



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 343 OF 2015**

**GEORGE NGUGI KIBUI.....PLAINTIFF**

**-VERSUS-**

**HOUSING FINANCE CO. LIMITED.....DEFENDANT**

**JUDGMENT**

1. This suit was filed on 15<sup>th</sup> July, 2015 by the Plaintiff, **George Ngugi Kibui**, against **Housing Finance Company Limited**, the Defendant for the following relief:

- a. A declaration that the Defendant's conduct herein amounts to misrepresentation, deceit, breach of duty, attrition of Customer-Bank relationship and/or frustration of the Plaintiff's right to discharge his parcel of Land No. Thika Municipality Block 2/849 as well as his legitimate expectations hereon;
- b. An award of General damages for misrepresentation, deceit, breach of duty and/or frustration of the Plaintiff's right to discharge the said property as well as his legitimate expectations thereon;
- c. Compensatory Damages for the interests wrongfully charged by the Defendant for the period when the Defendant undertook to finance the said purchase and the consequent repayment of the facility reference number 600-0011623 as well as the discharge of the security until the actual redemption date to be calculated from the Statements of Account;
- d. Exemplary Damages;
- e. Aggravated Damages;
- f. Cost of the suit;
- g. Interests on (b), (c), (d) and (e) above at court rates; and
- h. Any other or further relief the Honourable court may deem fit to grant in the circumstances.

2. The Plaintiff's cause of action is that on or about May, 2012 he took out a facility with the Defendant **Ref No. 600-0011623** which was secured by a charge over his parcel of **Land No. Thika Municipality Block 2/849**. According to him, he dutifully serviced the facility without any default. However, being desirous of repaying the facility at once and in full with a view of having the security discharged, he sought to sell the charged property by private treaty. Accordingly, he secured a prospective purchaser namely: **Roshan Holdings Limited** (hereinafter referred to as **Roshan**) and that together they approached the Defendant not only for approval of the proposal but also with a view to the Defendant financing Roshan in the transaction.

3. It was the Plaintiffs case that after subjecting the application of **Roshan** to its internal processes the Defendant advised them that **Roshan** did not qualify for the financing as sought. Accordingly, the Plaintiff approached **Equity Bank** with the same proposal, which request was accepted. The Plaintiff and **Roshan** then embarked on the documentation process, and that as they approached the penultimate stage, the Defendant intervened and implored the Plaintiff to prevail upon **Roshan** to abandon the financing arrangement with Equity Bank. The Plaintiff further averred that the Defendant promised to complete the financing transaction within two weeks from **15<sup>th</sup> March, 2014**.

4. It was the Plaintiff's contention that, on the strength of the representations and promise by the Defendant, he and **Roshan** were persuaded to halt the transaction with **Equity Bank**, and that they accepted the Defendant's offer to finance the sale of the suit property under the legitimate expectation that the Defendant would take up the financing of **Roshan** and finalize the discharge of the suit property within two weeks as promised.

5. The Plaintiff's case is that soon after the Defendant assured him and **Roshan** that it would provide the needed finance so as to discharge the suit property, it resorted to prevarication, and eventually ended up reneging on its promise to finance **Roshan**. Thereupon, **Roshan** went back to **Equity Bank** for financing; and **Equity Bank** was able to complete the said transaction with the result that the Plaintiff ultimately succeeded in having the charged property discharged, albeit after a longer period of time than had been anticipated.

6. It is the Plaintiff's contention that, although he continued to repay the loan with interest during the intervening waiting period, the Defendant exacerbated his situation by wrongfully and without notice disseminating negative information to **Metropol Credit Reference Bureau** about his creditworthiness, thereby causing him immense prejudice, unnecessary anxiety and anguish as well as missed opportunities and financial loss. He also averred that, the Defendant continued to charge interest amounting to **Kshs. 2,665,965.81/=** even during the duration of time that it delayed and/or frustrated his efforts towards full repayment of the loan. He therefore seeks compensation herein on account of the foregoing by way of an award of not only General Damages but also exemplary and/or aggravated damages together with interest and costs.

7. The Court record shows that upon the filing of this suit, Summons to Enter Appearance was issued dated 31<sup>st</sup> July, 2015 and that service of the said summons was effected on the Defendant on the same date. For the reason that the Defendant filed a Notice of Appointment of Advocate but failed to enter appearance or file Defence in response to the claim herein, a Request for Judgment was lodged by the Plaintiff on 27<sup>th</sup> August, 2015 pursuant to Order 10 Rule 4 of the Civil Procedure Rules, 2010. Consequently, Interlocutory Judgment was recorded in the matter on 27<sup>th</sup> August, 2015 and thereafter formal proof ensued in which the Plaintiff testified on 30<sup>th</sup> September, 2015 in support of his claim.

