



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 493 OF 2013
PETER NGANGA MUIRURI.....PLAINTIFF
VERSUS
BARCLAYS BANK LIMITED.....DEFENDANT
J U D G E M E N T

INTRODUCTION

1. By a Complaint filed in court on 17th November 2013 the Plaintiff sued the Defendant making prayers for the following orders:-

- a. *A declaration in terms of averments at paragraphs 12, 13, 14, 15, 16 and 17 and an order to give effect to the said declaration compelling the Defendant to execute a Discharge of charge over Ruiru East/Juja East Block 2/254 and over Ruiru East/Juja East Block 2/T.3084 and release to the Plaintiff the Discharge duly executed and the titles thereof in default the Deputy Registrar to execute Discharge of charge over the said properties.*
- b. *Pending discharge of the said charges the Defendant by itself its servants or agents be restrained from offering for sale selling or transferring charging or howsoever disposing off Plaintiff's title to properties Ruiru East/Juja East Block 2/254 Ruiru East/Juja East Block 2/T.3084 or its charge therein to third parties.*
- c. *The honorable court be pleased to make such further or other orders its inherent jurisdiction.*
- d. *Costs hereof provided for.*

2. The Plaintiff's suit is based on the allegations that the Plaintiff guaranteed the borrowing of certain monies from the Defendant sometime in 1995 by the Plaintiff's Company M/s Intertwin Company Limited, which monies were secured by the suit properties. However, the Plaintiff claims he repaid the said monies in full and owed the Defendant nothing. Despite this the Defendant has threatened to sell the suit properties claiming that a sum of over Kshs.1,513,614/20 was owed to it by the Plaintiff as at or about 1st October 2012.

3. Simultaneously with the suit the Plaintiff filed a Notice of Motion application seeking injunctive orders stopping the Defendant from selling the suit properties on allegation of the said outstanding sums. The said application was heard by this court and was allowed by the Ruling delivered on 31st July 2014.

4. The summons in the matter were served upon the Defendant on 24th November 2014 and an affidavit of service sworn and filed in court on 15th December 2014. However, the Defendant did not file a defence despite the fact that the Defendant appeared in the matter and defended the application filed in court on 17th November 2013.

5. The Plaintiff requested for judgement in default of defence and the same was entered on 7th January 2015, paving the way for the formal proof of the matter on 29th January 2015.

6. The Plaintiff was the sole witness for his case. In his evidence the Plaintiff stated that he lives in Kileleshwa Nairobi, and that the suit is in respect of an overdraft which he took from the Defendant in 1995 of Kshs.650,000/=. He provided a charge as security for kshs.410,000/= over the suit properties. The Plaintiff referred to the Plaintiff and relied on the same in support of his case. He also relied on his witness statement and bundle of document.

7. The Plaintiff's Plaintiff and the document at pages 30 – 35 sets out the basis for his action for discharge of charge on his titles Number Ruiru East/Juja East Block 2/254 and Ruiru East/Juja East/Block2/254 charged to the Defendant as securities for loan facilities by the Defendants to M/s Intertwin Co Ltd, copies of the said Title Number Ruiru EAST/JUJA EAST BLOCK 2/254 and Title Number Ruiru East/Juja East Block 2/T. 3084 are at pages 44 – 45 and 46 – 47. At page 48 is a portion of the charge dated 18th August 1995 showing that the said charge was on 31st August 1995 presented for registration against Plaintiff's title Ruiru east /Juja East Block 2/254 while at page 49 is a copy of a charge dated 18th August 1995 also presented on 31st August 1995 for registration against Plaintiff's title No Ruiru East/Juja East Block 2/T.3084.

8. In support of his contention that the charge debt was fully paid the Plaintiff has produced the Defendant Bank's Statement entries on or about 30th June 1998 of transactions in the said Account No. 2064855 the material loan account at the Defendant's Pioneer House Branch. It vindicates the Plaintiff's claim that account No. 2064855 Pioneer Branch vide the document at page 56 of his Plaintiff was in credit to the tune of Kshs. 7, 499/85.

Statements exhibited at page 57 relate to alleged account Number 2006000 at Haile Selassie Avenue Branch which commences with a debit balance of Kshs. 1,356,964/85 on the 20th August 1998 and the last transaction in which is an entry in April 2002 regarding closure of that account.

9. The Plaintiff's counsel, Mr. Wamalwa submitted that the Defendant although served has not appeared to the summons or delivered as defence refuting or contesting in any manner claims of the Plaintiff to entitlement to Discharge of charges on his titles aforementioned. The Defendant has failed to explain in what circumstances the charge account was transferred from Pioneer to Haile Selassie and how substantial debits of huge sums of money denied by the Plaintiff were made; or on whose instructions was the Plaintiff's account purportedly transferred by the Defendant to Haile Selassie Avenue Branch of the Defendant's Bank.

10. Unlike transaction in the Pioneer A/C at page 56 wherein debits and credits are backed by documents (cheques) that are linked to the Borrower, transactions in the statement at page 57 which are disowned by the Plaintiff relate to a novel account No 2006000 with an opening balance of Kshs. 1,358,964/05 clearly marked DB (debit balance) as of August 1998 and are not backed by any document authored or authorized by the Plaintiff. It is noteworthy that transactions in that account consist of ATM withdrawals Credit Advices and Debit Advices denied by the Plaintiff. The last entry in that account is interestingly the alleged closure of the said account. None of the debits in the mysterious new account at the Defendant's Haile Selassie Branch is backed by any transaction linked to the Plaintiff or its Company Intertwin Co Ltd (the Borrower).

11. Following the Defendant's failure to defend the Plaintiff's claims interlocutory judgment was entered against the Defendant and no controversy remains in that regard for determination by this court. The Plaintiff's counsel Mr. Wamalwa submitted that on the evidence as it stands the Plaintiff's claim is

unconverted by the Defendant. Transaction at page 56 in the Pioneer Branch of the Defendant's Bank vindicate the plaintiff's claim of a credit balance as of 22nd June 1998 of Kshs.77,499/85 as against which three cheques Nos 419925, 429926 and 419927 were deposited of Kshs.10,000/=, Kshs.15,000/=, Kshs.45,000/= respectively hence a total of Kshs.70,000/= which cleared the debt and left a credit balance of Kshs.7,499/85.

12. Counsel submitted that statutory right to discharge is indefeasible. No provisions in the Limitation of actions act create a statutory bar to the action for discharge which if the Limitation Act had done would be in issue only upon a plea on defence raising such provisions in defence to defeat the Plaintiff's claim to the rights of the discharge of title. In any event, had the Limitation of Action made any provisions capable of defeating chargor's right to a discharge on grounds of delay such provisions would have been offensive to provisions of Article 40 (1) of the Constitution which in so far as it is relevant provides as follows:

40 (1) "Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

- a. **Of any description, and**
- b. **In any part of Kenya**

(2) Parliament shall not enact a law that permits the state or any person

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description"

13. I have carefully considered the Plaintiff's claim as presented in the Plaint and his evidence. The Plaintiff's evidence is compelling, especially as there is no contrary evidence provided by the Defendant. I have considered the statements of account as presented in the Plaintiff's bundle. The Defendant's bank statement entries on or about 30th June 1998 in the account number 2064855 the material loan account at the Defendant's Pioneer House Branch vindicate Plaintiff's claim that the account number 2064855 Pioneer Branch vide document at page 56 of his bundle was in credit to the tune of Kshs.7,499/85. The alleged account number 2006000 at Haile Sellasie Avenue Branch which commences with a debt balance of Kshs.1,356,964/85 on 20th August 1998 is an account strange to the Plaintiff. Clearly the Plaintiff is entitled to the discharge of his property.

14. Section 80 (1) Land Act provides as follows:

"Upon the commencement of this Act, a charge shall have effect as a security only and shall not operate as a transfer of any interests or rights in the Land from the chargor to the charge but the charge shall have, subject to the provisions of this Part, all the powers and remedies in case of default by the chargor and be subject to all the obligations that would be confirmed or implied in a transfer of an interest in land subject to redemption."

Section 85 (1) of Land Act confers upon the Plaintiff a statutory right to redeem his property as follows:-

"Subject to the provisions of this section, chargor shall, upon payment of all the money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge of the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale."

15. In the light of the foregoing, I find that the failure by the Defendant to defend this suit despite being aware of it is an admission that the Defendant has no defence and that any defence that the Defendant may mount would not be enough to persuade this court to dismiss the claim. On the contrary, I find that the Plaintiff has proved his case on a balance of probability and is entitled to judgement as prayed in the Plaint.

16. I therefore enter judgment for the Plaintiff against the Defendant as follows:-

- a. *A declaration in terms of averments at paragraphs 12, 13, 14, 15, 16 and 17 and an order to give effect to the said declaration compelling the Defendant to execute a Discharge of charge over Ruiru East/Juja East Block 2/254 and over Ruiru East/Juja East Block 2/T.3084 and release to the Plaintiff the Discharge duly executed and the titles thereof in default the Deputy Registrar to execute Discharge of charge over the said properties.*
- b. *Pending discharge of the said charges the Defendant by itself its servants or agents be restrained from offering for sale selling or transferring charging or howsoever disposing off Plaintiff's title to properties Ruiru East/Juja East Block 2/254 Ruiru East/Juja East Block 2/T.3084 or its charge therein to third parties.*
- c. *The costs of the suit shall be for the Plaintiff.*

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

F. N. Wamalwa for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk