



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 214 OF 2007

PETER GITHU KABIRU.....PLAINTIFF

VERSUS

SIMPLY PERFECT DEVELOPMENT CO. LTD.....1ST DEFENDANT

JAMES GACHINGU MACHARIA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff, **PETER GITHU KABIRU**, is the registered proprietor of the property L.R No. 209/6911.
2. It is his case that the 1st Defendant, **SIMPLY PERFECT DEVELOPMENT COMPANY LIMITED** placed an advertisement in the local newspapers, indicating that it was able to procure financial loans for persons who needed the same.
3. The plaintiff expressed an interest in getting a loan for Kshs. 3,000,000/-.
4. The 1st Defendant then provided the plaintiff with the terms and conditions for the grant of the loan. They indicated that the 1st Defendant would obtain the loan from “their principal”, and that the plaintiff would repay the said loan through the 1st Defendant.
5. The repayment would be over a period of 36 months, at the rate of Kshs. 120,872/- per month.
6. The plaintiff was told that if the enumerated terms and conditions were acceptable to him, he should make the following payments;
 - a) *The Commission of Kshs. 300,000/-.*
 - b) *Assessment/Inspection fee for L.R. No. 209/6911.*
 - c) *Registration cost.*
 - d) *Charge preparation and cost”.*

7. The plaintiff, **PETER GITHU KABIRU** (PW1) testified that although he accepted the terms and conditions of the offer from the 1st Defendant, he was unable to raise the commission of Kshs. 3,000,000/-.
8. However, PW1 did raise the sum of Kshs. 60,000/-, which he paid to the 1st Defendant.
9. Upon realizing that the plaintiff was unable to meet the conditions for the grant of the loan for Kshs. 3,000,000/-, **JAMES GACHINGU MACHARIA** (the 2nd Defendant) came to the rescue of the plaintiff. He told the plaintiff that instead of losing the sum of Kshs. 60,000/- which he had paid, he could be enabled to take a smaller loan.
10. Peter testified that James Macharia offered him a smaller loan of Kshs. 140,000/-, provided that Peter paid the interest amount of Kshs. 70,000/-, upfront.
11. That meant that over and above the Kshs. 60,000/- which Peter had already remitted, he was required to add Kshs. 10,000/- only.
12. James Macharia told Peter that the only security that was required for the reduced loan was the retention of the Title document for the suit property, L.R. No. 209/6911.
13. It was agreed that the said Title document would be given back to Peter when he had repaid the loan of Kshs. 210,000/-.
14. Peter testified that he made payments of the agreed monthly instalments amounting to Kshs. 17,500/- every month, for five (5) months. PW1 exhibited the receipts to prove the said payments.
15. According to Peter, he was unable to continue making further payments after October 1999, because the 1st Defendant's place of business was closed down.
16. Peter testified that the reason for the closing down of the 1st Defendant's place of business was that James Gachingu Macharia had been arrested by the Anti-Banking Fraud Unit of the Central Bank of Kenya on suspicion of swindling scores of people out of their millions of shillings, on the pretext that the said people would be given loans, yet such loans did not exist.
17. PW1 testified that at the time the 1st Defendant's place of business was closed, the balance of the loan still due to the said 1st Defendant was Kshs. 133,000/-.
18. The next step which Peter took was to sell 30 acres of his land in Nyandarua. He then utilized the proceeds of sale to develop the suit property.
19. PW3, **PETER CHEGE KAMAU**, was a Mechanical Engineer who was working with **WEBSTON CONSULTING ENGINEERS**.
20. PW3 testified that he had experience in construction works.
21. Because of his said experience, PW3 advised PW1 on the general matters of the construction which PW1 undertook on the suit property.
22. According to PW3, the actual construction work was supervised by an Architect. Therefore, the role played by PW3 was to either give general advice to the plaintiff or to connect the plaintiff to the people whom the plaintiff required during the construction.
23. PW3 said that the construction of the plaintiff's business premises took place between August 2003 and April 2004.

24. **PW2, MOSES KAGO MUKUNYA**, was a Certified Public Accountant who practiced his trade in the style and name of Kago Mukunya & Associates.

25. PW2 told the court that the plaintiff had been his client since the year 2004. Moses Mukunya (PW3) prepared the annual accounts for the plaintiff.

26. PW2 exhibited the Annual Reports for the years 2004, 2005, 2006, 2007, 2008, 2009 and 2010. Those reports were admitted in evidence.

27. After the three witnesses testified, the plaintiff closed his case.

28. None of the plaintiff's witnesses were cross-examined by the Defendants. That was because the Defendants and their lawyer failed to attend court during the trial.

29. The trial had, therefore, proceeded in the absence of the Defendants. The court allowed the plaintiff to proceed with his case after satisfying itself that the Defendants had been duly served with the requisite Hearing Notice.

30. In the light of the uncontroverted evidence tendered by the plaintiff and his witnesses, I make the following findings:

i) *The plaintiff deposited his document of Title for L.R No. 209/6911, with the 1st Defendant, **SIMPLY PERFECT DEVELOPMENT COMPANY.***

ii) *Initially, the said property was to be utilized as security for the Kshs. 3,000,000/- which the plaintiff was going to borrow, with the help of the defendants.*

iii) *It was a requirement imposed by the 1st Defendant, and which the plaintiff accepted, that the loan of Kshs. 3,000,000/- would be given to the plaintiff after he paid a commission of Kshs. 300,000/-.*

iv) *The plaintiff failed to raise the deposit of Kshs. 300,000/-. However, he raised Kshs. 60,000/-, which he paid to the 1st Defendant.*

v) *When it became clear that the plaintiff could not raise Kshs. 300,000/-, he accepted a reduced loan of Kshs. 140,000/-.*

vi) *In order to get the reduced loan, the plaintiff had to pay, upfront, the interest sum of Kshs. 70,000/-. He therefore added Kshs. 10,000/- to the money which he had already remitted to the 1st Defendant.*

vii) *The 1st Defendant gave to the plaintiff the sum of Kshs. 140,000/- as the scaled – down loan. That reduced loan was payable within 12 months at the monthly rate of Kshs. 17,500/-*

viii) *The plaintiff paid five (5) instalments of Kshs. 17,500/- each. Thereafter, the plaintiff did not remit any further payments to the 1st Defendant because the place of business of the said 1st Defendant was closed down.*

ix) *In February 2007, the plaintiff received a Notice from the advocates for the 1st Defendant, demanding Kshs. 10,810,758/- as the balance due, in respect to an alleged loan of Kshs. 3,000,000/- which the 1st Defendant had advanced to the plaintiff.*

x) *The plaintiff responded to the Notice by making it clear that the sum of Kshs. 3,000,000/- was never advanced to him by the 1st Defendant. The plaintiff was therefore shocked to learn that the*

suit property had been charged in favour of the 1st Defendant.

xi) I am satisfied that the Defendants have failed to prove that they or either of them advanced Kshs. 3,000,000/- to the plaintiff. Therefore, it was wrong for the 1st Defendant to register a charge in its favour, as security for a loan that it never gave to the plaintiff.

xii) I declare that the charge which was registered on 17th May 1999, against L.R. No. 209/6911, NAIROBI was null and void ab initio, for lack of consideration. The said charge is thus of no legal effect.

xiii) As the charge was procured through fraud, I do direct the Registrar of Titles to cancel it forthwith.

xiv) The plaintiff has not demonstrated the losses which he has suffered. The Title document was in the hands of the 1st Defendant. That fact deprived the plaintiff from utilizing it in the manner in which he may have wished. But the plaintiff has not demonstrated before this court the exact use that he had wished to put the Title document.

xv) If the plaintiff had intended to use the Title as security, he should have placed material before this court to show that he negotiated for a loan from another financial institution; and that he failed to get the said loan because his title was not available.

xvi) Instead, the plaintiff has demonstrated an enterprising spirit, by showing that he sold some of his parcels of land, and raised money which he then used to construct his business premises.

xvii) As the said premises was built between August 2003 and April 2004, it follows that the job was already complete before the plaintiff received the Demand Notice from the advocates for the 1st Defendant.

xviii) Before the plaintiff received that Demand Notice, he has not shown the court the steps he had taken to get back his Title document.

xix) And if the plaintiff had got back his Title document, and had used it as security for further lending, he has not shown the court how that would have earned him greater returns than what he has been getting.

xx) Although the plaintiff has not proved his entitlement to General Damages, I find that he is entitled to Nominal Damages from the Defendants. I assess the said Nominal Damages at Kshs. 200,000/-.

xxi) I award the costs of the suit to the plaintiff.

xxii) The plaintiff is also awarded interest on the Nominal Damages at Court Rates, from the date of Judgment.

xxiii) Finally the 1st Defendant is ordered to hand over to the plaintiff the original Title document within 30 days from today. If the plaintiff is not given the Title document, he will be at liberty to apply for the issuance of another Title document.

It is so rodered.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of September 2014.

FRED A. OCHIENG

JUDGE

Jugment read in open court in the presence of

W awire for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. C. Odhiambo, Court clerk.