



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 97 of 2004

KAKAMEGA DISTRICT CO-OPERATIVE LTD..... PLAINTIFF

V E R S U S

CO-OPERATIVE BANK OF (K) LTD.1ST DEFENDANT

MAFATHER INVESTMENT GROUP 2ND DEFENDANT

J U D G M E N T

In its amended plaint dated 14.1.2005 the plaintiff is seeking nullification of the sale of its property known as plot number **KAKAMEGA/MUNICIPALITY/BLOCK I/182** by the 1st defendant to the 2nd defendant. The auction took place on the 19.4.2004 and it was done by the 1st defendant in exercise of its statutory power of sale. The matter proceeded to full hearing. The plaintiff produced two witnesses while two witnesses testified for the defence.

NOAH WERULA ONGAYA, was **PW1**. His evidence is that he is employed as a manager by the plaintiff. The plaintiff owned the suit property. The plaintiff mortgaged the suit property for a sum of KShs.375,000/= in 1976. Two accounts were opened with the 1st defendant's Kisumu Branch. The two accounts were Account Number 021110 and 020209. It is his evidence that the plaintiff duly paid the loan up to 1984. Due to oversight there was no discharge of charge executed. The 1st defendant advanced other monies to the plaintiff but those sums were unsecured debts. The debts were later written off. The unsecured debts were done through a government initiative and were not secured on the mortgaged property. By the time the unsecured debts were written off the suit property had been auctioned. The plaintiff is still in occupation of the suit property but the rent proceeds are paid to an account. The suit property is a commercial building located in Kakamega Town.

PW2, CALEB MAPUKO, testified that he is employed as a cashier by the plaintiff. He was the one who used to make payments to the 1st defendant in respect of the loaned amount. The loan was repaid and the last deposit was made on the 2.12.1983. Both two accounts namely 020209 and 02110 were fully settled. The subsequent unsecured loans were secured through stock hypothecation agreement. The last payment of the loan was KShs.9,496.50. The property was sold to the 2nd defendant who processed a title deed. The plaintiff was not aware about the auction. No balance was remaining for the loan.

DW1, SOLOMON ODHIAMBO ADUNDO, works with the 1st defendant at its Kisumu Branch. His evidence is that the 1st defendant advanced money to the plaintiff to develop plot number **KAKAMEGA/MUNICIPALITY/BLOCK I/182**. The advanced amount was KShs.375,000/=. The charge document was registered on 3.11.1976. The security was to be a continuing one for the loan until full payment. The loan was never repaid. Further advances were made to the plaintiff. As at 21.1.1983

there was an outstanding balance of KShs.114,665.10. On 1.11.2000 the 1st defendant sent a demand notice to the plaintiff indicating that the outstanding amount was over KShs.19 million. On 1.11.2000 a three months statutory notice was given to the plaintiff indicating that the bank intended to exercise its statutory power of sale. On 22.12.2000 the plaintiff wrote to the 1st defendant acknowledging its indebtedness to the 1st defendant. The 1st defendant also received a letter dated 20.5.2003 from the Kakamega District Co-operative officer proposing to pay KShs.10,000/= per month but the Bank rejected that proposal. The bank later instructed Mundega Agencies Auctioneers to auction the property and the property was sold through a public auction. On the 19.2.2003 the auctioneers gave a forty five days redemption notice and the property was auctioned on 19.4.2004. The auction was advertised on the People's Daily of 27.3.2004.

It is DW1's evidence that the security for the further advances was the charged property. There was also a guarantee from the government and hypothecation of stocks. A sum of KShs.9,807,832.30 was written off in February 2008. Even with the write off the total sum of KShs.9 million was not fully paid. The property was legally sold because the plaintiff owed the bank some money. The 2nd defendant bought the property. On 26.5.2003 the 1st defendant wrote to the plaintiffs giving them thirty days to pay the loan. When the plaintiffs borrowed the money there were two accounts opened, one for the principal amount and the other one for the interest. Account number 020209 was closed on the 15.8.1984 with a zero balance. The only charge that was registered was the one for KShs.375,000/=. He is not aware how the sum of KShs.19 million was disbursed. Some of the further advances were secured on crops and were for a duration of twelve months. By the time the property was auctioned it had not been discharged.

DW2, LINUS JOSEPH OBUTU, testified that he is the organizing secretary for the 2nd defendant. He saw an advertisement on 27.3.2004 for an auction of the suit property in the Peoples Daily. He got interested and the 2nd defendant participated in the public auction. The 2nd defendant conducted a search and found that the property had been charged to the 1st defendant for KShs.375,000/= in 1976. The 2nd defendant's bid at the auction was KShs.3.5 million and it was declared to be the purchaser. The 2nd defendant was later issued with a title deed and the property has been used as security to secure a loan of KShs.3 million from Giro Bank. The loan has not been discharged. The property is developed with shops and residential flats. The plaintiff has never moved out of the property and the 2nd defendant would like to have the plaintiff evicted. During the auction the 2nd defendant was the highest bidder.

