



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.659 OF 2007

SHAROK KHER MOHAMMED ALLI.....1ST PLAINTIFF

SAID MUHIDDIN GATIBARU.....2ND PLAINTIFF

FIROZE NURALI HIRJI.....3RD PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LIMITED.....1ST DEFENDANT

DEVETRONIC COMPANY LIMITED.....2ND DEFENDANT

J U D G M E N T

The Plaintiffs herein filed this suit against the Defendants seeking the following orders,

1. A declaration that sale and transfer of LR No. 7785/259 by the 1st Defendant to the 2nd was illegal, null and void.
2. Cancellation of transfer of LR. 7785/259 by 1st Defendant to 2nd Defendant.
3. General damages.
4. An award of 24,000,000 on account of loss of materials and other valuables on site at the time of eviction.
5. Cost of the suit.
6. Interest on prayer 2 and 3.

BACKGROUND

In or about November 2005, the 1st and 2nd Plaintiffs approached the 1st Defendant for a facility of Kshs., 5,800,000 as a working capital to boost their business which operated in the name Neeyat Hostel services Limited. LR 7785/259 situate at Runda Nairobi a property jointly owned by the Plaintiff was charged as security to secure the loan.

At the time the loan was advanced, the property was valued at Kshs. 15, 000,000 in July 2007; the 1st Defendant issued the 1st Plaintiff a notice of 30 days to pay Kshs. 8,200,000 the property was sold to the second Defendant.

The Plaintiff contend that transfer of the property to the 2nd Defendant was fraudulent, null and void. That due to fraud and collusion on the part of Defendants, there was no valid charge to enable 1st Defendant exercise statutory power of sale.

That the charge dated 30th November 2005 registered on 28th November 2005, is null and void.

Plaintiffs further contend that no valid notice was issued, that there was no public auction, sale was rearranged and the behavior and conduct of the second Defendant was mischievous.

That the 1st Defendant failed to act honestly and sold the property at 12,500,000 which was below the then market value of 42,000,000 thus frustrating the Plaintiffs' effort to redeem the property.

PLAINTIFF'S EVIDENCE

The Plaintiff availed four witnesses, the three Plaintiffs herein and a valuer. PW1 Firoze Nuruhi Hirji who is the 3rd Plaintiff recorded witness statement dated 18th April 2010. He testified that he had no relationship with 1st Defendant and he has never visited the 1st Defendants office at all. He testified that property IR No.46303 is a plot in Runda, which is his home together with his wife Sharok Hirji (1st Plaintiff). He testified that the land's title was the subject of his complaint and that the charged document made on 30 November 2005 refer to his property IR 46303. He testified that the chargors are himself and his wife but he was not in the bank when the property was charged. He said that his signature does not appear in the charged document even though his name appears as one of the chargors. He said the document was executed before Nyasimi Orok Advocate and it bears Sharok's signature. He further testified that the transfer of charged document title number is IR NO.30597 and the signature in the document does have Identity card or pin number. He denied having received demand letter from Zablon Mokuia and Company Advocates. He however, admitted the address on it is his Nairobi address, which he had gave up when he left for Tanzania in the year 2000. He said the demand letter was asking for payment of Kshs. 8, 248,577.70 within one month.

Pw1 testified that the Runda Property houses a bungalow and main house. That the main house has eight bedrooms, gym, sauna, steam bath and was built like a clubhouse. He added that it has a 25-meter swimming pool l-shaped. He said in the year 2012 when he testified, the property' market value was Kshs. 100 million. He said that he is not aware of any advertisement of the property by the bank.

He testified that at the time the property was sold, the construction for the main frame was 65%; that it was valued at 10 million on 1/12/2003 and 14 million on second valuation done on 23/2/2007. He added that the second valuation omitted the swimming pool, which was captured in the first valuation.

He testified that at the time the 2nd Defendant entered into the house, there were two containers with material which included tile, pump, sauna and steam bath materials, door frames, windows all estimated at 25 million and that he was not given an opportunity to remove them as they were ambushed with eviction. He said that there was no notice nor Court order. Pw1 testified that the value of property as of 15/5/2008 by Vineyard was Kshs. 32,500,000.

