



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL CASE NO. 25 OF 2009**

**RODGERS JOAB WAFULA .....1ST PLAINTIFF**

**DRY WOOD JOINERY WORKS LTD.....2ND PLAINTIFF**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LTD ..... DEFENDANT**

**J U D G M E N T**

The first plaintiff was at all material times the registered proprietor of Dry Wood Joinery Works Limited, the second plaintiff. The two have come to court for an order to compel the defendant herein to release title deed number **BUKHAYO/BUYOFU/1009** together with some properties that were allegedly irregularly attached.

In defence, the defendant contended that the said title deed was held as security for a loan advanced to the plaintiffs and which has not been repaid.

Briefly, the plaintiffs' case is that that the first plaintiff took a loan from the defendant to purchase a machine for his business. He gave his title for the land parcel **BUKHAYO/BUYOFU/1009** as security. The plaintiffs' project was put under receivership and all the machines carted away and sold.

According to the defendant, the first plaintiff took two loans. The first loan was secured by a debenture while the second loan was secured by a deed of guarantee and a title deed. It was contended that the loan was still outstanding and that the defendant still held on to the security.

The issues for determination are as follows:

1. Whether or not the plaintiff took two loans from the defendant.
2. Whether the title deed in issue was offered as security for the loan or not.
3. If he did, whether he has repaid the same.

I have noted that the plaintiff while testifying and in his submissions introduced matters that were not pleaded. It is trite law that parties are bound by their pleadings and that courts can only give a remedy that has been prayed for in the pleadings. In **DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014**, the Court of Appeal stated:

***It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an***

*adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.* [Emphasis mine]

The plaintiff having abandoned his intention to amend his plaint on 1<sup>st</sup> February 2017, he cannot be allowed to introduce matters outside his pleadings.

Both parties are in a consensus that the first plaintiff took two loans from the defendant and that he deposited his title in respect of land parcel number **BUKHAYO/BUYOFU/1009** as security for one of the loans. A copy of the registered charge was produced as D Exhibit 5.

According to the plaintiff he has repaid the entire loan. However, the receipts he produced in court (P Exhibit 14) show that he had paid Kshs. 305,560/= he conceded that he had taken a loan of Kshs.606,700/=. Even before the defendant's testimony, it is clear that the first plaintiff had only repaid half of the principal sum. It is trite that a loan from a lending institution attracts interest.

Susie Kinegeni (DW1) for the defendant testified that as at 31<sup>st</sup> May 2008 the balance for the first loan was Kshs.9,851,303/= whereas the balance for the second account as at 30<sup>th</sup> June 2015 was Kshs. 2,362,826/= She produced statements to support her contention as exhibits. Her contention was that at no time was the loan cleared. She further produced a letter by the plaintiff (D Exhibit 15) dated 20<sup>th</sup> April 2015 where the plaintiff acknowledged indebtedness of Kshs. 538,410/= to the plaintiff. My finding therefore is that the plaintiff has not repaid the loan advanced to him by the defendant in full. It is only upon full settlement of the loan that this court can grant him the orders he is seeking. He is still bound by the contract. He can only be released from it by meeting his part of the bargain.

It is evident from the foregoing analysis of evidence, the plaintiffs' case cannot succeed. The suit is dismissed with costs. Right of appeal 30 days.

**DELIVERED and SIGNED at BUSIA this 31<sup>st</sup> day of July, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**