



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

HCCC CASE NO 657 OF 2006

BRITE PRINT (K) LTD.....1ST PLAINTIFF

GEORGE MAINA KINGORI.....2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF (K) LTD..... DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiffs filed the suit herein on 1st December 2006. The Plaint dated 30th November 2006 sought the following reliefs:-
 - a. **A declaration that the Defendant do produce the 1st Plaintiffs title.**
 - b. **General damages.**
 - c. **Mesne profits with effect from January 2004 until the title is produced.**
 - d. **Costs and incidentals to this suit.**
 - e. **Interest on (b), (c) and (d) above.**
 - f. **Any other further relief as this Honourable court may deem fit to grant.**
2. The Defendant filed a Statement of Defence dated 5th February 2007 whereafter on 14th February 2007 the Plaintiff filed a Reply to Defence dated 12th February 2007. The Defendant amended its Defence on 2nd June 2007 to include a Counter- Claim. The Amended Defence and Counter-Claim sought the following prayers:-
 - a. **The Plaintiffs' suit be dismissed with costs.**
 - b. **That judgment be entered for the Defendant as prayed for in paragraph 8 and 9 of the Counter-Claim aforesaid together with costs and interest on the sum at courts rates.**
 - c. **Any other and further relief that the court may deem fit to grant.**
3. On 9th June 2009, the Plaintiffs filed their Reply to Amended Defence and Defence to Courter-Claim on the same date praying that the Defendant's Amended Defence and Courter-Claim be dismissed.

4. Although the suit was filed prior to the enactment of Order 11 of Civil Procedure Rules, 2010, parties complied with all the requirements by filing their respective Witness Statements and Agreed Issues. The Plaintiffs filed two (2) Lists and Bundle of Documents. The first list on 21st February 2007 and on 21st July 2009. The Defendant did not file any List or Bundle of Documents.
5. After several court attendances before Kimaru J and Lesiit J, the matter finally proceeded for hearing before Mutava J. Subsequently, the parties filed their respective written submission on 22nd November 2012 and 28th March 2013. However, before Mutava J could deliver his judgment, he was transferred from the Commercial & Admiralty Division Milimani Law Courts and this court became seized of the matter.
6. The parties' advocates requested this court to give its judgment based on the written submissions in the file as they did not wish to highlight the same. The judgment herein is therefore based on those written submissions as provided under Order 51 Rule 16 of Civil Procedure Rules, 2010.

EVIDENCE

7. According to George Maina Kingori, a director of the 1st Plaintiff (hereinafter referred to as PW 1), he borrowed money from the Defendant by charging parcel of land known as L.R No 209/38/51 (hereinafter referred to as the subject property). He said that it was part of a bigger parcel of land known as L.R No 36/914/1. He tendered in evidence the charge and lease documents.
8. He explained that he borrowed a sum of Kshs 700,000/= on 26th January 2001 and that the same was payable in thirty six (36) monthly instalments of Kshs 20,000/=. He stated that he would transfer the payments through Account No 80023337 to Loan Account No 1205623.
9. It was his testimony that as at February 2004, the outstanding balance was Kshs 104,000/= as was evidenced in the Account Statement on pp 37-38 of the Plaintiffs' Bundle of Documents. He averred that he wrote to the Defendant on 22nd October 2003 proposing to sell the subject property which the Defendant accepted provided that the sale proceeds were credited to the Loan Account to offset the outstanding sum and that its lawyers handled the transaction. He referred the court to pp 38-39 in the said Bundle of Documents evidencing his letter and that from the Defendant.
10. He further told the court that he identified a buyer who would purchase the subject property for a sum of Kshs 7,800,000/= as was evidenced on page 40 of the said bundle of documents. He said that since the prospective buyer wanted a copy of the title document, he wrote to the Defendant requesting for the said copy but that the Defendant could not produce the title. He said this was even after he personally went to the bank to look for the said title. As the title could not be found, he said the said buyer pulled out of the transaction. He averred that the Defendant gave him a certified copy of the title in 2009.
11. It was his evidence that prior to the offer to sell the subject property, he had not defaulted in paying the loan and the Defendant had never given him any Notice to sell the said property.
12. He testified that he had purchased a property in Umoja which he intended to develop using the proceeds from the sale of the subject property but because the same did not materialise, he borrowed a loan from Cooperative Bank and completed the ground floor from which he said he was deriving rental income of Kshs 340,000/= per month. He produced receipts on pp 45-50 in the Bundle of documents to support his claim. He contended that this was money he would have started earning in 2003 and that in fact he would actually have been making Kshs 1,000,000/= monthly as he would have put first and second floors.
13. He prayed for the unconditional release of the title. He complained that the Defendant had not assessed how much he was supposed to pay yet he had always been ready to pay the outstanding loan. He annexed copies of the letters on pp 43-44 in the Bundle of Documents.
14. During cross-examination, he stated that the repayment terms were contained in the Charge document at page 10 of the Bundle of Documents and that the title of the charge property was shown L.R No 36/914/1 L.R 20938/1 although he had charged L.R No 20938/1. He admitted that the description in the Plaint was shown as L.R No 209/38/51.

