



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO.773 OF 2012
KEZIAH NJAMBI MAINGI T/A ARRIVALS TEXTILE SHOP.....PLAINTIFF
VERSUS
BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. By her Plaint dated **20thDecember, 2012** the Plaintiff, **Keziah Njambi Maingi**, trading as **Arrivals Textile Shop**, approached the Court seeking judgment against the Defendant for:-

i. **A Permanent injunction to restrain the Defendant whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from recalling the loan of Kshs. 16,000,000/= advanced to the Plaintiff and the late Samuel Maingi Kibe, charging any punitive penalty interest on the Mortgage Loan Account Number [particulars withheld] and/or taking any steps towards realization of the charged security in respect of the property known as L.R NO. 25404 Grant I.R 87128/1 Tigoni, and/or in any other manner whatsoever adversely dealing with the mortgage loan account number [particulars withheld] and/or acting in breach of the contract contained in the Letter of Offer dated the 29.6.2012 and the Legal Charge dated the 6.8.2012.**

ii. **That the Defendant be condemned to pay the costs of this suit and all incidentals thereto.**

iii. **Any other or further relief that this Honorable Court may deem fit to grant.**

2. The background to the suit is that on **25th May, 2012**, the Plaintiff and her husband, the late **Samuel Maingi Kibe**, applied for a loan from the Defendant in the sum of **Kshs. 16,000,000/=** for the purpose of purchasing a residential house as owner occupiers. The facility was approved by the Defendant vide its Letter of Offer dated **29th June, 2012**. The loan facility was to be secured by a legal Charge over **L.R NO. 25404 Grant I.R 87128/1, Tigoni** (herein the suit property), which was the property to be purchased from the loan funds. The said loan was to be repaid within a period of 120 months, in monthly instalments of **Kshs. 329,627/=** inclusive of interest. The repayment instalments were to be debited from **Account No. [particulars withheld]** held by the Plaintiff and her husband.

3. There were conditions for the disbursement of the facility as set out in the Letter of Offer dated **29th June, 2012**. The salient terms and conditions as set out in the aforesaid Letter of Offer are:

- i. **that the security had to be perfected before drawdown;**
- ii. **that the Annual Creditor Life Insurance Premiums were to be provided for as they fell due;**
- iii. **that a Mortgage Protection Insurance Cover for Kshs. 16,000,000 was to be taken over the borrowers, and pro rata premium amount for the period up to the last day of the month of February was to be debited from the Borrowers' Account 2025607506;**
- iv. **that the loan repayments were to be provided for as they fell due, and any two missed payments would be treated as an event of default, and would trigger calling up the entire debt;**
- v. **that payments in respect of the purchase price balance were to be made to the Vendor through the Bank's lawyers upon perfection of securities.**

4. It was the Plaintiff's contention that they duly provided the requisite irrevocable standing instructions authorizing the Defendant to debit their account with the monthly instalments of **Kshs. 329,627/=** on the 20th day of each month until full repayment of the loan. Similarly, they instructed the Defendant to debit their account with the total premiums in respect of the Mortgage Life Insurance Cover as well as the Fire Insurance Cover; and that as a condition precedent to the processing of the mortgage facility, they were referred by the Defendant to **M/s The Kenyan Alliance Insurance Company Limited**, being the Defendant's insurer of choice, for medical examination. Upon compliance with all the formalities, they were, on **12th July, 2012**, accepted by **The Kenya Alliance Insurance Co. Ltd** as being eligible for the Group Mortgage Protection Policy cover for the sum assured of **Kshs. 16,000,000/=**.

5. Thereafter, on **6th August, 2012** the Plaintiff, her deceased husband and the Defendant executed an equitable Charge over the suit property herein in favour of the Defendant, whereupon, upon perfection of the securities, the loan was disbursed. The first monthly instalment towards the repayment of the loan of **Kshs. 329,677** was promptly made on **21st August 2012**.