In further cross examination Pw1 testified that the schedule of property on charge refer to 112 389 62/1 which is not his property. He further said that the schedule shows size as 0.0390 of a hectare, which is not the size of his property, and even survey plan is 120536, which is not his title.

He further said that the demand notice from Zablon Mokuia and Company Advocates refer to LR NO. 7785/259, which do not tally with the property details, set out in the charge.

Pw1 denied having consented to his property being charged to the bank. He said the bank or its lawyers never contacted him and that he has suffered loss and damage due to actions of the bank. 3rd Plaintiff testified that he was keen to finish his property and recover his investment but so far the property has not yielded any returns and that he had sold another property to invest in this property.

He said that he learnt of the eviction on 17th November 2016 and prior to that he never received any communication from the bank.

In cross-examination, Pw1 testified Sharok Hirji Mohammed was his wife and they separated around the years 2004 and 2005. He said he came to know the 2nd Plaintiff in the year 2007 as a business associate of his wife.

Pw1 confirmed that he and his wife jointly own the property. He confirmed that between the years 2004 and 2007 there was no construction going on and construction resumed in September 2006 and went on to November 2007 when the whole shell was completed and he was ready to embark on finishing the interior.

He informed Court that he was in Kenya from 2006 and 2007 when the eviction took place and on calling his wife (1st Plaintiff) on 17th November 2007, he learnt that she had approached the bank for financing. He confirmed that his wife signed against the charge, which had both his name and his wife's name and that the transfer of charge is registered against the title he co-owned with his wife. He also confirmed that the stamp on the title dated 19th November 2007 has IR NO. 46303/3, which belonged to him.

Pw1 testified that he had material worth USD 100,000 as at November 2007, which were stored in one of the rooms in the bungalow. He testified that his brother Khaleem was the caretaker but his wife the first Plaintiff had access to the premises specifically his bedroom where he kept the title document.

Pw2 a valuer testified that he valued the property on 9th May 2008 at 32.5 million. At the time he testified in June 2012, he estimated the value of the land 50 million and developments at 35 million. Total value being 85 million. He produced the valuation report as exhibit.

PW3 who is the first Plaintiff testified that the IR NO in the charge document is IR 38962/1, which is different from the title IR NO 46303/1. That there is variance of particulars of those in the charge and the title. She further confirmed that the land number in the statutory notice

dated 10th July 2007 served on her end of August by registered post has a different LR NO from the charge document.

She said that she is not aware if the 3rd Plaintiff signed the charge document. She confirmed that the 3rd Plaintiff was not informed of the charge by the bank. She confirmed that the Plaintiff and she were paid 5.8 million, which was credited to account of Neeyat Hostel services limited. She further confirmed that 4.5 million was debited from the account in favour of Saleem Bakrash loan account before perfection of the charge on 30th December 2012.

1st Plaintiff further testified that 10,000, 100,000, 400,000 and 50,000 were paid out by the bank from the account without her authorization or authority of anyone from the company. She blamed the bank for not being transparent in debiting the account and charging the property. She testified that the pin certificate of the 1st signatory was not provided and that he never executed a legal charge, never executed consent neither did they execute joint or personal guarantee nor credit agreement for 5.8 million over LR NO 7785/259. She however confirmed that she signed the letter of offer.

On cross-examination, she testified that receipts for materials worth 24 million were lost during eviction. She also confirmed that the 1st Defendant advanced loan to her business and that the property herein was being sold in respect to that loan. She confirmed that the property was transferred on 12th November 2007. She blamed the bank for not giving her sufficient notice of 3 months, which would have given her an opportunity to pay the loan as she had applied for a facility from Imperial bank. She denied receiving notice dated 4th December 2007.

On further cross-examination, she confirmed that Sharok Kher Mohammed Ali and Sharok Firoze Hirji are both her names and that title no 7785/259 was in the name Sharok Firoze Hirji. She said she adopted the names Sharok Kher Mohammed Ali from 2005. She confirmed that she intended to offer title IR NO.46303/2 as security for the loan facility. She confirmed that she signed the charge document. She also confirmed that the 3rd Defendant was away during the time and that he did not sign the charge document. The 1st Plaintiff further confirmed that she received one month's notice from 1st July 2007. She confirmed that at the time, she received notice and at the time of sale of property, she had not paid the loan. She further testified that she had power of attorney to act on behalf of the 3rd Plaintiff.

