



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC NO. 137 OF 2015**

**DANIEL KIPRUTO METO.....PLAINTIFF**

**VERSUS**

**CHASE BANK KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

By a plaint dated 30<sup>th</sup> April 2015 the plaintiff herein sued the defendant seeking for the following orders:

***a) A declaration that the Plaintiff is the registered owner of all that parcel of land known as L.R No. Moi's Bridge/Sirikwa Block I(Ziwa) 194 measuring 11.74 acres and that any and all the documents held by the defendant relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequences and the same should be surrendered to the Plaintiff, the court and/or the Uasin Gishu Land Registrar.***

***b) An order of injunction to permanently restrain the defendant, its agents and/or servants from entering, occupying, selling, transferring, encumbering, wasting and/or otherwise interfering with the Plaintiffs quiet possession use, and/or enjoyment of the suit land.***

***c) An order of discharge of charge of the Plaintiff's parcel of land namely NO. MOI'S BRIDGE/SIRIKWÁ BLOCK 1 (ZIWA) 194.***

***d) An order for payment of exemplary damages for the illegal charging of the property prompting him to engage intervention from the relevant authorities like the police and legal services.***

***e) Costs of the suit***

***f) Any other relief this Honourable Court may deem fit and just to grant.***

This matter had earlier proceeded ex-parte whereby judgment was entered in favour of the Plaintiff. The Defendant made an application dated 12<sup>th</sup> October 2018 to set aside the judgment which application was allowed and the matter was heard afresh. Further the defendant filed third party proceedings against Nileflow Sacco Limited and its directors who neither entered appearance nor filed any response to the case.

**PLAINTIFF'S CASE**

PW1 adopted his statement and stated that he is the registered owner of all that parcel of land known as L.R No. MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA)/194 measuring 11.74 acres. PW1 produced a copy of a title deed as an exhibit before the court. He stated that he neither took any loan from the defendant nor has ever guaranteed anybody to take a loan with his title. He further stated that neither his wife nor him signed any loan forms.

It was PW 1's testimony that his title got lost and only came to learn about the loan when the bank came to demand money from him. The plaintiff also stated that he reported the matter to the police and the persons who purportedly took a loan fraudulently with his title were arrested and charged in court. He produced a copy of the charge sheet and a search certificate which indicated that someone had taken a loan with his title without his knowledge or consent.

He denied knowing a company known as Nile Flow Sacco Ltd and that he is not a member of the said Sacco. PW1 also testified that he did not sign any documents for the defendant and that he usually thumb prints and not written signature.

PW1 further stated that he never appeared before the Land Control Board and that his wife is called Christina Chepkasi Meto and not Rebecca Metto who purportedly signed the spousal consent. It was his evidence that the documents were fraudulently acquired and registered irregularly.

PW1 stated that he went to his advocate who wrote a letter to the defendant who replied vide a letter dated 10<sup>th</sup> March 2015 whereby they requested for 28 days to enable them respond adequately to the issues raised in the letter but they never responded. It was the PW's evidence that he has been staying on the suit land for a period of over 40 years where he has put up mud structures and not permanent structures as it had been alleged in the valuation report by Metro Cosmo Valuers. He therefore urged the court to order the defendant to release his title plus costs of the suit.

On cross examination by Mr. Ogejo counsel for the Defendant, the PW1 told the court that he was not aware that there was any application for consent to charge the suit land or any charge registered on the suit land.

On re-examination, the PW1 further stated that there is a pending criminal case regarding the present issue but he has never been called to give evidence and further that he never executed any documents to take a loan.

PW2 who is the plaintiff's wife testified and stated that the plaintiff is the registered owner of the suit land and that she did neither executed any instrument for any loan nor guaranteed anyone. She further stated that she does not know Nile Flow Sacco Ltd and that she is not Rebecca Metto. PW2 produced a copy of her National Identity Card No 6856218 in the name of Christina Chepkasi Metto and that the ID used by Rebecca Metto was 11350210 which does not belong to her.

PW3 a son of the plaintiff also testified and confirmed that the suit land belongs to the plaintiff and that the father has neither taken any loan nor charged the property. He stated that upon carrying out an official search, they were shocked to find that the plaintiff's land had been charged in favour of a third party for a credit facility to the tune of Kshs. 4,000,000/ That the Plaintiff immediately reported the matter to the police and upon investigation several charges were preferred upon those who were involved.

PW3 also stated that the Bank's valuation report was in respect of land in Kipsomba which is 20 Kilometers from Ziwa Machine and stated that the land was fraudulently transferred. It was PW3's further testimony that Plaintiff was not a member of Nilefow Sacco and urged the court to allow the plaintiff's claim with costs.

## **DEFENDANT'S CASE**

DW1 Kevin Kimani a former official at the Defendant Bank testified that he has never taken part in any criminal proceedings regarding the suit land. He adopted his witness statement dated 22<sup>nd</sup> June 2015 and

produced as exhibit the documents in the Defendants list of documents dated 12<sup>th</sup> June 2015.

DW1 stated that he has never received any notice from the Land Registrar in respect of the charge that was registered on the suit land.

On cross examination by Ms. Kibichy DW1 confirmed that there is neither mention of the suit land on the board resolutions drawn by Nileflow Sacco, nor does the signature of the Plaintiff appear thereon. DW1 further stated that the Plaintiff appeared in their offices together with Nileflow Sacco to deliver the title to the suit land for purposes of registering a Charge against the suit land. It was further his evidence that the spousal consent was signed by the Plaintiff's wife, Sote Rebecca Metto, and attested to by the bank's advocates. DW1 confirmed that there was no marriage certificate attached thereon. DW1 added that he did not have any consent from the Land Control Board to register a charge against the suit title.

DW2 Donald Kipkorir the Managing Partner at Messrs. KTK Advocates confirmed that indeed he prepared the Charge documents in relation to the suit land.

On cross examination by Ms. Kibichy, DW2 testified that the Charge document was witnessed by another advocate in his firm, Wanja Gitau and that the spousal consent was prepared and witnessed by the firm of Gumbo Advocates.

On reexamination, DW2 stated that the stamp duty was subsequently paid on account of the borrower.

### **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff listed 6 issues for determination which he consolidated to 3 as follows:

- a) Whether the Plaintiff is the owner of the suit land***
- b) Whether the plaintiff executed any instrument guaranteeing the suit property in favour of any party***
- c) Whether the defendant carried out due diligence before charging the suit property.***

On the first issue counsel submitted that it is not disputed that the plaintiff is the registered owner of the suit land hence he deserves protection under Article 40 of the Constitution of Kenya, 2010 and Section 26 of the Land Registration Act, 2012.

On the second issue as to whether the Plaintiff executed any instrument guaranteeing the suit property in favour of any party, counsel submitted that the plaintiff confirmed that he did not execute any instrument as the signature on the charge did not belong to him. He also stated that he is illiterate and could only sign vide a thumb print which was not the case.

Counsel further submitted that the plaintiff could not have presented the wrong name and identity card for his spouse for the spousal consent. It is evident that the name and ID Card number for the purported spouse Rebecca Metto was different from the real spouse Christine Metto.

On the third issue as to whether the defendant carried out due diligence before charging the suit land, counsel submitted that the Defendant failed to follow the requisite procedure and that is why they did not discover the fraud by the 3<sup>rd</sup> parties.

Counsel submitted that it is evident that the Defendant never carried out even the basic and/or minimum requirement of what can be considered as due diligence. Due diligence should not stop at a search which as per their list of documents is not clear whether it was conducted or not. That the Defendant being the beneficiary of the charged property, was under an obligation to carry out a background check on the owner of the suit property, visit the property, enquire from neighbors and/or even establish a history of the land. Further, they would have realized that the structures situate in the suit property are mud houses

and not permanent houses as described by the Valuation Report allegedly prepared by Metro Cosmo Limited Valuers.