6. It was further averred that, quite unfortunately, the Plaintiff's husband, **Samuel Maingi Kibe**, got involved in an accident while at the suit property on **1st September 2012** that led to his untimely demise. The Plaintiff averred that the Defendant was accordingly notified of the occurrence, and that since the loan was insured against such risks as the death of any of the Chargors, her conviction and expectation was that she was not required to make any further payments in respect to the loan advanced, since the insured risk had already crystallized. She therefore pursued the Defendant to fast-track the processing of the Mortgage Life Insurance claim in respect of her late husband. It therefore came as a surprise to her to learn from the Defendant that their proposal for Mortgage Life Insurance Cover to **The Kenya Alliance Insurance Co. Ltd** had not been processed to conclusion on account of failure to pay premiums.

7. The Plaintiff's contention was therefore that, since the Defendant did not inform her or her husband of any anomalies or omissions with regard to their cover proposal prior to the drawdown and disbursement of the loan, she was under no obligation to repay the loan. Thus, when it was then communicated to her that she was obliged to repay the entire loan balance in lump sum, failing which the Defendant would proceed to initiate steps towards the realization of the charged security, she was constrained to file the instant suit. She took the posturing that her late husband complied with all the terms and conditions of the Letter of Offer and the Charge document, and that the failure to procure the Mortgage Life Insurance Cover was solely attributable to the negligence and or laxity on the part of the Defendant and its officers. She thus sought the intervention of the Court by way of a Permanent Injunction to restrain the Defendant from recalling the loan, or charging any punitive penalties thereon, or taking any steps towards realization of the charged security. The Plaintiff relied on the Witness Statement she made and filed herein dated **20th December 2012** in support of the foregoing averments.

8. The Defendant denied the Plaintiff's claim vide its Statement of Defence dated **15th March, 2014**.

According to the Defendant, the Mortgage Protection Policy was for the benefit and protection of the Chargors and therefore, pursuant to the special conditions of the Letter of Offer as well as the Charge, it was the duty of the Chargors to ensure that the Policy was in place and that funds were available in their account for the payment of the attendant premiums. The Defendant cited **Clauses 6, 8 and 40** of the Charge by which the Chargors covenanted thus:

- (a) that the Chargors would deposit with the bank the policies of insurance and duly pay all premiums for effecting and keeping up the insurance;
- (b) that in the event of default by the Chargors in depositing the policy or paying the premiums the bank would not be bound to take out the insurance;
- (c) that should there be any conflict in between the provisions of the Letter of Offer and the Charge, the provisions of the Charge would prevail;
- (d) that in the event of default, the bank would be at liberty to exercise its statutory power of sale;
- (e) that the Chargors would be jointly and severally liable for their liabilities and obligations under the Letter of Offer and the Charge.

9. The Defendant further averred that it had directed the Plaintiff and her husband to take out an insurance policy with **Pan Africa Life Assurance Ltd** and to that end it had debited their account with the funds for the insurance policy to the tune of **Kshs. 106,256/=**, but that the Plaintiff and her husband informed the bank that they intended to use a different insurance company with which they already had a policy. On that basis the Bank reversed the remittance already made to **Pan Africa Life Assurance Ltd**.

10. The Defendant further averred that, since the Plaintiff had failed to demonstrate whether or not they deposited a policy document with them as covenanted in Charge, and in the absence of the said policy document, the Plaintiff could not validly claim that they were insured. It is further the Defendant's case that the absence of an insurance policy could not, in any case, vitiate its right to exercise the statutory power of sale. Thus, it was the Defendant's contention that the Plaintiff having defaulted in repaying the loan, it was within its right to cause its advocates to issue a statutory notice and proceed to realize the security provided by the Plaintiff and her deceased husband to cover the loan.

11. In reply to the Defence, the Plaintiff reiterated her posturing that it was a fundamental requirement in both the Letter of Offer and the Charge document that the loan be comprehensively insured prior to draw down. The Plaintiff further averred that a policy of insurance could only have been effected after payment of the requisite premiums, which they had authorized the Defendant to do on their behalf. The Plaintiff denied the Defendant's allegation that it had directed them to take an insurance policy with **Pan Africa Life Assurance Ltd** or that she instructed the Defendant to reverse any remittance in respect to the insurance premium as alleged. According to the Plaintiff they only dealt with **The Kenya Alliance Insurance Company Ltd** and no other insurance company.