15. He further said that as at time he demanded for the title, he had not repaid the loan as was required in the Charge document and the Defendant was thus entitled to retain the title document. He said that he did not supply the Defendant with an Agreement for Sale as the prospective buyer needed a copy of the title before he could sign any agreement.
16. He agreed that at the time he sought the striking out the Defence in an application dated 19th April 2007, he had attached a copy of the title which meant that he had in his possession, a copy of the said title.
17. In his re-examination, he was emphatic that the Defendant should have given him his title irrespective of the confirmation of the land reference number as the Defendant would have offset the outstanding amount once he sold the subject property. He stated that the land described as 36/914/1 was the main parcel of land under the parent title.
18. On its part, the Defendant called Anthony Onyango, the Defendant's Recoveries Officer (hereinafter referred to as "DW 1") to testify on its behalf. He stated that the Defendant took the title as part of the perfection of the bank's security and that there was no term relating to payment of monies by purchasers.
19. He was categorical that the Plaintiff did not furnish the Defendant with a letter of undertaking which could have secured the bank or a copy of the sale agreement. It was his evidence that the Plaintiff's letter dated 5th December 2003 did not address itself to the issue of a professional undertaking. He said that the Defendant was therefore demanding a sum of Kshs 423,326.64 as at 31st March 2009 which had remained unpaid.
20. On being cross-examined, he stated that the Defendant did not provide a certified copy of the title to PW 1 although the request was not unreasonable. He said that the title could not have been released as the Plaintiff had not met the Defendant's conditions.
21. He explained that the Defendant was unable to trace the title due to the numbering in respect of the title. He pointed out that the Land reference in the Charge document was given as L.R No 20938/1 while the Loan Agreement on page 9 of the Plaintiff's Bundle of Documents showed the same as L.R No 20938/51, with the "5" causing some confusion.
22. During re-examination, he said that the Defendant was under no obligation to furnish the Plaintiffs with a certified copy of the title and that it had not placed any impediment upon the Plaintiffs in carrying out a search of the property.

LEGAL SUBMISSIONS BY THE PLAINTIFF

23. In its written submission, the Plaintiffs identified the following as the issues in dispute for determination by the court:-
 - a. **Whether the Plaintiffs made a proposal to vary the terms of the loan agreement.**
 - b. **Whether the proposal was accepted by the Defendant.**
 - c. **Whether the Defendant owed a duty of care to the Plaintiff.**
 - d. **Whether there was breach of duty of care by the Defendant.**
 - e. **Whether the Plaintiffs have suffered loss and damages as a result.**
 - f. **The remedies available to the Plaintiff.**
24. The Plaintiffs argued that the Defendant's acceptance of the new terms of payment gave rise to a new contract between them and the Defendant and that the Defendant was estopped from denying the implications arising there from as it knew the purpose for which the Plaintiffs intended to utilise the proceeds from the sale of the subject property.
25. They relied on the case of **Central London Property Trust Limited vs High Tress [1947] 1 KB 130** where it was held that:-

“Where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on by the promise, the court will treat the promise as binding on the promisor to the extent that it will not permit him to act inconsistently with it even though the promise may not be

supported by consideration in the strict sense and the effect of the arrangement is to vary the terms of a contract under seal to one of less value”.

26. The Plaintiffs therefore submitted that they performed their obligations and that were it not for the Defendant’s failure to furnish them with a certified copy of the title, the sale would have taken off without a hitch.
27. Further, the Plaintiffs contended that the loss of the title as was admitted by DW 1 was a breach of the fiduciary trust that they had placed upon the Defendant. They referred the court to the cases of **Blythe vs Birmingham Water Works (1856) 1, Exch 781 at page 784** and **Hedley Bryne & Co Ltd vs Hell & Partners Ltd [1964] AC** at pp 466,478,479,481 and 482 to buttress their argument that the Defendant was negligent and that a person possessed of special skill was required to exercise due care if that party knew or ought to have known that reliance was being placed on his skill and judgment.
28. It was the Plaintiffs’ case that the proximate failures by the Defendant caused the delay in commencement of construction works on land described as Umoja Innercore Block 83/1224 and led to the loss of income. They therefore claimed mesne profit for a sum of Kshs 340,000/= per month for three (3) floors from the date of breach of contract until payment.
29. On its part, the Defendant submitted that there was no variation of terms on the charge instrument as there was no Deed of Variation of Charge. Further, it averred that the Plaintiffs’ proposal to sell the subject suit was a mere proposal and not binding upon it and that the Plaintiffs did not provide a professional undertaking and a copy of the sale agreement as it had sought.
30. It argued that the Plaintiffs ought to have obtained a certified copy of the title from the Lands Office. In addition, it stated that the Plaintiffs never made any reference to the documents the Defendant had demanded before release of the title whenever they demanded for the release of the title.
31. It denied that the title got lost and argued that in any event, it was not entitled to release same before the Plaintiffs redeemed the subject suit as was envisaged in Clause 2(k) of the Charge which stipulated that they had agreed:-

“Not to sell or agree to sell subject to these presents or otherwise the mortgaged property or any party thereof without the prior consent of the lender”.

32. It was its argument that it could not produce title L.R No 209/38/51 indicated in paragraph 6 of the Plaintiffs’ Charge instrument showed that it held title for L.R No 36/914/1 being a portion of the premises comprised in a grant registered in the Lands Registry at Nairobi as L.R 20938/1.
33. The Defendant was emphatic that its relationship with the Plaintiffs was contractual and hence the issue of duty of care did not arise and that until the outstanding monies were paid, the Defendant could not release the said title. It was for that reason that the Defendant submitted that the Plaintiffs could not have suffered loss and damage as it was rightfully holding onto the title.
34. The Defendant therefore contended that the Plaintiffs were not entitled to any of the remedies they had sought in their Plaintiffs’ Charge as the loan against which the security was charged remained unpaid. It prayed that the Plaintiffs’ suit be dismissed with costs.

LEGAL ANALYSIS

35. The Plaintiffs itemised particulars of loss by the Defendant as follows:-

- i. **Failing to keep the 2nd Plaintiff’s title document safely.**
- ii. **Failing to release the 2nd Plaintiff’s title upon demand and/or as agreed between parties.**
- iii. **Losing the 2nd Plaintiff’s title document.**

36. They also listed the particulars of negligence on the part of the Defendant as shown hereunder:-

- a. **Failing to keep safely the title and/or ensure its safety while it was in the Defendant’s custody.**
- b. **Permitting and/or causing the said title to be lost.**

- c. **Allowing the Plaintiffs to advertise the said property for sale when the Defendant knew or ought to have known that the title has been misplaced or was missing.**
- d. **Failing to reasonably take care of the title.**

37. It does appear to this court that the items listed under “**particulars of loss**” do not particularise the loss the Plaintiffs are said to have suffered but rather they are an extension of the omissions and/or commissions of the Defendant indicated under the ‘**Particulars of Negligence**’.

38. For the Plaintiffs to succeed in the tort of negligence, they are required to demonstrate to the court that:-

- i. The Defendant owed them a duty of care;
- ii. the Defendant breached that duty by failing to act the way a prudent man would have been expected to act under similar circumstances; and
- iii. that they suffered harm or loss as a result of such breach of duty.

39. There is also a presupposition that the Defendant had breached a promise to exercise care or skill in performance of its duty under the fiduciary relationship it had with the Plaintiffs. The test here is that of a “reasonable man” and the proximate cause or the foreseeability of the loss or harm that the Plaintiffs were likely to suffer as a result of the Defendant not exercising reasonable care.

40. The Defendant’s conduct must be measured against the standard of what other banks would have been expected to attain in ensuring that the Plaintiffs’ title deed was kept safely and returned to them upon them redeeming the loan that had been advanced to them.

41. In a negligence suit, the burden of proof was on the Plaintiffs to show that the Defendant did not act as a reasonable man. They were required to prove this by furnishing the court with evidence that would lead the court to acknowledge the nexus between the alleged loss of the title deed and the loss they suffered, claimed herein as mesne profits. In other words, the Plaintiffs were required to demonstrate that the Defendant did not act with reasonable care as a result of which they suffered loss which had to be compensated.

42. This court has found it necessary to set out the ingredients of the tort of negligence against the backdrop of PW1’s evidence that the Plaintiffs were unable to sell the subject property due to the Defendant’s failure to produce the original title deed or a certified copy of the same, as a result of which they were unable to develop the property at Umoja Innercore which then denied them rental income. PW 1 stated that the Plaintiffs would have also been able to pay of the outstanding monies they owed the Defendant which as at the time of the hearing, the Defendant had not given them the exact amount due.

43. In the letter dated 27th November 2003 on page 40 of the Plaintiffs’ Bundle of Documents, a prospective purchaser by the name of J.M Gitau wrote to PW 1 and stated as follows:-

“Before commencing any transaction, I would like you to give me the original title document (emphasise mine). Kindly facilitate this matter as soon as possible”.

44. On page 41 of the Bundle of Documents, there is a letter dated 5th December 2003 in which PW 1 wrote to the Defendant asking it to release the original document in respect of L.R No 20938/51 part of L.R No 36/914/M11. The said letter said in part:-

“...we already have several prospective buyers and they are requesting to see the original document. Kindly arrange to release the same.... we have stalled project (sic) in Umoja which we want to complete and hence our request to urgent act on this matter.”

45. These correspondences were in furtherance of PW 1’s letter dated 22nd October 2003 in which the Plaintiffs had formally applied to dispose of the subject property through private treaty and the Defendant’s letter of the same date in which it demanded as follows:-

“...we have no objection. However, the proceeds of the sale must be used to clear the entire debt and as such the release of the title document will be subject to a professional (sic) undertaking of the same being given to our lawyers. Kindly endeavour to furnish us with a copy of the sale

agreement once you identify a buyer to enable us to progress with the matter”.

46. This was in line with Clause 2(k) of the Charge document on page 10 of the Plaintiffs' Bundle of Documents which provided that the Plaintiffs had agreed not to sell or agree to sell subject to these presents or otherwise the mortgaged property or any part thereof without the prior written consent of the Lender.
47. It therefore follows that the Defendant's letter of 22nd March 2013 was a conditional consent. From the documents provided by the Plaintiffs, there does not appear to have been any reference of a copy of a sale agreement or professional undertaking given to the Defendant's lawyers. What is, however, on record is a letter of 21st March 2005 from M/S R. O. A Otieno & Co Advocates on page 42 of the Plaintiffs' Bundle of Documents requesting for a certified copy of the title and advise of the loan balance and a letter dated 17th October 2005 from M/S W.G Wambugu & Co Advocates demanding for the release of the said title.
48. From the foregoing, it is evident that there was a proposal or offer by the Plaintiffs and a conditional acceptance of the said offer by the Defendant. Failure by the Plaintiffs to act on the requirements meant that the agreement could not become binding upon the Plaintiffs and the Defendant. The Plaintiffs could not compel the Defendant to release the said title as the Defendant had advanced monies to the Plaintiffs and used the title to the subject property as security.
49. The court wholly concurs with the Defendant's submissions that the release of the title to the Plaintiffs could only be done upon them redeeming the outstanding loan facility. The courts take the firm view that the Defendant was and is still entitled to hold on to the title deed until the Plaintiffs redeem the loan.
50. Turning back to the issue of negligence by the Defendant for having failed to keep the title safely, causing the said title to be lost or misplaced or not reasonably taking care of the title, the court finds that the Plaintiffs did not discharge their burden of proof to prove this fact. The Defendant did not submit on this issue but the court notes from DW 1's evidence that there was confusion when retrieving the title document due to the Land Reference number indicated therein. He explained that in the Charge Document and loan Agreement on page 9 of the Bundle of Documents, the land reference numbers were shown as L.R No 20938/1 and L.R No 20938/51 respectively. The court finds this to have been a plausible explanation as this fact was admitted by PW 1.
51. In his evidence, PW 1 admitted that the Defendant finally furnished him with a certified copy of the Title Deed in 2009. The court is not satisfied that the inability to obtain the title when the Plaintiffs wanted it met the threshold of a negligent act on the part of the Defendant.
52. The court has come to this conclusion because the proximate cause of the Plaintiffs' loss would have had to have been from failure by the Defendant to return the said title upon them redeeming the loan and thus losing an opportunity to sell the subject property to a buyer through private treaty. As long as the Plaintiffs had not redeemed the loan, the Defendant was entitled to retain the title document and no loss of business or rental income could be attributed to the Defendant.
53. The court also wishes to observe that the Plaintiff's claim for mesne profits with effect from January 2004 until the title is produced would have no legal basis as the term "**mesne profits**" refer to the damages or compensation recoverable from a person who would have been in wrongful possession of immovable property. The principle of a claim for mesne profits is that of wrong possession. As a general rule liability to pay mesne profits goes with actual possession of the land.
54. That is the definition that is generally accepted. In the Black's Law Dictionary 9th Edition, "**mesne profits**" have been defined as:- "**the profits of an estate received by a tenant in wrongful possession between (2) two dates.**" In the Concise Oxford English Dictionary 12th Edition, "**mesne profits**" is defined as:- "**the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.**"
55. From the facts of this case, it is evident that the relationship between the Plaintiffs and the Defendant was that of Bank and customer. Nowhere does their relationship fall within the ambit of a suitable case where mesne profits would be claimed.
56. Many factors would have come into play. For example, in the absence of the costing of constructing the 1st floor at the Umoja property, the court would be proceeding on a presumption

- that proceeds from the sale of the subject property would have been sufficient to have completed the two (2) floors as was alleged by the Plaintiffs and that they would have immediately starting earning the rental income.
57. The court cannot ignore the intervening factors such as rise in construction costs or other unforeseen circumstances that could have caused the Plaintiffs not to have completed the said development. This is, however, merely speculative and the court would not wish to engage in further discourse on this line of thought.
 58. Other consideration would have been the mitigating factors. The Plaintiffs would have had to demonstrate that they could not obtain finances to develop the Umoja property from other sources until such time the Defendant released the title deed to enable them sell the subject property and develop the said Umoja property to so as to be entitled to a claim of mesne properties from 2004 till the date the title was released to them.
 59. The court also finds that the Plaintiffs did not satisfy the court that they were entitled to general damages for breach of contract as argued in their written submissions. This is because the particulars itemised in the Plaint were in respect of a breach of duty of care and not breach of contract. The court has held over and over again that parties must be bound by their pleadings. A claim for general damages for breach of contract cannot therefore be introduced at the submissions stage.
 60. Having found that the Defendant was entitled to retain the title document as aforesaid, this court finds and holds that the Plaintiffs were not entitled to a claim for mesne profits. A claim for mesne profits is one of special damages which this court finds the Plaintiffs did not prove. The court also finds the said claim for mesne profits would not have been proven in any event based on the documentation the Plaintiffs placed before the court.
 61. Accordingly, the Plaintiffs' claim for mesne profits is completely misplaced. Their suggestion that they were entitled to mesne profits falls by the way side and is hereby rejected.
 62. The court has also noted that the certificate in the charge document states that the Plaintiffs were explained the effects of Sections 69(1) and 100A of the Indian Transfer of Property Act, 1882 (now repealed) and that they understood the same. The consequences of default of paying the mortgage herein were expected to be known by the Plaintiffs.
 63. It is therefore the finding and holding of this court that the Plaintiffs did not prove their claim and for that reason, the suit filed on 1st December 2006 is hereby dismissed.
 64. As regards the Counter-claim, the court has noted that the Plaintiffs were still indebted to the Defendant as at the time of hearing. This can be deduced from the evidence of both PW 1 and DW 1. PW 1 stated that the outstanding amount as at February 2004 stood at Kshs 104,000/=. In his evidence, DW 1 gave the outstanding amount as Kshs 423,326.64 as at 31st March 2009 and that the same continued to accrue interest.
 65. A Counter-claim stands on the same footing as a plaint. The Defendant is also expected to adduce evidence to support its claim. Save for stating that the Plaintiffs owed the Defendant the sum of Kshs 423,326.64 as at 31st March 2009, it did not furnish the court with any documentary or oral evidence to support the same. It did not also address this issue in its written submissions.
 66. This court recognises that parties have a right to bring its claim to court in the best way it deems fit for determination on its own merits. The Defendant filed a Counter-claim to recover its monies that were due to it from the Plaintiffs. The claim was not proven in which case the court has no option but to dismiss the same.
 67. Having carefully analysed the evidence, the parties written submissions and the case law, the court finds and holds that both the Plaintiffs and the Defendant did not prove their respective claims. They all had a duty to present their respective cases in a concise and coherent manner which they failed to do.

DISPOSITION

68. For the foregoing reasons, the Plaintiffs' Plaint dated 30th November 2006 and filed on 1st December 2006 and the Defendant's Amended Defence and Counter-claim filed on 2nd June 2009 are hereby dismissed. Each party will bear its own costs.
69. Orders accordingly.

DATED and SIGNED at NAIROBI this 27th day of February 2014

J. KAMAU

JUDGE

DATED SIGNED and DELIVERED at NAIROBI this 27th day of February 2014

F. GIKONYO

JUDGE