PW3 who is the second Plaintiff confirmed that he was a business partner of the 1st Plaintiff in Neeyat Hotel Services Ltd. He confirmed that together with the 1st Plaintiff they borrowed 5.8 million from the 1st Defendant bank. He further confirmed that at the time of sale of property no repayment had been made to the 1st Defendant bank. He also confirmed that the property in Runda was security for the loan. He said that on visiting the property on the day of eviction they informed that auctioneers served the caretaker with an eviction notice.

Dw1 who was an employee for the 1st Defendant confirmed that the Plaintiff applied for a loan of 5.8 million in the name of Neeyat Hotel service Ltd and was secured by property LR 7785/259 and that the loan was released on 23rd December 2005. He said that the borrower never made any single payment and that statutory notices were issued and property sold to the 2nd Defendant at 12,500,000 and the transfer was registered in favour of the 2nd Defendant on 19th December 2007. He said the bank was owed 8,447,460.88 and credit balance of 2,743,447.12 was paid to the Plaintiff's current account. He admitted that there were discrepancies in the title number in the charge document and he could not explain the discrepancies/errors. He conceded that the charge refers to a different title number and transfer by the chargee does not reflect the property referred in the charge document.

He further confirmed that LR number in statutory notice is different from the LR number in the charge document. He said phone calls were made to the borrowers before the sale but he could not confirm that. He confirmed that no letter sent to the borrowers and to his knowledge, no Court order was served on the Plaintiff in relation to the sale of the property.

In cross-examination by Mr. Taib for the Plaintiff, Pw1 was unable to produce power of attorney from the 3rd Plaintiff authorizing 1st Plaintiff to execute documents on his behalf. He said that the Power of Attorney does not exist. Pw1 on cross-examination by Mr. Ongegu for the 2nd Defendant, said that it is the 1st and 2nd Plaintiff who approached the 1st Defendant bank for a loan facility and at the time, the first Plaintiff was holding a title deed of the property in Runda LR NO 7785/259 and it is that same title which was used to secure the loan.

He said the 2nd Defendant paid the 12.5 million by instalments first deposit being 3 million on 28th August 2017. He confirmed that the 2nd Plaintiff withdrew money from the account credited with the loan.

Dw1 said the property charged is the same property referred to in the Plaintiff; he confirmed that the property was transferred by the 1st Defendant to the 2nd Defendant who took possession. He said before the property was sold, the Plaintiffs did not approach the bank on any irregularity but instead enjoyed the loan.

He testified that the 1st Plaintiff took all the steps required before the property was charged. He confirmed that Kshs. 2,743,447.12 was transferred the current account after closing the loan account and that the 1st and 2nd Plaintiffs withdrew money from the account. He said in his assessment, the bank did not act fraudulently in the charge of the property.

In reexamination, Dw1 confirmed that the letter of offer was signed by the 1st and 2nd Plaintiffs but 3rd Plaintiff did not sign. He confirmed that the both names of the 1st and 3rd Defendant are in the charge document but there is similar signature for both. He said after statutory notices were issued the Plaintiffs communicated through their lawyer but did not pay.

He said Kshs. 10,000 that was debited on the account was rates that were due on the property; Kshs. 100,000 debit was auctioneer charges and Kshs. 400,000 cost for eviction.

The 1st Defendant's witness testified that she inspected property on 21st February 2007 and prepared report on 23rd February 2007. She said

the property was abandoned, bushy and that she did not see a swimming pool. She said the photos in report of 15th may 2008 by vineyard show that the property had a roof and a swimming pool. She admitted that the reports are identical and that she only changed the value of the property. She admitted that presence of a swimming pool would affect the value of the property. She said that she saw a swimming pool when she did her first report in the year 2003 but did not see it in year 2007. She said that her valuation of 2007 is a true reflection of the property and that it was registered in the name of 2nd Defendant.

The 2nd Defendant availed one witness David Muthami Muthee the proprietor of 2nd Defendant company. He adopted his witness statement recorded on 23rd may 2012 and documents dated 16th January 2009. He testified that he took possession of the property herein in December 2007 while the report filed by vineyard was done on 15th may 2008. He said the first report was the state of the property before he took possession. He said the valuation was done 5 months after renovation and that there was a fishpond filled with debris; that he renovated and put water for construction. He said the structure was at Linton stage when he took possession. He said the 2nd Defendant continued with construction from the roof and that property purchased 2nd Defendant is parcel number 7785/259.

In cross-examination, the 2nd Defendants witness said she learnt of sale of property from a Mr. Mwangi from Waga investments in August/September 2007; and that he purchased it from the 1st Defendant. He said he visited the property with the said wanga and other brokers and gave verbal offer of 12.5 million. After getting response from 1st Defendant, he instructed Ithondika Advocates who informed him that the property was charged to southern credit bank.

2nd Defendant denied the allegation that the sale of the property by the 1st Defendant to him was a secret deal. He said there were other prospective buyers. He confirmed that the title deed was in the names of 1st and 3rd Defendants; and was charged to 1st Defendant. He said at the point of sale, he did not know any of the Plaintiffs and that he has not been charged with offence of fraud. He said the property could not have been Kshs. 42 million in the year 2007. He denied having frustrated the Plaintiffs in their effort to redeem property. He denied any collusion of fraud between him and the bank and said there was no complaint at the time he purchased the property.

In cross-examination by counsel for the Plaintiff, the 2nd Defendant said he conducted due diligence through his lawyer and was confident that everything was in order. He said his advocate inspected all documents but on further cross-examination, he said he has not seen power of attorney. He confirmed that it is not among the documents filed in Court.

He further said that he is not aware if the 3rd Defendant was made aware of the consequences of the charge.

He further testified that he has purchased other properties from the banks and that one of his activities is to purchase properties from banks. He however denied having been in a hurry to purchase the property and that he came to know of sale of the property on 21st August 2007 and made the first payment of 3 million on 22nd August 2007; he said the balance was to be paid upon transfer. He confirmed that the agreement for purchase of property is dated 12th September 2007 and that it was drawn 14 days after the deposit. He confirmed that he was purchasing the property by private treaty and that he did not know whether the bank had attempted sale by public auction. He said he was not notified that the statutory notice was less than 3 months and that the number in the charge, transfer and title are different. He attributed the errors to typing.

He added that he built the roof of the main house and fishpond and that its size could not allow it to be a swimming pool.

In reexamination by Mr. Ongegu, the 2nd Defendant testified that he cannot explain why he made deposit payment before signing the agreement.

He said that at the time Plaintiffs did valuation, he had done improvements. He said he purchased the property that was offered for sale and that he never colluded with the 1st Defendant; and that when he entered in to the agreement he was not aware of the errors.

ANALYSIS AND DETERMINATION

I have considered evidence adduced by parties herein. I have also perused documents filed, considered written submissions and authorities filed. I wish to consider the following issues:-

1. Whether title number 7785/259 was regularly charged to southern credit banking corporation Limited(1st Defendant)
2. Whether statutory notices were issued before sale of property herein to the 2nd Defendant
3. Whether transfer of LR 7785/259 by the 1st Defendant to 2nd Defendant should be cancelled
4. Whether 3rd Plaintiff should be awarded 24,000,000 being value of building materials.
5. Whether Plaintiffs are entitled to damages
6. Who is entitled to costs

Whether LR 7785/259 was properly charged

There is no dispute that the property herein is jointly registered in the names of the 1st and 3rd Plaintiff. 3rd Plaintiff confirmed that the 1st Plaintiff was his wife at the material time and that she had access to their bedroom where the title of the property was kept. It is not disputed that the 3rd Plaintiff was in Tanzania when the 1st and 2nd Plaintiff who were business partners approached the 1st Defendant bank for a loan of 6 million but were granted 5.8 million.