12. The hearing commenced on **7th July, 2015**. The Plaintiff testified on her on behalf while the Defendant called two witnesses, namely: **Castro Mutai (DW1)** and **Samuel Mukiti (DW2)**, both of whom are employees of the Defendant. For the reason that the evidence was attuned to the foregoing summary of the pleadings, I find it unnecessary to restate what each of the witnesses stated, but will refer to the same as appropriate in my analysis and consideration of the issues for determination herebelow. Thereafter the parties put in their written submissions.

13. The Plaintiff filed her submissions dated **4th September, 2015** on even date while the Defendant filed its submissions dated **22nd September, 2015** on **28th September, 2015**. The Plaintiff further filed a Reply to the Defendant's submissions on **13th October 2015**. Having carefully considered the pleadings and the evidence adduced in support thereof in the light of the List of Issues filed herein dated **25th June, 2014**, the main issues for determination can be summarized as hereunder:-

1) Whether there was a valid Life Mortgage Insurance Cover in place at the time of the death of the Plaintiff's husband;

2) Whose responsibility was it to ensure that the Cover was in place?

1) Whether there was a valid Life Mortgage Insurance cover in place

14. The Plaintiff's case is that there ought to have been valid insurance policy in place before the funds draw down, as this was an important pre-condition thereof; and that to that end the Chargors had done all they were required to do, including submitting themselves for medical examination and granting irrevocable authority to the Defendant to pay the premiums due by way of debits from their account. The Defendant's contention is that, while there was a valid insurance policy by **Pan Africa Life Assurance Ltd** as at the time of the draw-down, the said policy by **Pan Africa Life Assurance Ltd** was cancelled upon the Plaintiff's instructions, as they apparently preferred **The Kenya Alliance Insurance Co. Ltd**. It was the Defence case that the Plaintiff expressly communicated her preference for **The Kenya Alliance Insurance Co. Ltd** and requested that the premium payment to **Pan Africa Life Assurance Ltd** be reversed.

15. From the Court record it is discernible that the proposal forms for the cover with **Pan Africa Life Assurance Ltd** though apparently duly filled, signed and dated, were cancelled. It is the Defendant's posturing that it acted on the oral instructions of the Plaintiff to cancel the said policy, and in his evidence, **DW2** stated that the Bank at times acted on oral instructions depending on the relationship it had with the client; and that the Plaintiff had been known to him for more than three years prior to the issuance of the facility herein and thus he was not out of line by acting on her oral instructions in anticipation of written instructions which would be in the form of an alternative policy document.

16. In her List of Documents filed herein on **23rd December, 2012** the Plaintiff attached letters from **The Kenya Alliance Insurance Co. Ltd** accepting their proposal for a Mortgage Protection Policy. The said letters, dated **7th June 2011** and **12th July 2012**, respectively, were addressed to an officer of the Defendant Bank. Nevertheless, it is manifest that there was no policy document issued by **The Kenya Alliance Insurance Co. Ltd** in favour of the Chargors herein pursuant to their proposal. Moreover, there was no evidence of payment of premiums to Kenya Alliance to bring into effect the proposed Mortgage protection Cover. As it turned out, **The Kenya Alliance Insurance Co. Ltd** declined to indemnify the Plaintiff on the death of her husband for the reason that the process of obtaining the policy had not been completed by the time of the occurrence. The Defendant's letter to the Plaintiff communicating this stance is dated **9 November 2012** and is at **page 45** of the Plaintiff's Bundle of Documents.

17. In the circumstances, it is indubitable that there was no valid Life Mortgage protection cover at the time of death of the Plaintiff's husband.

Whose responsibility was it to ensure that the Cover was in place

18. In light of the above finding that there was no valid Mortgage Life Insurance Cover in place, it is pertinent to determine whose responsibility it was to ensure that a Mortgage protection cover was in place. Whereas it is the Plaintiff's case that it was the Defendant's obligation to ensure that there was a mortgage protection cover in place, the Defendant, on the other hand, contended that that it had no obligation to take out an insurance cover on behalf of the borrower or charger and that it could only pay premiums after receiving policy documents from the Plaintiff to ascertain how much was payable in premiums. The Defendant relied on **Clause 6 (e)** of the Charge document, which obligated the Plaintiff to deposit with the Bank the policies of insurance, in support of this posturing.