Counsel further submitted that the whole transaction was marred with illegalities or fraud as:-

- a) The Plaintiff never appeared before the legal practitioners (M/S Gumbo & Co. Advocates and KTK Advocates) acting on behalf of the defendant.***
- b) The legal practitioners did not conduct due diligence to affirm that the Plaintiff was aware and/or consents to guaranteeing the purported company.***
- c) That Metro Cosmo Limited Valuers (Agent appointed by the Defendant) themselves made a false report as the description of the property does not tally with what was on the ground.***
- d) The history of the land was never conducted (they have never even seen the land)***

Counsel relied on the case of **Kibiro Wagoro Makumi v Francis Nduati Macharia & another [2018] eKLR** where the court held that:

***“.....having analyzed the totality of the evidence adduced, having found that the title of the 1<sup>st</sup> Defendant was acquired fraudulently, the onus was on the 2<sup>nd</sup> Defendant to challenge the claim of the Plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 2<sup>nd</sup> Defendant capable of conveying a legal interest in the suit land by way of a realizable security. The question of the validity of the charge is called into question. It is doubtful. The 1<sup>st</sup> Defendants title and by extension the charge to the 2<sup>nd</sup> Defendant must be cancelled. The Bank has to pursue the 1<sup>st</sup> Defendant personally as well as the third-party borrower for recovery of the loan.”***

Counsel further cited the case of **Alice Chemutai Too v Nickson Kipkirui Korir & 2 others [2015] eKLR**; and **Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR** to buttress the point.

Ms Kibichy finally relied on the case of **Otieno Omuga & Ouma Advocates v CFC Stanbic Bank Limited [2015] eKLR**, and submitted that having established that the Defendant acted in cahoots with 3<sup>rd</sup> parties to defraud the plaintiff, the Defendant should be held vicariously liable and compensate the Plaintiff a sum of Kshs. 3,000,000/- being the amount charged against the suit land.

### **DEFENDANT’S SUBMISSIONS**

Counsel for the defendant listed three issues for determination as follows:

- a) Whether the Plaintiff has discharged his duty to prove fraudulent charge over the suit land.***
- b) Whether the charging of the suit land was legal, regular and procedural***
- c) Who is to bear the costs.***

On the first issue counsel submitted that the legal burden of proof is upon the person who alleges and relied on sections 107, 108, and 109 of the Evidence Act which counsel submitted that the plaintiff has failed to meet.

Counsel relied on the cases of **Wallingford v Mutual Society [1880] 5 App. Cas 685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd’s Rep. 305, 308, Lawrence v Lord Norreys [1880] 15 App. Cas. 210 at 221 and Davy v Garret [1878] 7 ch. D 473 at 489; and in Nancy Khahoya v Expert Credit Limited & another [2015] eKLR** on the issue of proof of fraud in civil cases.

Counsel also submitted that in a claim of negligence the plaintiff had to prove on a balance of probability as was held in the case of **Treadsetters Tyres Limited v John Wekesa Wepukhulu [2010] eKLR and East Produce (K) Limited v Christopher Astiado Osiro Civil Appeal No. 43 of 2001.**

Counsel therefore submitted that the plaintiff has failed to discharge the burden of proof hence the case should be dismissed. Whether the charging of the suit land was legal, regular and procedural.

On the second issue as to whether the charge of the suit property was legal and procedural, counsel submitted that the Plaintiff did not dispute in his pleadings the signature appearing on the letter of offer, letter of guarantee and indemnity, declaration of marital status, authority to charge and spousal consent. Counsel also submitted that the plaintiff did not even produce a specimen signature to invalidate the one on the mentioned documents.

It was counsel's further submission that section 56 of the Land Registration Act which deals with the form and effect of registration and that no charge can be registered unless the Registrar is satisfied that all the consents and requirements are complied with. That once a legal charge is registered, it is automatic confirmation that the same was compliant with the law.

Mr. Ogejo submitted that a challenge to the validity of a charge at the time of hearing a suit or after several years of registration was an afterthought and lacking in merit. To buttress this argument, counsel cited the cases of **Al- Jalal Enterprises Limited v Gulf Bank Limited [2014] eKLR; King'orani Investments C. Limited v Kenya Commercial Bank Limited & another [2007] eKLR and Coast Brick Tiles & Tiles v Premchand [1996] EA.**

Counsel submitted that the plaintiff has failed to prove his case to the required standard therefore he should pay coats of the suit.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case by the court are:

- a) Whether the Plaintiff is the owner of L.R NO. MOI'S BRIDGE/SIRIKWA BLOCK 1 (ZIWA) 194.***
- b) Whether the Plaintiff executed any instrument in favour of Nile flow Savings and Credit Co-operative Society limited while charging the suit property***
- c) Whether spousal consent was obtained in respect of the suit property***
- d) Whether the Plaintiff appeared before the Land Control Board and law firm which executed the charge document***
- e) Whether the Defendant carried out due diligence before charging the suit property.***
- f) Whether the plaintiff is entitled to exemplary damages and costs of the suit.***

This is a very unfortunate case where a party's title is purportedly used as a collateral without his knowledge or consent. The issue as to whether the plaintiff is the registered owner of the suit land is not in doubt because he produced a copy of a title deed registered in his name. The defendant also did not dispute that the plaintiff is the owner of the suit plot and that is why they were pursuing the purported loan amount advanced to the plaintiff.

Section 26 (1) of the Land Registration Act states as follows:

***"The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and***

***indefeasible owner... and the title of that proprietor shall not be subject to challenge except –***

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The above section gives the court powers to presume that a certificate issued by the Registrar to be prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. It further gives an exception where the title has been fraudulently or procured illegally or unprocedurally, then the same can be cancelled. In the current case there is no proof that the plaintiff's title was acquired procedurally.

From the evidence on record, it is clear that what was done fraudulently and illegally was the charging of the plaintiff's property without his knowledge or consent. The demeanor of the plaintiff who is an old man and from observation on how he gave evidence indicated that he was a truthful witness. The plaintiff's evidence was corroborated by his witnesses who stated that the land belonged to him and that he has never taken any loan or guaranteed any third party to take a loan with his title.

Looking at the letter of offer filed by the Defendants, it is clear that the borrower is Nileflow Savings and Credit Co-operative Society Limited. The collateral is the suit land together with a personal guarantee and indemnity from the Plaintiff. The loan amount was Kshs. 4,000,000/-.

According to the Plaintiff, that Charge was fraudulently registered because he never signed any documents in relation thereto neither did he appear before the Land Control Board.

In the case of **Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA.** (as he then was) stated as follows:

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

The Court of Appeal in **Kinyanjui Kamau v George Kamau [2015] eKLR** expounding on the same issue and regarding the standard of proof expressed itself as follows; -

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”***

The Plaintiff testified that he could not have signed the guarantee forms and Charge documents since he did not know how to write and that he always used a thumb print for execution. The Plaintiff's witness statement and verifying affidavit were both executed by way of thumb print; it was also evident that the Plaintiff is indeed a very old man that he even gave his testimony in Nandi language. All this combined can only lead to one reasonable conclusion that the Plaintiff is indeed illiterate.

This is apparent from the discrepancies on the signature and the identification. The name and identification card number of the wife was also different. The wife's name was indicated as Rebecca Sote Metto ID No. 11350210 while the plaintiff's wife is Christine Chepkasi Metto ID No. 6856218. The

plaintiff and the wife PW2 also denied having appeared before the Land Control Board to obtain the requisite consent to charge the property. Why would someone impersonate a husband and wife to take their property away by taking a loan with no intention of repaying?

It is on record that the advocate who allegedly witnessed the Chargor's signature on the Charge document did not identify the Chargor as she should have. If she did, she would have indicated the Plaintiff's identity card number which in the circumstances would have been the only way to identify or verify that it was indeed the Plaintiff signing. Besides DW2 told this court on cross examination that they acted on trust. In a country where there are strict laws and procedures in place, it is bizarre that an advocate would blindly witness documents or proceed with a transaction based on just trust. Section 44 (1), (5) and 45 of the Land Registration Act, 2012 are to this effect. Those provisions read:

**44. Executions of instruments in writing.**

***(1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.***

***(5) The transferee shall in addition to executing the instrument, attach the following—***

- (a) a copy of an identity card or passport; and***
- (b) a copy of a Personal Identification Number certificate;***
- (c) passport-size photographs;***
- (d) where applicable, a marriage certificate; or***
- (e) a copy of the certificate of incorporation, in the case of a corporate entity; or***
- (f) such other identification documents as the Cabinet Secretary may prescribe***

