



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 214 of 2011

GRAND CREEK LLC 1ST PLAINTIFF

JOHN KRISTLER COORS 2ND PLAINTIFF

VERSUS

NATHAN CHESANG MOSON..... DEFENDANT

RULING

1. The 1st plaintiff is a limited liability company registered in the State of Colorado, USA, while the 2nd plaintiff is its Manager. In their plaint, they averred that they advanced **Kshs.17, 000,000/=** as loan at the request of the defendant subject to a written agreement on or about 1st September, 2006. The terms of the loan agreement are inter alia that;

“(a) The loan advanced would be used by the defendant to acquire the property that he occupied at the date of the agreement as well as acquire the property adjacent to that which he occupied the latter of which is known as L.R. No. 2116/XVI Kitale.

(b) The loan advanced would be utilized within 90 days to acquire

the aforementioned properties and that should the defendant not have entered into any binding agreement to purchase the property that he occupied as well as the adjacent property, within 90 days from the date of the advance being paid, the defendant would be granted a further period of 90 days within which to find and purchase a residential property of equal value failing which the entire loan amount would be returned to the plaintiff.

(c) If any loan balance was utilized after the purchase of residential property it would be immediately paid to the plaintiff.

(d) The loan would be secured by way of a fixed charge and/or mortgage over the property to be registered in favour of the plaintiff.

(e) The defendant was to pay 3% interest semi-annually for the first three years, and thereafter make actual semi-annual loan repayments for the remaining 22 years at the rate of 5.5% interest.”

2. Further, the plaintiffs aver that the claim for the loan amount of Kshs.17,000,000/= and the terms of lending are contained in e-mail correspondence between the 2nd plaintiff and the defendant that

were exchanged between October 2005 and August, 2007. According to the plaintiffs, the defendant agreed that the property that he was to purchase would operate as collateral for the loan, and that he would forward the title of the property and/or its particulars to the 2nd plaintiff for registration as security.

3. The plaintiffs aver that the defendant has defaulted on the loan advanced together with interest and consequently they have incurred losses and/or damages. Further, the plaintiffs aver that despite numerous requests for the title of the purportedly acquired property and particulars of its location, the defendant has refused and/or neglected to provide the plaintiffs with either.

4. In the circumstances therefore, the plaintiffs seek judgment against the defendant as follows:

“(a) The said sum of Kshs.17,000,000/- together with interest on at ruling overdraft rates until payment in full;

(b) Alternatively, the sum of Kshs.17,000,000/- together with interest as provided for under the Loan Agreement;

(c) Alternatively, an account of the loan advanced;

(d) In addition to (c) specific performance of Loan Agreement between the First Plaintiff and the defendant and/or the loan agreement between the second plaintiff and the defendant;

(e) Further and in the alternative mandatory orders compelling

the defendant to give up to the plaintiffs the title to any or all property, movable and immovable that he acquired with the loan advanced;

(f) In addition to paragraphs (e) and (f) a declaratory order that

the plaintiffs be at liberty to register a charge, mortgage and/or any other encumbrance over any or all property owned by the defendant, in its favour;

(g) Cost attendant to registration of the encumbrance in paragraphs (g);

(h) General damages;

(i) Costs;

(j) Any other or further orders and/or reliefs as this Honourable Court might deem just.”

5. The defendant entered appearance and filed a defence denying the averments made by the plaintiffs in their plaint. In particular, the defendant stated that the amount of Kshs.17,000,000/= was given to him by the 2nd plaintiff and his team as a donation/gift to purchase the house that he and his family were renting. Being a donation/gift, the defendant avers that the same was not subject to repayment.

6. With regard to the Loan Agreement, the defendant avers that he signed the same under duress and pressure because of fear that the activities of Servant and Light Development Foundation (SELIDEF) would be adversely affected if the funding being received by the Community Uplift

Ministries was to stop. Further, the defendant insists that the Kshs.17,000,000/= was forwarded to him in his capacity as the Chairman of SELIDEF and was given as a donation/gift without him having applied for it and should not be ordered to repay the same.

7. According to the defendant, the alleged loan agreement is null and void for all purposes and intent on grounds that:-

- “(a) The same was not sealed.**
- (b) The same was not properly attested to.**
- (c) That the agreement contravenes the relevant Laws of Kenya.”**

8. The defendant also avers that there exists another suit in **Kitale HCC No. 34 of 2011, COMMUNITY UPLIFT MINISTRIES vs. NATHAN CHESANG MOSON, JOSEPHINE CHELANGAT and SERVANTHOOD & LIGHT DEVELOPMENT FOUNDATION**, in which the 2nd plaintiff through Community Uplift Ministries claims for the same donations that were given to the defendant and SELIDEF. For the aforesaid reasons, the defendant prayed that the plaintiff’s suit be dismissed with costs.

9. At the hearing of this case, **John Kristler Coors**, the 2nd plaintiff and the 1st plaintiff’s Manager, testified as **PW 1** and relied on his statement dated 13/5/2012 as well as his filed documents. In his testimony, he stated that the defendant headed an organization where they worked with him as Community Uplift Ministries. Vide e-mail correspondence between himself and the defendant, PW1 gave the defendant a loan of **Kshs.17,000,000/=**, evidence of payment of the loan being the 1st defendant’s bank statement where **US\$240,108/-** was paid to the defendant.

10. It was PW1’s testimony that the defendant acknowledged receipt of those funds. PW1 further stated that they borrowed those funds in order to advance the loan to the defendant. However, the defendant did not refund the money. The last installment was received from him on 27/9/2010. Accordingly, PW1 prayed for judgment as per the plaint.

11. The defendant neither attended court nor adduced any evidence in respect of his defence.

12. I have considered the evidence adduced, as well as the pleadings on record.

13. The Loan Facility Agreement dated **1st September, 2006** refers to the defendant as “the borrower” and the 1st plaintiff as “the lender”. The terms of the agreement, *inter alia*, are for the advance of **Kshs.17,000,000/=**. The purpose of the loan is as herein below stated:

- “i. The loan advance shall be used by the borrower to purchase the residential property currently occupied by the borrower and the adjacent Real property at Kitale being L.R. No. 2116/112/XVI Kitale.**
- ii. The loan advanced herewith shall be utilized within 90 days to acquire the property stated hereinabove.**
- iii. If the borrower shall not have entered into any binding agreement to purchase the captioned property within 90 days from the date of advance he shall be granted a further period of 90 days within which to find and purchase a residential property of equal value failing which the entire loan amount shall be returned to the Lender forthwith.**
- iv. If any loan balance shall be unutilized after the purchase of the residential property it shall immediately be paid to the lender and credited in reduction of the loan amount.”**

14. A further look at the Loan Facility Agreement shows that the document was duly sealed with the common seal of the 1st plaintiff in the presence of the 2nd plaintiff. The defendant also appended his signature in the presence of **Koyyoko Bernard Kiberass, Advocate**.

15. The defendant states that the amount of Kshs.17,000,000/= was advanced to him as a donation/gift by the 2nd plaintiff and his team to purchase the house that he and his family were renting and as such, he is not obligated and/or should not repay the same. However, a look at the correspondence between the 2nd plaintiff and the defendant paints a totally different picture. Vide the **e-mail** dated **7th April, 2007** from the defendant to the 2nd plaintiff, the defendant stated that:

“.....since the money you gave me was a loan and the purpose was basically for us to own a home.....I will make sure I repay you all your money.”(Emphasis supplied)

16. Further, the defendant’s **e-mail** dated **10th July,2008** states in part:

“...I am fully committed to repaying this loan in full and within the stipulated time frame. I have already demonstrated this to you by way of partial re-payments as agreed.”

17. From the evidence on record, it is clear that the 1st plaintiff sent US\$240,108, the equivalent of Kshs.17,000,000/= to the defendant on 1st September 2006. From the above and the correspondence before this court, the defendant does not dispute receiving that amount. Further, the defendant does acknowledge the money advanced to him was a loan and he also states that he is fully committed to repaying the same. For the defendant then to come round and plead that the Kshs.17,000,000/= was given as a gift/ donation and therefore he is not obliged to repay the same is simply ludicrous!

18. From the bundle of documents produced by the plaintiffs before this court, it is evident that the defendant paid only 8 installments of varying sums between 11th April, 2007 and 27th September 2010, all amounting to **US\$36,975**. Clearly, this could not have been a donation/gift. The defendant is therefore in breach of his loan repayment obligation.

19. It is most unjust for the defendant to receive the sum of Kshs.17,000,000/= advanced to him as a loan and thereafter turn around and plead that the same was a donation/gift. The defendant did acknowledge the money as a loan and even made some repayments towards the same. Although the Loan Agreement shows that the loan amount was Kshs.17,000,000/=, the same was advanced in form of US Dollars, the equivalent of which was **US\$240,108** and out of that principal sum only **US\$36,975** has been repaid. The outstanding balance amounts to **US\$203,133**.

20. In the premises therefore, judgment is hereby entered in favour of the 1st plaintiff as follows:

i. The sum of US\$203,133 or the equivalent thereof in Kenya

Shillingstogether with interest as provided under the loan agreement.

ii. The defendant shall bear the costs of this suit.

WRITTEN AND SIGNED BY JUSTICE D. MUSINGA

DATED, DELIVERED AND COUNTERSIGNED ON THIS 25TH DAY OF JANUARY, 2013 BY THE HONOURABLE JUSTICE G.K. KIMONDO FOR AND ON BEHALF OF JUSTICE D. MUSINGA, PURSUANT TO THE PROVISIONS OF ORDER 21 RULE 3 (2) OF THE CIVIL PROCEDURE RULES.

SIGNED:

.....