



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NUMBER 213 OF 1991

JACARANDA INVESTMENTS LIMITED.....PLAINTIFF

- V E R S U S -

TRADE BANK LIMITED 1ST DEFENDANT

LIMA FINANCE LIMITED 2ND DEFENDANT

TRADE FINANCE LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff came to this Court by way of the Plaint dated **18th January, 1991** and sought for judgment against the Defendants as follows:-
 1. **An injunction restraining the Defendants whether by themselves or their servants or agents or auctioneers or Advocates, or otherwise howsoever, from selling the property subject of the Charge dated 11th March, 1988, in the pleadings mentioned, as threatened to be advertised or otherwise.**
 2. **A declaration that the suit charge is null and void illegal and unenforceable for:-**
 - a. **Transgressions by the Defendants of Central Bank Orders and Directions and**
 - b. **The accommodations, variations and indulgence granted by the Defendants to the principal debtor without the Plaintiff's prior consultation and/or consent.**
 3. **An order that an account be taken of what has been paid for principal and interest under the charge by the principal debtor to the Defendants and for moneys realized by the Defendant in the sale of the principal debtor's charged properties.**
 4. **An order that the Defendants deliver up to the Plaintiff or to such person as it appoints, the charge and all documents in the Defendants' possession or power relating to the property charged.**
 5. **An order that the Defendants do execute a discharge of the charge, in the pleadings mentioned, and all encumbrances created by the Defendants or any person claiming under it.**
 6. **An order that the Defendants do pay to the Plaintiff the costs of drawing up, engrossing, stamping and registering the said discharge and the amount thereof be certified by the**

- Registrar.**
7. **Interest at Court rates thereof.**
 8. **Costs of the suit with interest thereon.**

2. In response to the Plaintiff's claim, the Defendants filed a Defence and Counterclaim dated **15th November 1991**. The Plaintiff filed a reply to the Defence and a Defence to Counterclaim dated **9th December, 1991**.
3. It is worthy to note that the 2nd Defendant does not exist and was succeeded by the 3rd Defendant herein. The defence witness testified that the 2nd Defendant Lima Finance Limited had by a special resolution changed its name to Trade Finance Limited, the 3rd Defendant herein.

THE PLAINTIFF'S CASE

4. The background to the Plaintiff's case is that by a legal mortgage dated 11th March, 1998 and duly registered on 7th April, 1988 made between the Plaintiff and the first and second Defendants, the Plaintiff mortgaged its property known as L.R 330/672 (**hereinafter the suit property**) together with the buildings and improvements thereon to guarantee a loan and financial accommodation by the first and second Defendants to one Justus Kavindu Kalinga (**hereinafter the principal debtor**).
5. The Plaintiff averred that the said loan and advances were to be in the sum of Kshs.6,200,000/= and that the prescribed maximum debt secured by the mortgage was Kshs.2,000,000/=. The Plaintiff further averred that before it executed the mortgage, the Defendants and the principal Debtor represented to it that a sum of **Kshs. 5 million** was to be paid from the sale proceeds of the principal debtor's property namely L.R 814/815 situated at Malindi. It was also represented to him by the Defendants and the principal debtor that a sum of Kshs. 1.1 million was to be paid by the principal debtor to the Defendants on 30th April, 1988. It was further represented to the Plaintiff that there were other securities to guarantee the loan and advances and that there were two other guarantors besides the Plaintiff. The Plaintiff also averred that the Defendants represented to them that they would not be called upon to pay up any money on the mortgage before the principal debtor's securities had been realized in the payment of the advances aforesaid.
6. The Plaintiff's case is that the Defendants breached the duty of care they owed to them by varying the terms under which the principal debtor was to repay the advances and interest thereon without the Plaintiff's consent. It is the Plaintiff's contention that the Defendants are in breach of the representations they made to them and that the Defendants should exhaust all means available to recover the debt from the principal debtor before calling upon them to pay up the debt. It is also the Plaintiff's contention that it was contemplated by the parties under the Mortgage that the total indebtedness of the company to the Defendants at no time exceed the sum of Kshs. 6.2 million and of which Kshs. 6.1 million was to be recovered by a cheque of Kshs. 1.1 million from the principal debtor and Kshs. 5 million expected from the sale of the malindi property. It is therefore the Plaintiff's case that the Defendants breached the foregoing condition by failing to recover Kshs. 6.1 million from the principal debtor. It is further the Plaintiff's case that by virtue of the aforesaid breaches on the part of the Defendants, it should be deemed that the Plaintiff has been fully released and discharged from any liability.
7. It is also the Plaintiff's case that they have not received a detailed true and accurate statement of account showing the true amount due at the date of any written demand to the principal debtor.
8. In view of the foregoing, the Plaintiff has sought for the several prayers in the Plaint as enumerated above, among them that they are entitled to a delivery up of the title deed to the suit property and to a discharge of charge as well as a permanent injunction restraining the sale of the suit property.

