



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 214 OF 2015

JOHN CHEGE MWANGI..... PLAINTIFF

=VERSUS =

FRANCIS NJOROGE MWANGI..... DEFENDANT

JUDGEMENT

Introduction

1. The suit herein involves two brothers who were the sons of the late **Mwangi Njoroge**. The suit was brought vide a Plaint dated 21st December 2014.

2. This suit is premised on the default of a soft loan agreement dated 13th July 1999 between **John Chege Mwangi (lendor)** and **Francis Njoroge Mwangi (borrower)**. According to the terms of the agreement, the Defendant borrowed the sum of **Kshs 550,000/-** which was scheduled for repayment within two years without any interest. In the event of default of the repayment, the Defendant being the registered proprietor of **LR No. 1160/161 situated in Karen** was expected to execute a transfer of the said property in favour of the Plaintiff.

3. Additionally, the Agreement included an undertaking that in default of repayment, the Defendant would not transfer, charge or do anything that would prejudice the interests of the Plaintiff in respect to the said property.

4. The Plaintiff later amended his plaint and in the Further Amended Plaint dated 7th June 2017, he sought the following prayers:

i. A declaration that the Plaintiff is entitled to 1 acre of the land out of the Defendant's land known as LR No 1160/1146;1147;1148;1149;1150 and 1151(original No 1160/161 & 1116/2) situated in Karen, Nairobi;

ii. An order of transfer of 2 of any of the above sub-plots (LR No 1160/1146;1147;1148;1149;1150 and 1151) to the Plaintiff being the equivalent of 1-acre sub-division of LR No 1160/1116 and transfer of the same 1 acre thereof to the Plaintiff at no costs to the Plaintiff;

iii. An injunction restraining the Defendant whether by himself, his agents or anybody claiming through him from transferring, alienating, selling or charging the properties known as LR No 1160/1146;1147;1148;1149;1150 and 1151 pending the hearing and determination of this suit;

iv. Costs of this suit.

5. In the statement of defence and counterclaim dated 26th May 2015, the Defendant denied the Plaintiff's entitlement to the suit property. He further averred that the claim would be time barred by virtue of the Limitation of Actions Acts and therefore unenforceable.

6. In his Counterclaim, the Defendant averred that the Plaintiff and Defendant had incorporated a company known as Milimani Security Guards Limited with both being equal shareholders. By oral agreement, the Plaintiff was to oversee day to day running and other affairs of the company.

7. The Defendant averred that being biological children of **Mwangi Njoroge (deceased)**, the Plaintiff fraudulently caused a transfer of parcel **LOC 3/KARIUA/800/20** located in Muranga in his favour which property was family property that was initially registered in their father's name.

8. The Defendant subsequently sought for the dismissal of the Plaintiff's suit with costs and the following prayers within the counterclaim:

i. An order directing the Plaintiff to render and provide to the Defendant a true statement of account of that company known as Milimani Security Guards Limited from 21st June 1983 to date;

ii. An order compelling the Plaintiff to pay such sum of monies that may be found due and owing to the Defendant upon making of the said statement of account;

iii. A declaration that the transfer of that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the Plaintiff is fraudulent, null and void;

iv. An order directing cancellation of the Plaintiff as proprietor of that parcel of land known as Title Number LOC. 3/KARIUA/800/20;

v. Alternatively, an order that the plaintiff be compelled to transfer that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the legal representative of the estate of Mwangi Njoroge (deceased) and an order vesting that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the legal representative of the estate of Mwangi Njoroge (deceased);

vi. Costs.

9. Prior to the hearing of this suit, the matter being a dispute between family members, had been referred to Court Annexed Mediation on 3rd October 2018 but which was not successful and hence necessitating the hearing of the suit before this Court.

10. Pursuant to the court's directions issued on 27th September 2021, the matter was finally set for hearing on 26th October 2021 wherein the Plaintiff and Defendant being sole witnesses in their respective cases gave their testimony and closed their cases. The parties were then granted time to file and serve their written submissions for consideration by the Court. The Plaintiff filed his written submissions dated 9th November 2021 while the Defendant's written submissions were dated the 22nd November 2021.

The Plaintiff's case

11. It was the Plaintiff's case that he entered into an agreement dated 13th July 1999 with the Defendant, wherein the Defendant borrowed Ksh 550,000/- under the following terms: -

a) As consideration for the lending/borrowing, the Defendant undertook to pay back to the Plaintiff the said sum of Ksh 550,000/- within a period of two years failing which the Defendant agreed and undertook to transfer to the Plaintiff one (1) acre of land out of the Defendant's land then known as L.R No. 1160/161 (now L.R No. 1160/1116) situate in Karen.

b) The Defendant further undertook not to transfer and not to do anything with his land known as L.R No. 1160/161 which could prejudice the Plaintiff's interest over the once acre piece which he undertook to transfer to the Plaintiff in the event he did not pay back the money lent to him by the Plaintiff.

12. According to the Plaintiff, the Defendant was engaged in litigation with his former wife and he needed the money to settle the pending legal fees.

13. He averred that L.R No. 1160/161 was later subdivided to make provision for the share of the Defendant's former wife and the portion of the land which was registered in the Defendant's name was known as L.R No. 1160/1116 measuring appropriately 1.444 Hectares.

14. He further averred that after filling the suit, he learnt that the Defendant had sometimes in June, 2014 further subdivided the said L.R No. 1160/1116 into seven (7) sub-plots which became L.R Nos. 1160/1145, 1146, 1147, 1148, 1149, 1150 and 1151.

15. It was the Plaintiff's case that the Defendant did not pay back the money neither did he transfer the one (1) acre piece of land to him.

16. During trial, he testified to being a retiree who is currently staying at home. He adopted his witness statement dated 21st December 2014, the list and bundle of documents as part of his evidence in chief. He averred that the counterclaim had wild allegations to the effect that the Defendant had borrowed money from Barclays bank which he was unable to pay. He asserted that the agreement was for the Defendant to repay the loan in default of which he would get the land.

17. In cross-examination, he stated that the agreement did not involve the Defendant's wife and the loan amount was to be used as working capital. He reiterated that the money was paid to the Defendant's lawyer although he did not have receipts confirming such payments. Neither did he produce any to the Court. He further stated that he only brought up the claim for the seven (7) properties due to the subdivision that had been done.

18. He refuted the claim that their father was too sick to understand what was happening. For these reasons, he maintained that the cancellation of title for parcel LOC. 3/KARIUA/800/20 could not be cancelled since it was transferred after the payment of the Barclays bank loan.

19. In the written submissions dated 9th November 2021, the Plaintiff submitted that his claim could not be time barred since according to

him, time began to run upon determination of **Court of Appeal No 179 of 2009**, whose decision was delivered on 23rd July 2013. He relied on the case of ***Mariano Dinacci v Angelo Lattineli [2015] eKLR***, to support the position that a delay in recovering his rights under contract was justifiable.

20. Lastly, he submitted that the Defendant's counterclaim regarding Milimani Security Guards Limited which sought for inter alia orders requiring him to render a statement of accounts for the said company was commercial in nature and did not fall within the Court's jurisdiction and therefore ought to be dismissed.

Defendant's case

21. The Defendant filed a statement of defence and counterclaim dated 26th May 2015. He admitted to entering into an agreement with the Plaintiff but denied ever receiving Ksh 550,000/- or any monies from the Plaintiff.

22. He stated that the Plaintiff was not entitled to the portion of land known as L.R No. 1160/161 or any portion of that land whatsoever since he purchased it way back in 1973 without any contribution or assistance from the Plaintiff. He further stated that he has fought several protracted legal battles in safeguarding his interests to the said property.

