



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 612 OF 2007

FREDRICK KANYIRI WERU.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGEMENT

1. Fredrick Kanyiri Weru (the Plaintiff) questions the authenticity of a charged dated and registered on 31st July 1998 over Title No. Kajiado/Olchoro-Onyore/3831 (the suit land) in favour of Barclays Bank of Kenya Limited (the Defendant Bank).
2. In a Plaint presented to Court on 22nd November 2007, the Plaintiff seeks that the said charge alongside a Personal Gurantee he purportedly executed in favour of the Defendant be declared null and void and for an order cancelling the Registration of the said Charge. Further the Plaintiff seeks the return of the original Title Deed of the suit land which is now in the custody of the Defendant Bank.
3. Stated in the Plaint and repeated in testimony to Court, is that Plaintiff is the registered owner of the suit land. On 16th April, 2002 the Plaintiff received a Statutory Notice dated 21st November 2001 in which the Defendant sought to exercise its Statutory Power of Sale over the said land purportedly for a debt of Kshs.2,901,114.40 by Storm Chemical Industry Limited.
4. On inquiry, the Plaintiff found out that the Defendant purported to hold a charge dated 31st July 1998 and registered on the same day. Further still that the Defendant Bank also held a Personal Guarantee said to have been executed by him.
5. The Plaintiff denies that he ever executed either of the two documents and avers that on the dates of the alleged execution ie. 29th July 1998 and 23rd July 1998, he (the Plaintiff) was serving a jail sentence.
6. It is the Plaintiff's further position that the title held was stolen from his house on an unknown date and that the person who would be responsible for the forgeries on the two documents would be one Harun Armstrong Kanyiri. This is a cousin of the Plaintiff, who is said to have been convicted for the offence of forging the two documents and convicted in Criminal Case No. 3110 of 2005 at Kibera Law Court (**Republic Vs. Armstrong Kanyiri**).
7. The Banking Defence is simply that the Plaintiff executed the said documents and that the proceedings in Criminal Case No. 3110 of 2005 do not prove that either of the two documents were forged.

8. On 24th March 2014 the Defendant was granted Leave to enjoin Harun Armstrong Kanyiri as a Third Party herein. And after obtaining Leave to effect service of the Third Party Notice upon the Third Party by way of advertisement in the Daily Nation Newspaper, the Defendant Bank filed an Affidavit of Service sworn by one Leonard Muendo Nthahu to prove that the said Notice was served on 25th October 2015 issue of the said Daily.

9. Todate, the Third Party has not Entered Appearance to the said Third Party Notice.

10. The parties herein did not file issues (either joint or several) but the Court thinks that the following are the two main issues for determination.

a) Was the Plaintiff serving a Prison term at the time the impugned charge and/or Guarantee are said to have been executed by him?

b) Are the signatures on the said documents said to be of those of the Plaintiff forgeries?

11. The Plaintiff who bore the responsibility of proving every element of his case told Court that on the dates (23rd July 1998 and 29th July 1998) when he was said to have signed the Documents he was incarcerated at Kamiti Maximum Prison having been convicted in Criminal Case No. 3257/96. To prove his incarceration he produced a copy of the Judgement and Sentencing proceeding in Criminal Case No. 3257/96 (P Exhibit 1 page 11-23). The Proceedings show that the Plaintiff was sentenced to a jail term of 5 years on 19th June 1998.

12. Under cross-examination, the Plaintiff told Court that after he preferred an appeal against his conviction and was granted Bail pending appeal, and was released from Prison towards the end of August 1998 and could not have been available to sign the Documents in July 1998.

13. What this Court must determine is whether the said proceedings and evidence before Court prove that the Plaintiff was indeed under confinement at Kamiti Maximum Prison throughout the month of July 1998 and in particular on (23rd July 1998 and 29th July 1998). The Court takes a view that the fact that the Plaintiff was sentenced to a jail term of 5 years on 19th June 1998 **alone** could never be sufficient proof that the Plaintiff was in the 5 years following 19th June 1998 confined in prison. The Plaintiff's own evidence that one could obtain a respite on the imprisonment through bail pending appeal speaks to this. Indeed the Plaintiff said he was released towards the end of August 1998.

14. For that reason the Court agrees with Counsel for the Defendant that proof of the Plaintiff's incarceration on the material dates, ought to have been some Official Records from the Prison Authorities. And there should have been no difficulty in obtaining these Records because under Rule 135 of the Prison Rules, 1963 the Officer in Charge of a Prison is obligated to keep or cause to be kept a Record of the date of admission into and release from Prison of each Prisoner.

15. It is also the case of the Plaintiff that the conviction of Harun Armstrong Kanyiri in Criminal Case No. 3110/2005 proved that the signatures purportedly to be those of the Plaintiff were forgeries. Let us examine those proceedings in some detail.

16. The Charge presented to Court on 25th April 2005 and its particulars reads as follows:-

CHARGE: FORGERY CONTRARY TO SECTION 345 OF THE PENAL CODE.

PARTICULARS: HARUN ARMSTRONG KANYIRI:

On the 29th day of July, 1998 at City Centre in Nairobi Area, within the Nairobi Area Province, forged certain signatures purporting them to be genuine signatures of FREDRICK KANYIRI WERU.

17. Some portion of the proceedings on the facts that were read to the Accused, to which he admitted as correct, are not legible but the substantial portion is as below:-

“Facts: On 29.7.98 at City Centre the complainant who is accused’s Cousin gave accused some document after he borrowed them a title document No. Kajiado/Olchoro-Onyore/3831. The accused wanted to use it to change for a loan. The complainant went out of the country thereafter. He came back found accused had gone to complainant’s family,,,,,the title and went ahead to prevent it to the Bank for the loan. The Bank detected some forgery and accused was denied loan. Complainant came back found the forgery. He reported at C.I.D Ongata Rongai. The accused was arrested and charged. He was purporting to be the complainant in the forgery. I have a copy of the document produce it”.

18. The Plaintiff produced a copy of a Gazette Notice (P Exhibit 2) indicating that records of Criminal cases for Kibera Court for the years 2003-2005 may have been destroyed pursuant to the Record Disposal (Courts) Rules hence his inability to obtain better record of the proceedings. But the Court shall make do with what is before it.

19. These proceedings were produced by the Plaintiff in furtherance of its case. But even as admitted by the Plaintiff under cross-examination, it is clear that Harun Armstrong Kanyiri was not charged with stealing Title to the suit land. Indeed the facts read out in the Criminal Proceedings are that the Plaintiff gave the Title to the Accused at the request of the accused because,

(‘The accused wanted to use it to charge (sic) for a loan’)

This is a variance with the testimony of the Plaintiff that the Title was stolen from his house. Of course, the Plaintiff’s argument is that after making a complaint to the Police it was beyond his control as to the charges to be preferred or how the prosecution would be conducted. But that is not the only problem the Plaintiff’s case encounters.

20. Nowhere in the proceedings before the Criminal Court is it expressly stated that what the Accused forged were signatures on the Charge and Guarantee Documents. The Proceedings do not tell whether or not the Documents which were subject herein. The Proceedings do not tell whether or not the Documents which were subject thereof were ever presented for document examination. That presents incertitude as to whether the forgeries which the Accused pleaded were in respect to the impugned Charge and Guarantee Document.

21. The many gaps in the Plaintiffs case leads this Court to conclude that he has not proved his case on a balance of probabilities.

22. And I must observe that the Plaintiff’s case is not helped simply because the Defendant took out Third Party proceedings against the said Harun Armstrong Kanyiri. When seeking leave to take out those proceedings the Defendant explained,

“It is in the interest of Justice that Harun Armstrong Kanyiri be enjoined in this suit as a Third Party as the Defendant is entitled to an indemnity arising out of the actions of the said proposed Third Party in the event that this Court finds the Plaintiff not to have executed the Charge”. (my emphasis)

The joinder of the Third Party cannot be held as an admission by the Defendant that the impugned signatures are forgeries.

23. I would, as I now do, dismiss the Plaintiffs case with costs.

Dated, Signed and Delivered in Court at Nairobi this 19th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Nganga for Plaintiff

Kimani for Defendant

Alex - Court Clerk