THE DEFENDANTS' CASE

9. In response to the Plaintiff's claim, the Defendants filed their Defence and Counterclaim on 18th November, 1991. The Defendants denied the allegations that they had made any representations to the Plaintiff prior to the execution of the Mortgage. They averred that in the event that there were any representations made to the Plaintiff by the principal debtor, then the same had no legal effect upon them. The Defendants further denied the allegations that they were obliged to realise the principal debtor's security prior to calling upon the Plaintiff to pay up the debt. They also denied any variations on the terms of payment by the principal debtor under the mortgage.
10. With regard to the statement of accounts, the Defendant averred that the Plaintiff had never requested for any statements from them. They stated that the amount owing from the principal debtor and the plaintiff to the Defendants was at all times known to the Plaintiff. The Defendants further averred that they were under no obligation to restrict the principal debtor's indebtedness.
11. In the circumstances, the Defendants' case was that they did not in anyway breach the Mortgage and therefore the Plaintiff was not entitled to any release or discharge of its liability under the said Mortgage.
12. In their Counter-claim, the Defendants pray that the Plaintiff's claim be dismissed and for a declaration that they are entitled to exercise the power of sale contained in the mortgage. In the alternative, the Defendants pray for judgment against the Plaintiff for Kshs.3,927,541.45 as at 31st October 1991 under the Mortgage together with interest thereon at 24% per annum until payment in full.
13. The Defendants' case is that, in the Mortgage, the Plaintiff covenanted with the Defendants to pay on demand Kshs. 2 million plus interest thereon. The Defendants therefore averred that the amount due to them from the Plaintiff as at 31st October, 1991 was Kshs. 3,927,541.45 made up as follows:-

Principal amount..... Kshs.2,000,000

Interest at 18% per annum from

11th March 1988 to 31st March 1990..... Kshs.888,607.85

Interest at 19% per annum from

1st April 1990 to 31st August 1991..... Kshs.886,017.20

Interest at 24% per annum from

1st September 1991 to 31st October 1991..... Kshs.152,916.40

THE HEARING

14. The hearing of the suit commenced on **28th October, 2014** and was concluded on **27th May, 2015**.
15. The Plaintiff called one witness, **JOHN KIMANZI** described as one of the directors of the Plaintiff. The Defendant also called one witness, **HELLEN CHEPKWONY**, described as an assistant liquidation agent with the Deposit Protection Fund and particularly in charge of the 1st and 2nd Defendants under liquidation.
16. The evidence given by both parties essentially reiterated their case as stated in their respective pleadings and the same were later expounded in their submissions. The said evidence will be

considered by the Court in its judgment herein.

THE WRITTEN SUBMISSIONS

17. The Plaintiff filed its submissions dated **28th October, 2015** on even date while the Defendant filed their submissions dated **6th November, 2015** on **9th November, 2015**.

ISSUES FOR DETERMINATION AND ANALYSIS

18. I have considered the pleadings herein, the oral evidence given by various witnesses and the written submissions by Counsel for the respective parties.