**45. Verification of execution.**

***(1) Subject to subsection (3), a person executing an instrument shall—***

- (a) appear before the Registrar, public officer or other person as is prescribed; and***
- (b) be accompanied by a credible witness for the purpose of establishing identity, unless the person is known to the Registrar, public officer or other person.***

***(2) The Registrar, public officer or other person shall identify the person and ascertain whether the person freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.***

***(3) The Registrar may dispense with verification under this section—***

- (a) if the Registrar considers that it cannot be obtained or it can only be obtained only with difficulty and is otherwise satisfied that the document has been properly executed;***
- (b) if the Registrar knows the document has been properly executed, and shall record on the document the reasons for dispensing with the appearance of the parties; or***
- (c) if the instrument has been electronically processed and executed by the parties consenting to it.***

The plaintiff testified and stated that his title deed got lost and he was shocked to find out that someone had taken a loan with it. He only became aware when the defendant bank came to demand the amount from him. This prompted him to report the matter to the police and some people were arrested and charged with the offence of forgery and stealing of title. This shows that the plaintiff was not aware of the forgery that took place.

The defendant should have done due diligence and get the history of the land not just from the lands registry but also from the neighbours. The plaintiff and his witnesses indicated that they have mud structures and not permanent structures as was put in the valuation report by Metro Cosmo Valuers. The parties who engaged in this act must have been a cartel that has been fleecing people of their hard earned money or property. The defendant should therefore be held vicariously liable for the wrongful acts of its agents.

With the digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their systems. Banks must be extra diligent when dealing with properties to be charged or mortgaged.

On the issue of as to whether the plaintiff is entitled to exemplary damages, the same was pleaded but no evidence was tendered in respect of the same. It is important to understand the meaning of exemplary damages in law. These are damages requested and/or awarded in a lawsuit when the defendant's willful acts were malicious, violent, oppressive, fraudulent, wanton or grossly reckless. Although often requested, exemplary damages are seldom awarded.

As per *Halsbury's Laws of England 4<sup>th</sup> Edition Volume 12 Para. 1190 at page 474*, exemplary damages may only be awarded in actions for torts. Exemplary damages may not be awarded in actions for breach of contracts as was held in *Kenny-v-Preen [1962] 3 All ER 814, CA*. In *Rookes v Barnard [1964] AC 1129; [1964] 1 ALL ER 367*, the House of Lords held that ***except where is specifically authorized by a statute*** exemplary damages should only be awarded in two categories of cases. The two categories are 1. against oppressive, arbitrary or unconstitutional action by government servant and 2. tort calculated by Defendant to yield profit.

From the description of exemplary damages above, the current case does not fall under the 2 categories where exemplary damages can be awarded. The defendant is not a government servant and the tort by the defendant was not calculated to yield profit. I therefore find that the plaintiff is not entitled to exemplary damages. I however order that the defendant do pay the plaintiff a token sum of Kenya shillings 500,000/ for illegal charging of his property without conducting due diligence therefore causing him untold suffering and loss.

I have considered the pleadings, the exhibits produced, the evidence and submissions by counsel and come to the conclusion that the plaintiff has proved his case on a balance of probabilities. In the case of *Macfoy v United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172* Denning LJ stated;

***“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”***

I therefore enter judgement in favour of the plaintiff against the defendant in the following terms:

*a) It is hereby declared that the Plaintiff is the registered owner of all that parcel of land known as L.R No. Moi's Bridge/Sirikwa Block I(Ziwa) 194 measuring 11.74 acres and that any and all the documents held by the defendant relating to the said parcel of land are fraudulent, illegal, null and void and of no legal consequences and the same should be surrendered to the Plaintiff, the court and/or the Uasin Gishu Land Registrar within 30 days from the date of this judgment.*

*b) An order of permanent injunction is hereby issued restraining the defendant, its agents and/or servants from entering, occupying, selling, transferring, encumbering, wasting and/or otherwise*

*interfering with the Plaintiffs quiet possession use, and/or enjoyment of the suit land.*

*c) An order of discharge of charge of the Plaintiff's parcel of land namely NO. MOI'S BRIDGE/SIRIKWÁ BLOCK 1 (ZIWA) 194.*

*d) General damages of Kshs. 500,000/*

*e) Defendant to pay costs of this suit.*

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF JANUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***