



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 118 OF 2014

CAROLINE ADIKINYI WANZALA

AND JACINTA SAAKUMI KANOTI

(Suing as the administrator of the Estate

Of JACOB OGWANDA OGULLA DECEASED).....PLAINTIFFS

VERSUS

FINA BANK LIMITED.....DEFENDANT

RULING

1. The application before the court is for 3 interlocutory reliefs, as follows;

a) An Injunction to restrain the defendant from transferring or selling the plaintiff's motor vehicle Registration No. KAX 005T;

b) An Injunction to restrain the defendant from advertising for sale, selling or transferring the plaintiff's property L.R. No. BUKHAYO/BUGENGI/7374; and

c) A Mandatory Injunction compelling the defendant to return to the plaintiffs, the vehicle Registration KAX 005T.

2. The plaintiffs, **CAROLINE ADIKINYI WANZALA** and **JACINTA SAAKUMI KANOTI** have brought the action against the defendant, **FINA BANK LIMITED**, in their capacities as the Administrators of the Estate of the late **JACOB AGWANDA OGULIA** (“*the Deceased*”).

3. It is common ground that Jacob Ogulia used to be a customer of Fina Bank. It is also common ground that the said Agwanda Ogulia applied to the bank for a facility of Kshs. 985,880/-. Out of that sum, Kshs. 500,000/- was a loan, whilst the balance was used to finance the purchase of the motor vehicle, a Toyota Sprinter Registration No. **KAX 005T**.

4. The securities which were given to the bank were;

a) A legal charge over L.R. No. BUKHAYO/BUGENGI/7374;

b) Asset Finance Documentation, Log book and Transfer form in respect of the motor vehicle

KAX 005T; and

c) Key-man insurance for the sum of Kshs. 985,880/-.

5. The plaintiffs' claim that the borrower died on 3rd October 2009. They also indicated that they provided the bank with documentary proof of his death.
6. As at the time of death, the plaintiffs contend that the borrower owed only about Kshs. 300,000/-.
7. There is no dispute that the bank had required the borrower to take out an Insurance Policy which could pay off such loan as may be outstanding at the time of the borrower's death.
8. Following the demise of the borrower, the plaintiffs believe that the Insurance policy should have paid off any such balance as may still have been owed by the borrower.
9. The bank admits that the borrower took out an Insurance cover, which could have helped the bank recover the outstanding balance.
10. However, when the bank contacted the Insurer, they did not receive payment in full. The reasons advanced by the insurer for not meeting its obligations is that they did not believe that the borrower was dead.
11. When pressed to explain their said failure to believe the demise of the borrower, the insurer, reportedly, said that the cause of death, as shown on the death certificate was incompatible with the fact that the borrower was a man.
12. On the copy of the Certificate of Death the cause of death is cited as **"FIBROID"**.
13. The bank said that fibroids are a condition which are known to affect only women. Therefore, as the borrower was a man, the bank was skeptical about his alleged death due to fibroids.
14. The bank also pointed out that the insurer rejected the claim. Instead, the insurer remitted Kshs. 193,130/- as ex gratia payment to the bank.
15. In the light of the partial payment by the insurer, the bank said that there was still a balance payable by the borrower. And because the bank was still holding the car and the charge over the borrower's land, it is the bank's contention that they should not be stopped from selling off the vehicle and the land.
16. It is noted that whilst the plaintiffs accused the bank of failing to make available to them, the particulars of the borrower's account, the plaintiffs also said that the balance still outstanding at the time of the borrower's demise was Kshs. 300,000/-.
17. If the plaintiffs wanted the court to accept that piece of information, they should have provided evidence to the court, to demonstrate wherefrom they obtained it.
18. The plaintiffs cannot expect the court to believe that the figure they cited is accurate yet they also insist that the information did not originate from the bank.
19. At the same time, if the bank wants the court to be in a position to accept its contentions concerning the alleged continued indebtedness of the borrower, the bank should have made available to the court all the relevant statements of account.
20. The figure of Kshs. 64,300/- is mentioned in a letter dated 29th October 2013, from the family of the borrower to the bank. That letter suggests that the bank had demanded Kshs. 64,300/- as the outstanding balance, as at 30th September 2013.

21. The bank has not given to the court the advantage of its response.
22. The grant or rejection of an application for an interlocutory injunction is discretionary. And one of the things that the court takes into consideration in an application for an interlocutory injunction is the conduct of the parties.
23. If the plaintiffs presented the death certificate to the bank, as they did; and if the bank had doubts about the legitimacy of the said certificate, the bank ought to have raised it with the plaintiffs, immediately.
24. For now, the bank is yet to place before the court any material to back its contention that the borrower may not be dead.
25. Indeed, the very fact that the insurer made some payment to the bank, is an indicator that the bank and the insurer had accepted the proof contained in the death certificate.
26. Had the bank and the insurer believed that the plaintiffs were telling untruths concerning the borrower, they would have been expected to either involve the police or get a private investigator to dig up the truth.
27. A certificate of death is prima facie proof of death.
28. In this case, the death in question was said to have been recorded onto the certificate by Dr. Peter M. Ndegwa. Therefore, if the bank or the insurer had any doubts, they had an easy start-off point for conducting their investigations.
29. Coupled with the name of the said doctor, the family of the borrower had provided information about the fact that the borrower had, (*prior to his death*) been a patient at the Kenyatta National Hospital.
30. They even indicated that the borrower had undergone 2 operations.
31. The point I am making is that the plaintiffs appear to have provided so much information to the bank that if they were telling untruths, it should have been easy enough for the bank to verify.
32. So far, the bank had not offered any tangible reason for doubting the certificate of death.
33. Secondly, the bank has not provided any tangible basis upon which the status of the plaintiffs, (*as the Administrators of the Estate of JACOB AGWANDA OGULIA*) could be questioned.
34. Therefore, on a prima facie basis, the plaintiffs are held to be the Administrators of the Estate of Jacob Agwanda Ogulia (*Deceased*).
35. It is common ground that the plaintiffs notified the bank about the demise of the borrower soon after the death occurred.
36. As one of the securities the bank was holding was an Insurance Policy, which the bank had insisted on, it would have been expected that the Insurer would have cleared the balance which was then still outstanding.
37. However, the bank has alleged that the Insurer did not settle the debt because they doubted the death of the borrower.
38. The bank said that the insurer only remitted an *ex gratia* payment Kshs. 193,130/-.
39. If the bank still doubted the demise of the borrower, it would have been expected to provide evidence to prove that the material and

40. The bank said that the insurer only remitted an *ex gratia* payment Kshs. 193,130/-.

41. If the insurer had reason to believe that the borrower was not dead or that the insured event had not come to pass, there is no reason given by the bank to explain why the insurer made the alleged *ex gratia* payment.

42. The court would have expected the bank to contact the plaintiffs so as to ask them to respond to the insurers doubts about the demise of the borrower. If the plaintiffs were contacted but they failed to provide the bank and the insurer with the requisite proof, then the insurer would not have had any obligation to make payment towards the balance of the loan which was outstanding at the time.

43. Considering that the insurer paid Kshs. 193,300/-, the other question which arises is as regards the quantum of the debt which was outstanding at the time when that payment was made.

44. In order to appreciate how a balance was still outstanding, and how much the said sum was, the bank ought to have provided the plaintiffs and this court with the requisite statements of account. That was important in this case because the borrower was dead, and the persons who were being called upon to offset the alleged debt had not been receiving statements of account regularly or at all.

45. In effect, this is not just a case in which the outstanding balance was being disputed. The alleged outstanding balance was unknown to the administrators of the estate of the late Jacob Agwanda Ogulia (*the borrower*).

46. On a *prima facie* basis, I find no evidence that the plaintiffs came to court with unclean hands.

47. In my considered opinion, the case gives rise to a very serious legal question; can a lender who had got an insurance policy to cover the loan, in the event of the death of a borrower, pursue the charged property after the borrower passes away?

48. On a *prima facie* basis, based on the material already made available to the court, I find that the plaintiffs' have made out a case with a probability of success.

49. I further hold that the interests of justice demand that the security be safeguarded until the case is heard and determined. I so find, not just because the security is the family home of the plaintiffs'; but more so because totality of the circumstances already discussed above.

50. In the event, I order that an interlocutory injunction do issue to restrain the defendant from selling the charged property until the suit is heard and determined.

51. However, I find no basis in law, or in fact to warrant the grant of an interlocutory mandatory injunction, to compel the release of the motor vehicle.

52. Nonetheless, I direct the parties to consider what to do with the motor vehicle, even as they await the trial. I hold the view that if the issue of the motor vehicle was not looked into, it's value may be totally lost to both parties, by the time the case is finally determined.

53. Finally, the plaintiff is awarded the costs of the application dated 22nd March 2013.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of June 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Wathome for the Plaintiffs

Mbigi for the Defendant

Collins Odhiambo – Court clerk