19. There appears to be no dispute that the Plaintiff and her husband did instruct the Defendant to pay the requisite premiums by way of direct debits from their account, and that pursuant thereto the Defendant did pay some premium to **Pan Africa Life Assurance Ltd** before draw-down. Accordingly, the Chargors had put in place firm arrangements for the payment of premiums. It is further evident that the acceptance of the cover by **The Kenya Alliance Insurance Co. Ltd** was forwarded to the Defendant directly and it

was therefore upon them to communicate the same to the Plaintiff. There is no evidence that they communicated the said acceptance.

20. It is further the Plaintiff's position that the Mortgage Life Protection cover was a pre-condition to the disbursement of the loan facility. It was submitted for the Plaintiff that the instructions in the Letter of Offer were clear to the effect that premiums were to be deducted from their (the borrowers) account held with the Defendant. Moreover, **Clause (xii)** of the Letter of offer provides as follows:-

"The loan amount will be disbursed directly to your vendors by Banker's Cheques. The Group insurance life and fire premiums will be paid to the insurer direct by the Bank."

21. From the foregoing it is clear that it was the Defendant's responsibility to ensure that premiums were paid, by way of debits from the Chargors' account, when they fell due. Nevertheless, such premiums could only be paid if there was a valid Insurance Cover in place. The Charge, which by virtue of **Clause 6(q)** thereof, takes precedence over the Letter of Offer, is explicit that it was the obligation of the Chargors to ensure, not only that a policy was in place, but also that the policy was duly deposited with the Defendant for compliance purposes. **Clause 6(e)** of the Charge instrument states thus in this respect:

"The Chargors and/or borrowers shall deposit with the Bank the Chargors' and or borrowers' policies of insurance and duly pay all premiums and other money necessary for the effecting and keeping up Chargors and or borrowers' insurances and deliver to the Bank at least seven (7) days before expiry of any policy the receipt for the payment to renew that policy."

22. Clearly then, it was the responsibility of the Plaintiff to ensure the policy was in place and it matters not, in my view, that **The Kenya Alliance Insurance Co. Ltd** may have communicated with the Defendant directly in respect of the proposal by the Plaintiff and her husband. The Defendant's role in paying the premiums was, in the premises, auxiliary to and dependent on the policy being issued in the first place.

23. I do note that, in her written submissions, the Plaintiff relied on the case of **Mary Muturi vs Housing Finance Co. Ltd, Nairobi HCCC No. 346 of 2006** in which the Court decided in favour of the Plaintiff for the reason that the Defendant was in a position of knowledge and experience and should have ensured that a valid insurance policy was in place before draw-down. It is notable however that the facts thereof are markedly distinguishable from the facts of this case in that there was a valid policy cover in place at the time of the demise of the Chargor. There having been no such policy in place at the time of the death of **Samuel Maingi Kibe**, the question of policy cancellation would not arise.

24. In the result, it is my finding that the Plaintiff has failed to make out a good case against the Defendant in terms of the principles laid out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** in the sense that since there was no valid policy in place, and since it was the duty of the Plaintiff to ensure the policy was in place, the Plaintiff's claim for a permanent injunction is without foundation. In the absence of a valid policy, it would follow that the Plaintiff, as the surviving Chargor and partner in **Arrivals Textile Shop** business, would be obliged to repay the loan, and that in default of payment, the Bank should be at liberty to realize the security under its Statutory right of sale, which must be done within the strictures of the **Land Act, 2012**. Any allegations of negligence by the Plaintiff against the Defendant are, in my view, issues that the Plaintiff is at liberty to pursue separately if she so wishes.

25. Accordingly, I would dismiss this suit but with an order, given the circumstances hereof, that each party bears own costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 12th DAY OF OCTOBER, 2016

OLGA SEWE

JUDGE