1st Defendant's witness confirmed that, it is the 1st and 2nd Defendant who approached the bank and that it is 1st Plaintiff who signed the charge documents on behalf of the 3rd Defendant. This confirmed 3rd Plaintiff's assertion that, he never dealt with the bank. Even though, the 1st Defendant said she had power of attorney authorizing her to execute documents on behalf of the 3rd Defendant, she never showed it to Court, DW1 was directed by Court to avail power of attorney document, but in his next appearance in Court he said he didn't have it and that it does not exist. It is evident therefore that the 1st Defendant did not have authority to execute documents on behalf of the 1st Defendant. It was incumbent upon the bank to ensure that the 3rd Defendant who was a joint owner of the property executed documents consenting to the property being charged.

From the foregoing the purported charge of property without consent of joint owner was irregular.

2. Whether statutory notices were issued before sale of property herein to the 2nd Defendant

Evidence adduced do not demonstrate that the 90 days' notice was issued to both the 1st and 3rd Plaintiffs before the property was sold. The 1st Plaintiff admitted being given one month notice. There is no evidence of service to the 3rd Plaintiff using his current address. Dw1 confirmed that no letters were send to the borrowers.

Even the 30 days' notice which the 1st Plaintiff admitted to have received also had registration number of a different property not the Plaintiff's property.

From the foregoing, I find that the both 1st and 3rd Plaintiffs should have been given 90 days statutory notice. The purpose of statutory notice is to give parties opportunity to regularize loan arrears or seek to restructure the loan with the bank. Even though the 1st and 2nd Plaintiffs may have known of default and had notice of 30 days, the 3rd Plaintiff appear to have been in the dark concerning the loan, charge of property and intention to sell property.

3. Whether the sale of property herein should be nullified

Having found that the 3rd Defendant was not involved in the charge of property and was not notified of the sale, the sale was irregular.

That aside no justification for sale through a private treaty was given. The 2nd Defendant also signed sale agreement after payment of deposit for the property. Further, no notice for sale of property by private treaty was given to the 3rd Plaintiff. The transaction between the bank and the 2nd Defendant was not above board.

From the forgoing I do find it fair and just to cancel the sale of LR No.7785/259 to the 2nd Defendant.

4. Whether Plaintiffs should be paid damages

It is not disputed that Kshs. 5.8 million was advanced to the 1st and 2nd Plaintiffs by 1st Defendant. The 1st Plaintiff confirmed that she presented title No.7785/259 to the bank for charging and that she intended to have it charged. 1st and 2nd Plaintiffs confirmed that no single payment was paid to the bank at the time the property was sold. After payment of the loan from proceeds of sale of property the balance was withdrawn by 1st and 2nd Plaintiff. The bank officials had duty of ensuring that charge documents were executed by registered owners of the property or by a holder of power of Attorney. 1st Plaintiff talked of power of Attorney but never produced. Dw1 who testified on behalf of the bank also never produced it even after being given an opportunity to do so. The is likelihood of collusion between the bank officials and 1st and 2nd Plaintiff in allowing the process to go on without consent of 3rd Defendant.

There is no dispute that the 1st and 2nd Plaintiffs enjoyed the loan and never paid and further benefited from surplus from sale of property, they are not entitled to any damages. In fact, the bank should have pursued 1st and 2nd to repay the loan or have their individual property attached to repay the loan.

5. Whether 1st and 3rd Plaintiff should be awarded 24,000,000 being value of building materials.

The 1st and 3rd Plaintiffs talked of presence of building in the premises. None of them however, produced any receipt or documents to proof existence of the materials.

I therefore decline to award the claim.

FINAL ORDERS

1. Charge of LR 7785 259 was irregular and I therefore declare it null and void.

2. Transfer of LR 7785/259 from the 1st Defendant to 2nd Defendant is hereby cancelled.
3. Special damages of Kshs. 24,000,000 declined.
4. No orders as to General damages.
5. Costs to be paid by Defendants to 3rd Plaintiff.

Judgment dated, signed, and delivered at Nairobi this 19th day of December, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

JASMINE.....COURT ASSISTANT

MR. WACHIRA H/B FOR TAIB.....COUNSEL FOR PLAINTIFFS

MS.KAMWAMI.....COUNSEL FOR 1ST DEFENDANTS

MR.ONGEGU.....COUNSEL FOR 2NDDEFENDANT