15** of the **Auctioneers Rules, 1997** were validly issued; and were issued by a duly licensed auctioneer for purposes of the Auctioneers Act and the Rules thereunder.

On Whether the Plaintiff is entitled to general and aggravated damages for breach of contract.

[27] Having found that the Plaintiffs were in default in servicing the overdraft facility, and that they were duly served with the requisite notices, there would be no basis for the Court to issue a Declaration that the 2nd Plaintiff has discharged all its obligations under the lending agreement between it and the 1st Defendant; or a Permanent Injunction restraining the 1st Defendant acting alone or through its agents and/or employees from selling or disposing off or in any way interfering with the Plaintiffs rights and interest in the residential property comprised in **L.R. 209/10530/959 (Title No. 67940)** situate at **Siwaka, Nairobi**. Similarly, there is no justification for an Order that the 1st Defendant delivers to the 1st Plaintiff, a duly executed discharge of Charge in respect of the property comprised in **L.R. No. 209/10530/959 (Title No. 67940)** situate at **Siwaka, Nairobi**. Accordingly, an award of damages for breach of contract, general or aggravated, would be unwarranted.

Accordingly, I would dismiss the Plaintiff's suit with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2018

OLGA SEWE

JUDGE