8. The Plaintiff's evidence was no more than a reiteration of the averments in the Plaintiff and his witness statement filed on 15<sup>th</sup> July, 2015 along with the documents attached thereto. That evidence is entirely uncontroverted and clearly proves the allegations made herein by the Plaintiff. The question that remains is whether, on the basis of that evidence it can be concluded that the Plaintiff is entitled to the reliefs sought. To this end, Counsel for the Plaintiff prepared a list of issues for the Court's consideration, namely:

a) Whether the Defendant's conduct herein amounts to misrepresentation deceit, breach of duty and/or frustration of the Plaintiffs' right to discharge the suit property

b) Whether the Plaintiff is entitled to an award of General Damages for misrepresentation, deceit, breach of duty and/or frustration of the Plaintiff's right to discharge the said property as well as his legitimate expectations hereon on the quantum of such damages.

c) Whether the Plaintiff is entitled to Compensatory Damages for the interest wrongfully charged by the Defendant for the period when the Defendant undertook to finance the said purchase and the consequent repayment of the facility reference number 600-0011623 as well as the discharge of the security until the actual redemption date to be calculated from the Statements of Account.

d) Whether the Plaintiff is entitled to Exemplary Damages.

e) Whether the Plaintiff is entitled to Aggravated Damages.

f) Who should bear the costs of the suit.

g) Whether any amount awarded would attract interest at Court rates until payment in full.

I have grouped these issues under three broad heads as hereunder:

**Whether the Defendant's conduct herein amounts to misrepresentation deceit, breach of duty and/or frustration of the Plaintiffs' right to discharge the suit property:**

9. As pointed out hereinabove, the misrepresentation complained of by the Plaintiff was that the Defendant offered to provide **Roshan** with the requisite financing within a period of only two weeks, as opposed to the 60 days that had been offered by **Equity Bank**. This is evidenced by the documents at pages 14-18 of the Plaintiff's Bundle of Documents. The email dated 14<sup>th</sup> March, 2014 in particular indicates that the Defendant offered to waive the commitment fees, charge the rate of interest of 16% per annum and disburse the funds in 2 weeks.

10. **Roshan** on the other hand was to complete the loan application form and open a current account with the Defendant. It was also required to provide the Defendant with the loan offer from Equity Bank in addition to availing the valuation report done by Equity. The Plaintiff has demonstrated that Roshan complied with all these conditions and that by a letter dated 25<sup>th</sup> March, 2014 (at page 19 of Plaintiff's Bundle of Documents) the Defendant acknowledged that Roshan had opened an account as required.

11. At page 20 of the Plaintiff's Bundle of Documents, the Defendant in an inexplicable turn of events, recalled the title documents "due to unavoidable circumstances" and thereby cancelled the transaction. The Plaintiff has demonstrated that despite his efforts to follow up the matter, the Defendant did not budge. (See pages 35-36 of Plaintiff's Bundle of Documents) and that they had no option but to go back to **Equity Bank** for the needed financing. It is not in dispute that **Equity Bank** eventually provided the financing and that the Plaintiff was able then to redeem his property at a much later time than would have been the case.

12. From the foregoing therefore, the Court is satisfied that the Plaintiff has established that there was a representation by the Defendant to him that it was ready, able and willing to finance the purchase of the charged property by **Roshan** and to disburse the funds within two weeks to enable the Plaintiff redeem his charged property. The court is further satisfied that this representation was not carried through by the Defendant and that no explanation was given for this change of mind. The Plaintiff has further shown that when this representation was made, **Roshan** had made substantial progress with **Equity Bank** for similar accommodation which had to be abandoned on the basis thereof. The Court is therefore satisfied that what the Defendant did amounted to misrepresentation, and that the same was relied on and acted upon by the Plaintiff to his injury.

13. There can be no disputing that the Defendant had the capacity and competence as a banker to perform what it promised to do vide the communication aforesaid and that it was on that basis that the Plaintiff and by extension **Roshan** relied thereon and abandoned the offer by **Equity Bank** midstream. In the case of **Esso Petroleum Company Limited Vs Mardon [1976] QB 801, Lord Denning** expressed the view that:

**“If a man who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another...with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable.”**

I therefore find and hold that the Defendant, in this instance, acted in breach of this duty of care to the Plaintiff.