23. During trial, he testified to being a farmer and businessman. He also adopted his witness statement filed on 27th May 2015 and the bundle of documents that were marked as Defence Exhibits 1-4. It was his testimony that although he was aware of the agreement, he did not receive any money from the Plaintiff. He stated that the suit property was five (5) acres and after the determination of **Court of Appeal No 179 of 2009**, his wife got 2 acres, leaving him with 3 acres.

24. Upon cross-examination, he stated that the land was of joint tenancy therefore he would not have had the sole authority to transfer the said property. He also claimed to have invested in Milimani Security Guards Limited since its incorporation, however in cross examination he conceded that he did not have any evidence before court to confirm his investment nor his capital contribution. It was his assertion that although he had not taken out letters of administration for his late father's estate the said transfer of **LOC. 3/KARIUA/800/20** to the Plaintiff was done in a fraudulent manner.

25. In his written submissions dated 22nd November 2021, he submitted that the Plaintiff's claim was a claim for recovery of debt and hence this Court did not have jurisdiction to hear and determine the same. To support this position, he relied on the Supreme Court case ***In the matter of Interim Independent Electoral Commission [2011] eKLR***, to contest the jurisdiction of the Court. It was his assertion that since the suit was premised on the recovery of a debt this would fall outside the jurisdiction of the Court and therefore prayed for the same to be dismissed with costs to the Defendant and judgment entered as prayed in his counterclaim.

26. With the regard to the claim that the suit was time barred, he relied on the case of ***Taulo Juma Nasongo vs Masinde Laketero .C.A. 66 of 2002***. It was submitted that if the cause of action was brought under contract the Plaintiff had exhausted the 6 year limitation period. Additionally, if the court was to find that the claim was for recovery of land, under **Section 7 of the Limitations Actions Act**, time would run until 2011 and since the suit was filed in 2015 it was equally time barred.

27. The Defendant further submitted that the agreement ambiguously conferred the Plaintiff the whole portion of **LR No. 1160/161** which was now non-existent.

28. Lastly, in his written submissions dated 22nd November 2022, he abandoned his claim relating to Milimani Security Guards Limited under prayer (a) and (b) in the counterclaim and sought for the following reliefs:

i. A declaration that the transfer of that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the plaintiff is fraudulent, null and void;

ii. An order directing cancellation of the plaintiff as proprietor of that parcel of land known as Title Number LOC. 3/KARIUA/800/20;

iii. Alternatively, an order that the plaintiff be compelled to transfer that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the legal representative of the estate of Mwangi Njoroge (deceased) and an order vesting that parcel of land known as Title Number LOC. 3/KARIUA/800/20 to the legal representative of the estate of Mwangi Njoroge (deceased);

iv. Costs.

Analysis and Determination

29. Having considered the pleadings herein, the oral evidence, documentary evidence and written submissions for the parties, the issues for determination in my opinion are as follows:

i. Whether the Court has jurisdiction to hear and determine the suit as filed in the Further Amended Plaintiff dated 7th June 2017?

ii.

Whether the Defendant's counterclaim is competent?

iii. Who should bear costs of the suit and counterclaim?

Issue No. 1

Whether the Court has jurisdiction to hear and determine the suit as filed in the Further Amended Plaintiff dated 7th June 2017?

30. As sated earlier, the Plaintiff's claim against the Defendant is based on an agreement dated 13th July 1999. Which agreement was titled, "**An agreement for soft loan**".