19. The parties agreed on a total of nineteen (19) issues for determination and filed the same in Court on **17th March, 1997**. This Court has considered the same and has come up with a summary of the following issues for determination:-

1. **Whether the Defendants and the principal debtor before execution of the Mortgage, subject matter of the suit, made representations to the Plaintiff which purportedly led it to enter into the Mortgage;**
2. **Whether the Defendants were in breach of the Mortgage transaction by varying the terms under which the Principal Debtor was to repay the advances and interest thereon without the Plaintiff's consent;**
3. **Whether the Defendants ought in law to dispose of the principal debtors securities before calling the Plaintiff to pay up.**
4. **Whether the Defendants realized the securities offered in the Mortgage other than the Plaintiff's suit property and if so how much was realized**
5. **Whether the Plaintiff ought to and did receive a statement of account of the true amount due at the date of any written demand by the Defendants from the Principal debtor;**
6. **Whether the Plaintiff is entitled to judgment as prayed for in the Plaintiff;**
7. **Whether the Defendants are entitled to judgment as prayed for in the counterclaim;**

Issue 1

20. The Plaintiff's case is that prior to them agreeing to guarantee the principal debtor, there were certain representations made to them making them believe that the exposure was very minimal. It was the Plaintiff's case that the Defendants and the principal debtor breached the said representations thereby exposing the Plaintiff to liabilities otherwise not due to it.

21. On cross-examination PW 1 testified that the said representations were to be found at pages 2 and 36 of the plaintiff's bundle. At page 2 is the Letter of offer from Lima Finance Limited dated 29th January 1988 advancing a loan facility of Kshs. 10,639,234.60 to the principal debtor. The Plaintiff has placed reliance on this letter in arguing that the Defendants and the principal debtor misrepresented to them that the securities furnished by the principal debtor in the said offer letter would be realized first in the event of default before the Defendants realized the Plaintiff's security. According to the Plaintiff, the Defendants misrepresented to it that the principal debtor's securities were adequate to cover his indebtedness without the realization of the Plaintiff's security. The Plaintiff did not produce any evidence before this Court to substantiate the foregoing allegation. Besides, this argument by the Plaintiff is not satisfactory. If indeed the securities offered by the principal debtor were adequate to cover his indebtedness, then the Defendants would not have entered into the Mortgage with the Plaintiff or better still there was no need for the Plaintiff to guarantee the principal debtor. The fact that the parties herein entered into the mortgage is sufficient to show that the Defendants needed more security to secure the facilities advanced to the principal debtor.

22. It is also not clear to this Court how the letter of offer dated 29th January, 1988 is related to the mortgage executed between the Plaintiff and the Defendants herein. The Letter of offer was between the Defendants and the principal debtor, so it is clear the Plaintiff was not privy to it. The

- mortgage was executed a few months later, on 11th March, 1988 between the Plaintiff and the Defendants of which the principal debtor was not a party. In other words, the Mortgage herein was an entirely different transaction from the said letter of offer. The terms in the letter of offer or representations, if any, could not have any effect on the Mortgage document. In the event that the Plaintiff entered the Mortgage document relying on the Letter of offer then that cannot be called a misrepresentation. The Plaintiff being a legal entity and having made a resolution to enter into the mortgage did so under its legal capacity and without any duress or undue influence.
23. The Plaintiff does not dispute that it guaranteed the principal debtor for a maximum of Kshs. 2,000,000/= and therefore so long as the Principal debtor had defaulted in repaying the facilities advanced to him, the Defendants were entitled to recover the said amount from the Plaintiff.
24. In the circumstances, the Plaintiff has failed to prove that there were any representations made to it that induced it to enter into the Mortgage or that it entered into the said Mortgage based on misrepresentations.

Issue 2

25. It is the Plaintiff's case that the guarantee, (the mortgage transaction herein) was varied. It was the Plaintiff's submission that the same was varied by extension of time in the sense that the facilities advanced to the principal debtor were payable not later than 31st December 1989 according to the Letter of Offer dated 29th January, 1988. It was further the Plaintiff's submission that it was on this basis that they guaranteed the maximum debt of Kshs. 2,000,000/=. To this end, the Court reiterates its position that the said Letter of Offer is not related to the mortgage transaction herein. Therefore, the fact that the principal debtor was to repay the loan not later than December, 1989 has no relation or effect to the mortgage transaction.
26. It was further the Plaintiff's submission that the guarantee was varied by varying the amount guaranteed. The Plaintiff submitted that the facility to the borrower was increased from Kshs. 10,639,234.60 to Kshs. 16,913,802.25 without their consent. The Plaintiff further submitted that under the mortgage document, the Defendants had granted a facility of Kshs. 6,200,000/= to the principal debtor and out of it the Plaintiff had guaranteed the sum of Kshs. 2,000,000/=. There are several instances under the Mortgage where the expression "prescribed maximum debt" has been used. The same has been described at clause 8 (v) of the Mortgage to mean "the aggregate sum of Kshs. 2,000,000/=". At Clause 1(a) of the Mortgage, it is provided that the Mortgagor shall pay to the lender a sum not exceeding the prescribed maximum debt. Further, in the same clause at paragraph (c) it is provided that the mortgage debt therein shall not at any time exceed the prescribed maximum debt together with interest thereon at the time the mortgage debt becomes payable until actual payment thereof. (Emphasis supplied) This therefore means that the Plaintiff's suit property herein as charged under the mortgage was to secure a maximum amount of Kshs. 2,000,000 in addition to interests to be incurred thereon. At this juncture, the Court notes that the Plaintiff's argument that its liability under the mortgage was limited to Kshs. 2,000,000 inclusive of interest cannot stand.
27. Back to the issue of variation, it is not disputed that the principal debtor's facility was rescheduled on 6th August 1990 whereby he was advanced Kshs. 16,913,802.25 by the First Defendant Bank and the same was repayable within six (6) months. (See pages 41-44 of Plaintiff's list of documents). The Plaintiff's suit property herein was among other securities that the First Defendant Bank required from the principal debtor to offer the facility aforesaid. There is no evidence to show that the Plaintiff was notified of this facility or rather the rescheduling of the facilities advanced. This Court therefore takes it that the Mortgage document as earlier drafted remained unchanged. That is, the liability of the Plaintiff was still limited to Kshs. 2 million together with interests.
28. In summary, there is nothing to show that the mortgage document was varied by virtue of the rescheduling of the facilities to the principal debtor. In any case, the Defendants in their letter dated 17th October 1990 at page 49 of their bundle only demanded for the prescribed maximum debt of Kshs. 2,000,000/= together with interest thereon from the Plaintiff.

Issue 3

29. The third issue is whether the Defendants ought in law to dispose of the principal debtor's securities before calling the Plaintiff to pay up. The Plaintiff did not refer the Court to any law that supported their contention either in Statute or case law.
30. In the present case, there is no provision in the mortgage

document requiring the Defendants to first realize all the securities provided for by the principal debtor before pursuing the security provided for by the Plaintiff. I believe the Defendants had the right to pursue any security as is convenient to them or even pursue all of the securities available to it concurrently so long as there was an outstanding debt due to them from the principal debtor. Moreover, a look at the mortgage document indicates that the Plaintiff (the guarantor) was to pay the lender (the Defendants) the prescribed maximum debt on the legal date of redemption which is defined as seven days after the mortgage had been executed. (see clause 1 (a) and 8 (iv) of the said mortgage document). In essence the prescribed maximum debt was payable on demand and there is nothing in the mortgage to show that the Defendants had to first realise all the securities from the principal debtor.

Issue 4

31. The fourth issue is whether the Defendants realized the securities offered by the principal debtor and if so, for how much.
32. It was PW 1's testimony that he was not aware of what became of the other securities offered to the Defendants with regard to the facilities advanced to the principal debtor. He however referred to a Notification of sale and advertisement for sale by the Defendants for one of the principal debtor's properties located in Karen. He was still not aware for how much it was sold.
33. On the other hand, DW 1 in her witness statement stated that the records kept at the Deposit protection fund in relation to the liquidation of the Defendants indicated that the properties LR No. 814/815 Malindi and LR NO. 1160/114 Nairobi were sold by way of public auction for Kshs. 5 million and Kshs. 10 million respectively. The sale of the said properties was conducted on 12/01/96 and 15/12/95 at Malindi and Nairobi respectively. It was also her assertion that before the realization of the two securities, Kshs. 37.5 million was outstanding from the borrower which after application of the proceeds from realization of the said properties and Kshs. 2.2 million paid by the borrower reduced the outstanding amount to Kshs. 20,286,000/=. It is also worthy to note that the principal debtor had paid a sum of Kshs. 2,214,000/= before the original facility was rescheduled. This must be the Kshs. 2.2 million the Defendants' witness was referring to. (See the letter dated 20th July 1989 at page 40 of the Plaintiff's bundle of documents). It was however DW 1's testimony that she did not have any Statement of accounts to show how the amount realized from the said properties was credited into the principal debtor's account. It was further her testimony that the securities given by the principal debtor in the letter of offer (page 5 plaintiff's bundle) were not all realized and she was not sure whether the same had been exhausted before following the guarantor (the plaintiff herein).
34. It is therefore this Court's conclusion that the Defendants did not realize all the securities offered by the principal debtor. There is also no statement of accounts to show how much was realized from the sale of the aforesaid two properties or to account for any direct payments made by the principal debtor. This takes us to the next issue which deals with statements of account.

Issue 5

35. On the issue of statement of accounts, it was PW 1's testimony that the Plaintiff was seeking for an order of accounts to know how the money paid by the principal debtor was applied. It was his testimony that he did not know how much had been paid by the said principal debtor or how much had been realized from the sale of the principal debtor's suit properties by the Defendants.
36. Indeed there is no statement of accounts from the Defendant to give an account of how much had been paid by the principal debtor or realized from the securities offered by him. The Defendants' witness confirmed as much when she testified that she did not have the statement of accounts to show how the funds realized from the sale of the principal debtor's properties was applied to his account.

37. It is the Court's view that it was careless of the Defendants to take the position that the mortgage document did not require them to issue a statement of accounts and that the Plaintiff had not requested for the same. I say so, because the Plaintiff had raised the issue of statement of accounts as a fundamental issue in determining whether the Defendants were entitled to realise the security from the Plaintiff. It was upon the Defendants to produce such statements in Court to prove that the principal debtor had defaulted in payments. There are no statements of account from the Defendants or even from the liquidator to show how much had so far been recovered from the principal debtor and what amount was owed, if any.

38. In the circumstances, since the outstanding amount from the principal debtor, if any, cannot be ascertained, there would be no basis in law or in fact, to hold the Plaintiff liable as a guarantor.

Issue 6

39. The 6th issue is whether the Plaintiff is entitled to the prayers sought in its Plaint. It has been established before this Court that the Defendant did not produce substantive evidence of the principal debtor's indebtedness as a basis for the Plaintiff's liability under the mortgage. The Defendants failed to produce any statements of accounts to show how much was owing to them from the principal debtor. It is trite law that he who alleges must prove. In the circumstances, the Plaintiff is entitled to a permanent injunction restraining the Defendants from selling the suit property and subsequently, an execution of a discharge of the Mortgage instrument.

Issue 7

40. The 7th issue is whether the Defendants are entitled to their counterclaim. This Court has already stated under issue 5 and 6 above that the Defendants failed to produce statements of account and it was therefore difficult to ascertain what amount was owing to it, if any. In that case, the Defendants have not proved that they are entitled to the amount they have counter-claimed. The counter-claim is therefore dismissed.

DISPOSITION

41. In the upshot, Judgment is herein entered for the Plaintiff in the following terms:-

- a. **A permanent injunction restraining the Defendants whether by themselves or their servants or agents or auctioneers or Advocates, or otherwise howsoever, from selling the property subject of the Charge dated 11th March, 1988, in the pleadings mentioned, as threatened to be advertised or otherwise.**
- b. **An order that the Defendants deliver up to the Plaintiff or to such person as it appoints, the charge and all documents in the Defendants' possession or power relating to the property charged.**
- c. **An order that the Defendants do execute a discharge of the charge, in the pleadings mentioned, and all encumbrances created by the Defendants or any person claiming under it.**
- d. **Each party to bear their own costs of the suit.**

That is the Judgment of the court.

READ, DELIVERED AND DATED, AT NAIROBI THIS 17th DAY OF MARCH 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Kamau hb Thangei for Plaintiff

Mr. Mayende hb Echesa for Defendant

Teresia – Court Clerk