14. A second aspect of the misrepresentation complained of by the Plaintiff is in the Plaintiff making a false report to **Metropol Credit Reference Bureau** about his creditworthiness. In the letter dated 28th July 2014 to Metropol Credit Reference Bureau Ltd, appearing at page 40 of the Plaintiff's Bundle of Documents, the Defendant conceded that the report was unwarranted. The letter reads:

**"...It has since come to our attention that the information submitted thereon was inadvertent and hereby request you to delete the default information and update the file as per the attached template, noting that the accounts are active and have never had default history."**

The Plaintiff's case is that, by making the aforesaid report, the Defendant thereby caused him immense prejudice, unnecessary anxiety and anguish as well as missed opportunities and financial loss.

In the case of **Kennedy Nyagudi vs. Central Bank of Kenya & Others [2013] eKLR** in which general damages were sought by the Petitioner, among other reliefs, on more or less similar grounds, the court was of the view that since there is a prescribed procedure for handling complaints of this nature set out in the **Banking (Credit Reference Bureau) Regulations, 2008**, that procedure ought to be invoked first for the CRB to be afforded an opportunity to offer amends, before a customer can approach the court for relief. The court thus expressed the view that:

**"...the Regulations provide relief to any customer who is aggrieved by wrong and erroneous information. The Petitioner's grievances fall within these provisions and he is entitled to invoke the statutory procedure provided."**

There is no indication that the Plaintiff took advantage of those statutory provisions. Indeed there is no indication that he sought a facility and was denied on account of the report. Besides, the Defendant did promptly request for the deletion of their report. I would be of the view that no liability would lie on this score in the circumstances.

**Whether the Plaintiffs is entitled to an award of General Damages for misrepresentation, deceit, breach of duty and/or frustration of the Plaintiff's right to discharge his charged property and the Quantum of such damages:**

15. The Plaintiff has adduced evidence herein to show that the negotiations with the Defendant for the redemption of his property started in earnest before March, 2014 when the Plaintiff and Roshan were induced by the Defendant to abandon the offer by Equity Bank. According to the Plaintiff what would have taken two weeks or thereabouts ended up taking about one year. (See page 41 of Plaintiff's Bundle of Documents) His email to the Defendant at **page 35** of his Bundle of Documents shows that it was his intention to use the purchase price to acquire some properties and therefore that he lost business opportunities as a result of the delay. It is therefore my finding that the Plaintiff is indeed entitled to damages for the misrepresentation and deceit.

16. As to quantum thereof, Counsel referred the Court to the case of **Moses Gakuru Thuo & Another**

**Vs Kenya National Assurance Company (2001) Limited & Another [2011] eKLR.** in which the Plaintiffs put in a bid for the purchase of land. The bid was accepted, a sale agreement prepared and executed by the Plaintiffs whereupon a deposit of the purchase price paid. The 1<sup>st</sup> Defendant who did not sign the agreement, thereafter proceeded to rescind the contract. An award of **Kshs. 8,000,000/=** was made by the court.

17. I note however that the facts of the instant case are markedly different in that the Plaintiff was indebted to the Defendant and that we had willingly charged the suit property for a loan. Nevertheless, a misrepresentation was made by the Defendant that induced the Plaintiff to abandon the **Equity Bank** offer that would have seen him redeem his property in a shorter time of two months. Accordingly, I consider an award of **Kshs. 500,000/=** to be fair and adequate compensation in the circumstances.

**Whether the Plaintiff is entitled to Compensatory or Exemplary or Aggravated Damages for interests charged:**

18. The Plaintiff's claim for damages under this head is hinged on his claim that interest was wrongfully charged by the Defendant for the period of its prevarication. According to the Plaintiff, this claim is premised on the principle against unjust enrichment, which precludes a person from benefiting unjustly at another person's expense on account of their own wrongful act.

19. As pointed out hereinabove, the fact that the Plaintiff was indebted to the Defendant cannot be gainsaid, such that the proposal for sale must be looked at from that prism, namely an arrangement to accommodate the Plaintiff and enable him redeem his property earlier than he would otherwise have done. In the interim he was bound by their initial loan agreement. He indeed conceded that he continued to pay the monthly instalments notwithstanding the negotiations. In the same vein, he was expected to continue paying interest due on the facility. For this reason, I find that no compensatory or exemplary damages would be due to the Plaintiff in the circumstances.

20. In the result judgment is hereby entered in the Plaintiff's favour for: (a) **A declaration that the Defendant's conduct herein amounts to misrepresentation, deceit, breach of duty, attrition of Customer-Bank relationship and/or frustration of the Plaintiff's right to discharge his parcel of Land No. Thika Municipality Block 2/849 as well as his legitimate expectations hereon;**

(b) **An award of Kshs. 500,000/= in General damages for misrepresentation, deceit, breach of duty and/or frustration of the Plaintiff's right to discharge the said property as well as his legitimate expectations thereon;**

(c) **Interest on (b) above as well as costs of the suit.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF FEBRUARY 2016**

**OLGA SEWE**

**JUDGE**