The agreement was executed by both the Plaintiff and the Defendant in the presence of **M.M. Mugi Advocate**

"The terms of the agreement were as follows: -

a) The amount of money passing from the lender to the borrower is Ksh 550,000/- (receipt of which the borrower acknowledges upon execution hereof)

b) The consideration passing from the borrower to the lender is an undertaking, in default of repayment as hereinbelow stipulated, to transfer L.R No. 1160/161, of which the borrower is the registered proprietor, to the lender, which is about 1 acre by measurement. The parties hereto agree upon execution hereof, that failure on the party of the borrower to execute a transfer in respect of L.R No. 1160/161, in default of repayment as hereinbelow stated, the Deputy Registrar High Court of Kenya shall have the right to execute the same, and it shall have the same effect as if executed by the borrower himself.

c) The borrower shall repay the Ksh 550,000/- only in lumpsum within two (2) years from the date of execution hereof without any interest.

d) The borrower undertakes not to transfer, part with possession, charge, do or suffer anything to be done on parcel No. Langata/Karen/116/1160, which would prejudice the interests of the lender in the recovery of the soft loan being granted herein.

e) The parties hereto agree that in case the interests of the lender shall, by any way whatsoever, by the acts of the borrower or otherwise, become unenforceable, this soft loan shall become recoverable by summary procedure."

31. In his pleadings and his testimony, the Plaintiff stated that the Defendant defaulted in paying back the money and neither did he transfer the land know as L.R No. Langata/Karen/116/1160 to him.

32. In cross examination he stated that no money was paid directly to the Defendant since the same was paid to the Defendant's lawyers. However, he did not have any receipts to confirm such payment. He also conceded that the agreement did not mention anything to do with the ongoing case between the Defendant and his former wife **Virginia Wanjiru Mwangi**.

33. In his submission, the Plaintiff submitted that the said agreement was a valid agreement which was duly executed by both parties and was admissible in evidence binding the upon the Defendant.

34. The Defendant on the other hand, admitted the existence of the said agreement but denied ever receiving any money in respect to the same.

35. Pursuant of the said agreement the Plaintiff now seeks for orders that the court should find that the said agreement was binding between the parties and the Defendant having defaulted in the terms by failing to pay back the loan and further declining to transfer one acre of L.R No. 1160/116, he be ordered to transfer the same to him and also a declaration that the Plaintiff is entitled to one (1) acre of land of the above mentioned property.

36. Section 3(3) of the Law of Contract Act provides that:'

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

i) is in writing;

ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

37. It is trite law that courts cannot re-write contracts. As was held in the case of **Esilon Plastics (K) Limited vs. National Water Conservation and Pipeline Corporation (2014) eKLR**, it is not the function of the court to re-write contracts for the parties. Parties are bound by and should be committed to the terms of their contract.

38. This is the same position that the Court of Appeal took in the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd &**

Another (2001) eKLR where it was held as follows:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”

39. In the case of

incorporation, the Plaintiff had totally excluded him from the affairs of the said company and had never furnished him with any statements of accounts.

53. The rule of evidence is clear that the burden of proof was upon the Defendant to prove his case so as to be entitled to the reliefs sought in the counterclaim

54. During trial and his evidence in chief, the Defendant did not produce nor adduce any evidence to prove or demonstrate any particulars of fraud as was pleaded. There was also no nexus between the counterclaim and the Plaintiff's suit.

55. In his written submissions dated 22nd November 2021, the Defendant abandoned two of his prayers that were sought against the Plaintiff in respect to the company known as Milimani Security Guards Limited. Perhaps this was due to the realization that this Court did not have jurisdiction to grant the prayers sought.

56. There being no evidence adduced in support of the counterclaim, it is the finding of this court that the same has not been proven to the required standard and the prayers sought therein cannot be granted. The same is equally for dismissal.

Issue No. iii

Who should bear costs of the suit and counterclaim?

57. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**.

58. In the instant case, the suit involves a dispute between family members who are brothers being sons of the late Mwangi Njoroge. In the circumstances and considering that the Plaintiff's claim has been dismissed and the Defendant equally having not been successful in his counterclaim, I direct that each party bears own costs of these proceedings.

Final orders

59. In conclusion, I hereby make the following final orders: -

a) The Plaintiff's suit is dismissed with no orders as to costs.

b) The prayers in the counterclaim are declined with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Ongegu for the Plaintiff.

N/A for the Defendant.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE