



REPUBLIC OF KENYA

High Court at Bungoma

Environmental & Land Case 90 of 2005

MATHIAS OCHIENG WERE1ST PLAINTIFF

ESTHER WERE2ND PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION DEFENDANT

JUDGMENT

The plaintiff filed this suit vide a plaint seeking orders;

- (a). A declaration that the conduct of the defendant and correspondence shared between the plaintiff and the defendant created fresh contract between the parties.
- (b). A permanent injunction restraining the defendants from committing a breach of the said fresh contract over the payment and receipt of the balance of monies owed by the plaintiffs to the defendant.
- (c). A declaration that the defendant is legally estopped from seeking to reverse its communication and contract on the satisfaction of the debt as agreed.
- (d). A declaration that the plaintiffs through payment of Kshs. 341,121/= had fully satisfied the debt to the defendant.
- (e). An un –conditional discharge and release of the Title No. East Bukusu/South Nalondo/984 to the plaintiffs.
- (f). costs of the suit.

The defendant also filed a defence on 2nd February 2006 denying the plaintiffs claim. The hearing commenced on 5.12.12 when both the plaintiffs and the defendants case was heard and closed.

The plaintiffs only testified and did not call any witnesses. The defendants only witness was her acting Bungoma branch manager. The brief history of the case is, the plaintiff took a loan with the defendant in sum of Kshs. 756,000/= to purchase

land title No. East Bukusu/South Nalondo/984 in 1996. The plaintiffs paid the loan but at one time defaulted when the 1st plaintiff retired from employment. The defendant did put up an advertisement in the Nation daily newspaper of 16th October 2003 headed “Press release” **Implementation of Government – approved write off of specified categories of loans**”.

The plaintiff took advantage of this advertisement and applied for waiver of his loan. The disagreement between the parties is thus how much was the waiver. The 1st plaintiff in his evidence adduced before this court and states that the only sum due and which he said was Kshs. 341,121/= and therefore the defendant ought to discharge the title used as security. The 2nd plaintiff confirmed the facts as set out by the 1st plaintiff.

The defendant on her part admitted making an offer of the balance of the debt at Kshs. 341,121/= but it was conditional offer subject to ratification by their board of directors .

The letter the plaintiff relied on according to them was written on a “*without prejudice*” basis and so far the plaintiffs still owe them Kshs. 267,723/= which must be paid before they can discharge the title. They sought to have the plaintiff’s case dismissed with costs.

I am thus asked to look and determine if the letters written by the defendant and produced by the plaintiff in court were binding on the defendant given some of them were written on a without prejudice basis. Plaintiff exhibit 3 – a letter by the defendant dated 14.11.2003 forms the bone of contention as to whether it formed a new contract.

The plaintiff in their submissions aver that the defendant vide their letter of 17th February 2004 confirmed that after previous payment the balance due was Kshs. 117,121/= which was to be paid within a period of one month.

They relied on the case of Walker Vs. Walker (1889) 23 QBD 335 to define the meaning of the words “**Without prejudice**” to protect the writer of the letter only if the terms he proposes are not accepted.

The defence in their submissions maintained the offer was made on a without prejudice basis subject to ratification by the defendants Board of Directors and subject to the plaintiff making the payments within 90 days. According to the defence, the boards position was communicated to the plaintiff vide their letter produced as defence exhibit 6 dated 12th August 2005 indicating the balance as Kshs. 267,723/=. It is on receipt of this letter that the plaintiff commenced this suit.

It is interesting to note that the letter dated 12th August 2005 is written on a without prejudice basis too.

From the above submissions and evidence on record, it is clear a new contract was created between the plaintiffs and the defendant. As at the time of writing the letter of 14th November 2003, the plaintiff owed the defendants Kshs. 983,956.40/= on loan account NO. 130933. This amount was reduced to Kshs. 341,121/= which according to the defendant was subject to ratification by its board. Assuming they are correct, if you add Kshs. 341,121/= to Kshs.267,723/= the answer is Kshs.608,844/=.

This can only be interpreted as a reduction from the initial balance of Kshs. 983,956/= hence my conclusion that a new contract was created by the parties herein.

The plaintiffs exhibit 5 which is a letter dated 18th December 2003 in response to an earlier letter by the plaintiffs (dated 15th December 2003) confirmed the balance was correct as the amounts shown in the managing directors letter as at that date. This letter did not bear the **“without prejudice”** words. Exhibit P.6 – a letter dated 17th February 2004 does indicate the balance as at that date to be Kshs. 117,121/= and the defendant allowed the plaintiff to pay it before 12th March 2004. Again it does not bear the words “without prejudice”.

The plaintiff requested the defendant to release their title on 26th April 2004.

There is nothing on record to show the defendant replied to this letter instead the

defendant wrote to them vide the letter dated 12th August 2005 advising the plaintiffs that they still owed the defendant the sum of Kshs. 267,723/=.

According to this letter, the plaintiffs account had a balance of Kshs. 656,120.90/= as at 31st July 2005. They advised them to pay Kshs. 267,723/= for the account to be closed and payment had to be made within 90 days. In my perspective the defendant was creating another new contract where none existed. If by February 2004, the balance due from the plaintiff's was Kshs. 117,121/ = had been paid. No such explanation was offered either in oral or written evidence. All they said the offer was subject to ratification by the board and the board two years later give a new offer once again on " without prejudice" basis.

The defence asked this court to ignore the earlier letter of 14th November 2003 that it was on "without prejudice" basis. The same party wants this court to take in evidence a latter letter dated 12th August 2005 written on a "without prejudice" basis as binding the parties in finding the plaintiffs as owing them Kshs.

267,723/=. Is it like the proverbial English saying **"Having your cake and eating it."**

I do therefore find the plaintiffs have proved their case within the standards required by Law. They cleared the balance owing to the defendant when they paid the sum of Kshs. 117,121/= as advised by the defendant in their letter of 12th February 2004. The new demand of Kshs. 267,723/= by the defendant has no basis both in fact and in giving a new offer on an amount that did not exist.

In conclusion therefore I allow the plaintiffs suit and enter judgment in their favour against the defendant as follows;

- 1). A declaration be and is hereby made that the correspondence between the plaintiff and the defendant created a new contract.
- 2). Declaration be and is hereby made that the plaintiffs having paid the sum of Kshs. 341,121/= has fully satisfied the debt between the defendants and themselves.
- 3). The defendant is hereby ordered to unconditionally discharge and release title No. East Bukusu/South Nalondo/984 to the plaintiffs.
- 4). The sum of Kshs. 267,723/= deposited in court by the plaintiffs be released to them.

5). The plaintiffs shall have the costs of this suit.

JUDGMENT delivered in open court this 23rd day of January 2013.

A. OMOLLO

JUDGE.