



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.798 OF 2015

MARY ATIENO NYAMONGO.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

1. **Mary Atieno Nyamongo**, the plaintiff, commenced this suit through the plaint dated 10th November 2010 and subsequently amended on 8th may 2010 in which she seeks for the following prayers;

- “ a) A declaration that the intended sale is illegal and void ab initio.
- b) A declaration that the Plaintiff has fully paid and/or settled the charges due under the charge instrument dated 1st February 2006 and that the Defendant do discharge the charge.
- c) In the alternative, the Honourable court be pleased to order taking of accounts as between the Plaintiff and the Defendant.
- d) A permanent injunction restraining the Defendant from selling alienating, dealing and/or in any other way interfering with the property known as **Kisumu/Nyalenda B/1069.**”

The Plaintiff avers that in the year 2005 she obtained a loan facility of Kshs2.5 million from Barclays Bank Limited, the Defendant, that was secured by a legal charge on her land parcel **Kisumu/Nyalenda B/106** to be repaid in fifteen years. That as of March 2010, the loan outstanding was Ksh.276, 754.45 which she has now cleared and hence this suit.

2. The claim is opposed by the Defendant though their statement of defence dated 7th December 2010 and subsequently amended on the 29th May 2012 with the prayer that the Plaintiff's suit be dismissed with costs. The Defendant avers that the loan facility granted to the Plaintiff was to be paid in seven years and not fifteen years as alleged by the Plaintiff. That the Plaintiff started defaulting in repayments in September 2005 and is yet to clear the loan. That the Plaintiff still owes Ksh.361,458.55 and costs of Ksh.918,030,517 that the Defendant incurred in pursuing the debt recovery from her. That the Defendant was therefore entitled to realize the security as they had complied with the statutory requirements on notices.

3. The Plaintiff testified as PW1 and told the court how in 2005 she applied for and obtained a Ksh.2.5 million loan from the Defendant. That she offered land parcel **Kisumu/Nyalenda B/1069** where her matrimonial home is situated as security. That the Defendant informed her that the maximum period for repaying the loan would be seven years and the repayment would be in monthly installments but that she

was at liberty to pay more. That she received information that her land had been advertised for auction in the 1st November 2010 newspaper for 15th November 2010 and she promptly filed this suit. That in January 2011 she received a bank statement from the Defendant dated 16th July 2010 showing that the loan debt stood at Kshs.276,000/= which she subsequently paid. The Plaintiff denied having received the Defendant's letter dated 23/2/2009 or the auctioneers letter dated 1st October 2010 even though they carried her postal address. That the last payment of Sh.277,000/= was taken from her personal account at Kisii branch on 17th February 2011 as by then the loan account had been closed. She disputed that she still owed the Defendant Ksh.361,458.55 and costs of Ksh.918.030.51 as it had not been included in the statement of July 2010. During cross examination, the Plaintiff agreed that the letter dated 21st March 2006 in her list of documents was a demand notice from the Defendant's advocate whom she agreed she talked to. She agreed that the Defendant statutory notice, certificate of posting, auctioneers letter dated 11th August 2009 and certificate of posting in Defendants list of documents carried her correct postal address. She also confirmed that the charge document carries her signature which she appended after the Defendant's officers explained the contents to her. She confirmed that the mobile number [...] on the auctioneer's letter was hers. She further agreed that the advocates fees, valuation costs and loan arrangements fees were to be added to the loan account and paid by herself. That after discussing with the Defendant's advocate called Karanja she paid the Defendant kshs.1000,000/=.

4. The Defendant called Nkuruma Oduol, the operations manager Kisumu branch, who testified as DW1. He told the court that the Plaintiff operated a personal current account Number [...]. That after the Plaintiff obtained a loan facility from the Defendant and that a loan account number [...] was opened for that purpose. That on 16th July 2010, the Defendant changed its system and in the process of migrating to the new system some loan accounts were changed. That the loan balances in the old loan accounts, which were closed, were transferred to the new loan accounts. That the Plaintiff new loan account was [...] with a balance of 276,754.45 which was reduced to Ksh.39,362.70 after crediting Ksh.275,501/=. That the amount increased to Ksh.361.456.55 after adding other costs. That the Defendant had notified its customers about the account migration and the new loan accounts allocated. That the over Ksh.900,000/= in the defence was additional costs incurred by the Defendant in its loan recovery endeavors from the Plaintiff.

That the Defendant had communicated with the Plaintiff through the address she had provided being **P.O. BOX [...] Kisumu**. During cross-examination, DW1 agreed that he had not come with any document to confirm that the Defendant had notified the Plaintiff of her new loan account after the systems migration. He testified that after the crediting of Ksh.275,501/ to the Plaintiff's loan account, the amount that remained owing was about Ksh.39,000/=. He added that he could not give the breakdown of the over Ksh.900,000/= in the defence said to be costs incurred by Defendant in recovering the debt from the Plaintiff.

5. At the closure of oral evidence, counsel for the parties agreed to file written submissions. The counsel for the Plaintiff filed their written submissions dated 27th June 2016 on the same date while the Defendant's counsel filed theirs dated 4th August 2016 on the 18th august 2016.

6. The following are the issues for the court's determinations:

- a) Whether the Plaintiff was in arrears of the loan repayment by the time the Defendant commenced the realization of the charged property procedures.
- b) Whether the Defendant had served the statutory notices on the Plaintiff before advertising the sale by auction.
- c) Whether an order to take accounts should issue.
- d) Who pays the costs.

7. The court has carefully considered the evidence tendered by both parties, the submission by counsel

and come to the following conclusions;

a) That the Plaintiff signed the letter of offer of a loan amount of Ksh.2,500,000/= on the 16th December 2004 and the charge document on 1st February 2005 over land parcel **Kisumu/Nyalenda B/1069**.

b) That the postal address attributed to the Plaintiff in the letter of offer is indicated as P.O. BOX [...], Kisumu while in the charge document, the address is P.O Box [...] Kisumu.. That the Plaintiff in her oral evidence confirmed her address as P.O. Box [...] Kisumu which was the address appearing on the statutory notice dated 23rd February 2009, certificate of posting number [...], letter dated 1st October 2010 and certificate of positing of the same date. That the foregoing documents are attached to the Defendant's list of documents and goes to challenge the Plaintiff's contention that she had not been served with the statutory and redemption notices in accordance with the law before the charged land was advertised for sale. That the court finds that the Defendant had indeed complied with the law and the contractual obligations under the charge document by serving the Plaintiff with the statutory and redemption notices before the advertisement for the auction.

c) That the statutory notices showed the amount outstanding as of 26th January 2009 was Ksh.349,596.84 while the auctioneers redemption notice dated 1st October 2010 indicated that as of 15th September 2010, the amount outstanding was Ksh.1,403, 425/=. That this indicated or shows that the Plaintiff had made some payment hence bringing the total indebtedness down.

d) That the auction did not take place following the injunction orders of 12th November 2010. That as of the time this suit was filed and interim injunction orders obtained, the documentary evidence availed by the Plaintiff in form of the copy of the bank statement issued on 16th July 2010 for loan account No.[...], the balance outstanding was shown as Ksh.276,754.45. That the Plaintiff's evidence is that the amount outstanding was cleared in 2011 when Ksh.277,000/= was moved from her personal account at Kisii branch and that she therefore do not owe the Defendant any more money. That the Defendant explanation that the Plaintiff's loan account number was changed in July 2010 and the balance moved to the new loan account has clearly explained why the statement covering the period of 17th July 2010 to 31st December 2010 of account No.[...] had zero balances. That the explanation is that the balances of Ksh.276.754.45 had been moved to the new account and therefore the Plaintiff position that she owed no debt is based on a misapprehension of facts.

e) That the period of repayment of the loan was seven and not fifteen years which therefore ended on or about February 2012. That however the Plaintiff had evidently fallen into arrears in her monthly repayments which inevitably led to the Defendant engaging their advocates to write to the Plaintiff hence incurring some expenses. That even though DW1 was not able to give a detailed itemizations of the costs said to be beyond Ksh.900,000/=:, the Plaintiff is obligated under the charge document to meet such reasonable costs that the Defendant incurred in pursuing her for the regularization of her loan account.

f) That the Defendant has availed a copy of a bank statement in respect of account number [...] allocated to the Plaintiff after the 16th July 2010 system migration that shows that, as of 20th April 2012, the amount outstanding was Ksh.361,458.55. That the Plaintiff has not availed evidence to rebut that position and the Defendant is therefore entitled to pursue her for its payment. That the amount has definitely increased if the interests and penalties since that date are added to the figure.

8. That having concluded as above, the court finds that the Plaintiff has failed to proof her case on a balance of probabilities and her suit against the Defendant is dismissed with costs. The injunction orders earlier issued are hereby lifted.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 26TH DAY OF OCTOBER 2016

In presence of;

Plaintiff Present

Defendant Absent

Counsel Mrs. Onyango for Asuna for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

26/10/2016

26/10/2016 at 3.20 pm.

S.M. Kibunja Judge

Oyugi court assistant

Plaintiff present

Mrs Onyango for Asuna for Plaintiff.

Court: Judgment delivered and dated in open court in presence of the Plaintiff and Mrs. Onyango for Asuna for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

26/10/2016