Parties filed written submissions. The plaintiff's contention is that the mortgage loan was fully repaid and the accounts were closed. No further charge was registered against the property. The security for subsequent advances was government guarantee and hypothecation of stock which amount was later waived. The 1st defendant took advantage of the plaintiff's failure to have the property discharged after the loan had been repaid. Counsel further contends that no statutory notice was given to the plaintiffs.

The 1st defendant's submissions summarize the evidence on record. Counsel contends that the documents which indicated that the security for the further advances was hypothecation and government guarantee were never signed by the 1st defendant. The write off of the loans was done after the auction had been completed in 2004. A forty five days redemption notice was issued on 19.2.2003 and the property was auctioned on 19.4.2004. The 1st defendant had the right to exercise its statutory power of sale under **Section 77(1)** of the Registered Land Act. Counsel relies on the case of **SIMEON J. MUTHUMA V SAVINGS & LOAN (K) LTD. & ANOTHER Nyeri HCCC No. 233 of 2000**.

The 2nd defendant in its submissions contends that it did participate in the public auction and the plaintiff did nothing to stop the auction. Having bought the property lawfully the 2nd defendant is an innocent purchaser for value without notice and is now the registered owner of the suit property. The property is now mortgaged and the only remedy available to the plaintiff is to sue the 1st defendant for general damages.

The main issues for determination is whether the plaintiff mortgaged the suit property, whether the said mortgage was fully paid, whether the 1st defendant made further advances to the plaintiff, whether the further financial advances by the 1st defendant to the plaintiff were secured by the suit property, whether the 1st defendant was entitled to exercise its statutory power of sale, was the auction properly conducted and whether the title deed issued to the 2nd defendant should be cancelled.

The evidence on record shows that the 1st defendant advanced a sum of KShs.375,000/= to the plaintiff. The above amount was secured through a charge registered against plot number **KAKAMEGA TOWN/BLOCK I/182**. The charge was registered on 30.11.1976. It is the plaintiff's evidence that two accounts were opened when the loan was disbursed. The plaintiff produced original cards for account numbers 021110 titled building account and account number 020209 titled building loan. From the evidence on record it is clear that both parties are in agreement that the 1st defendant indeed advanced a sum of KShs.375,000/= to the plaintiff for purposes of building the suit property.

The card for account number 021110 starts from 15.3.1983 and the last entry shows that on the 2.12.1983 there was a credit balance of KShs.1,387.10. From 2.12.1983 to 27.7.1984 there are some postings on the account with figures of amounts less than 2,000/= and by the end of 27.7.1984 the account had a negative balance of KShs.193.50. With regard to account number 020209 the same starts from 24.12.1982 with a debit balance of KShs.114,665.10. Several postings are shown up to 15.8.1984 when a sum of KShs.6,321.65 was made and the account was closed on that date. As far as the two accounts are concerned it is clear that the loan amount of KShs.375,000/= was fully paid.

The next issue is whether the 1st defendant made further financial advances to the plaintiff and what was the security to those advances. It is established from the evidence on record that no further charge was registered against the suit property. There is no document signed by both parties showing how the sum of KShs.19 million was disbursed to the plaintiff. The parties produced several documents and it is the plaintiff's contention that the further advances were secured by a government guarantee as well as hypothecation of stock. The plaintiff produced exhibit 3 which is a letter dated 4.2.1980 written by the Commissioner for Co-operative Development and addressed to Provincial Co-operative officers. The gist of that letter is that the Co-operative Bank of Kenya and the Agricultural Finance Cooperation were to be the main agents for lending the finances to farmers. The funds were to be channeled to members of co-operative societies and this was a new seasonal credit scheme which was meant to supplement an existing credit scheme for food crop production. The document indicates that the loans were to be repaid by the loanees through sale of their produce to their co-operative societies. The co-operative societies were to deduct the repayment amount from the crop proceeds. There are documents such as plaintiff's exhibit 4 which indicates to be a loan agreement between the plaintiff and the 1st defendant for KShs.1,296,900/=. It indicates that the security for the repayment of the loan plus interest was to be hypothecation of stock as well as government guarantee. The document is not dated and it is not signed by the 1st defendant. The letter writing off a sum of KShs.9,807,832.30 is from the 1st defendant and it is dated 29.2.2008. The letter gives the details of the loan accounts as well as the amount disbursed as follows:-

Loan Account No.	Amount
01700/123385/00	1,288,664.90
01700/123385/01	1,493,342.85
01700/123385/03	1,059,437.05
01707/123385/00	207,968.85
01700/123385/00	750,084.75
01710/123385/00	872,595.15
01721/123385/00	987,451.30
01798/123385/01	1,090,537.30
01798/123385/02	807,308.15
01798/123385/03	314,359.35

01798/123385/04	591,233.05
01798/123385/05	304,386
01798/123385/06	40,462.85
TOTAL	9,807,832.30

According to the evidence on record it is not clear how the further advances were made and when they were indeed disbursed. From the letter dated 4.2.1980 by the Commissioner for Co-operative Development it is clear that there was a government project to assist farmers financially. The money from the government was disbursed through the 1st defendant and the Agricultural Finance Corporation. The plaintiff did acknowledge in its letter dated 22.12.2000 that indeed some money was disbursed through the plaintiff but the same was advanced to members of primary co-operative societies that had since collapsed. The letter also indicates that politicians had informed the farmers that the government had written off the loans and it was not therefore possible to recover the money from the farmers. There is no single letter from the 1st defendant indicating that it is disbursing the loan other than the one dated 29.2.2008 indicating the write off.

It is the 1st defendant's position that the charge created over the suit property was a continuing security. The charge indicate as follows:-

“.....having agreed at the request of chargor by way of a loan or granting to the chargor other financial accommodation from time to time an aggregate amount not exceeding Kenya Shillings Three Hundred and Seventy-five Thousand (K. shs. 375,000/-) or such lower limit as may for the time being and from time to time fixed by the Bank DOTH HEREBY CHARGE the property comprised in the above-mentioned title.”

It is also stated in the charge that the total monies for which this charges constitutes a security as follows:-

“.....AND PROVIDED FURTHER that the security hereby constituted shall be a continuing security for the payment of the said sum of Kenya Shillings Three Hundred and Seventy-five Thousand (K.shd.375,000/-) or so much thereof as may from time to time be outstanding notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the Bank prior to the execution hereof relating to any security which the Bank may now or at any time hereafter hold in respect of the mortgage debt or any part thereof.”

It is clear from the evidence that when the further advances were being advanced to the plaintiff there was no agreement that the suit property was to be the security. The loan was fully paid and the 1st defendant did not indicate that it was using the suit property as the security for the further advances. Indeed as stated herein above the further advances was money from the government and the 1st defendant was merely an agent of the government for purposes of disbursement. It is a fallacy for the 1st defendant to have demanded a security in form of the suit property when loaning the plaintiff a sum of KShs.375,000/= yet there was no charge over any property when it was disbursing the KShs.19 million. It is clear that the further advances were not deposited in the two accounts herein stated which had been used for purposes of settling the sum of KShs.375,000/=. I do find that the further advances were not secured by the suit property. The contentions by counsel for the 1st defendant the charge created over the suit property was a continuing security is not supported by the charge itself. The charge indicates that it was a continuing security for the payment of the said sum of KShs.375,000/= and the security was not to exceed that amount. The further advances were a different arrangement altogether and this was money given to individual farmers for purposes of boosting crop production. The plaintiff was merely a conduit for disbursement of those advances. As per the letter dated 29.2.2000 from the 1st defendant, the sum advanced was only KShs.9,807,832.30. The rest of the claim was interest. This amount was given to the 1st defendant by the Government of Kenya and there is no agreement that interest was to be charged. It is

not clear whether the Government repaid that amount or what happened to the other co-operative societies which failed to settle the loans. I do find that the write off of the debts was due to Government's initiative as the money was given to the farmers by the Government.

The next issue is whether the 1st defendant was entitled to exercise its statutory power of sale and whether the auction was properly conducted. It is the 1st defendant's position that it exercised its statutory power of sale under **Section 77** of the Registered Land Act. **Section 74** of the Registered Land Act states as follows:-

Section 74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observation of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the charger does not comply, within three months or the date of service, with a notice served on him under sub-section (1), the charge may-

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property

Provided that a charge who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

Section 77 allows a chargee to exercise its power of sale by public auction. It is the plaintiff's contention that the loan had been fully paid and there was no right to auction the property. I have gone through the charge document and the same does not satisfy the provisions of **Sections 83** and **84** of the Registered Land Act which state as follows:

"83.(1) Provisions may be made in the charge for a charge to make further advances or give credit to the chargor on a current or continuing account, but, unless that provision is noted in the register, further advances shall not rank in priority to any subsequent charge except with the consent in writing of the proprietor of the subsequent charge.

(2) Except as provided in this section, there is no right to tack.

84. A charge has no right to consolidate his charge with any other charge unless the right is expressly reserved in the charges of in one of them and is noted in the register against all the charges so consolidated."

It is clear from the above two sections that a charge document can provide for the advancing of further credit to a chargor but such provision has to be specifically indicated in the charge document. Further under the provisions of section 84 a chargee has not right to consolidate his charge with any other charges unless that right is expressly reserved in the charge document. The contentions that the charge document was a continuing one and could be utilized as a security for other advances does not arise. The charge document does not provide for the consolidation for other charges or for using it as a security for other advances. Indeed there were no other charges created other than the single charge on the suit property. I have also gone through the charge document and note that what was produced only states that the plaintiff's chairman **REUBEN KAGAI** signed the document and it appears that some of the pages of the document were not produced. There was no attempt by the 1st defendant to produce the original charge document.

It is the 1st defendant's evidence that it gave a statutory notice of sale. According to the evidence of

DW1 the notice was given on the 1.11.2000. There was no any other notice given to the plaintiff until when the property was auctioned. The evidence on record shows that Mundega Agencies Auctioneers wrote to the plaintiff on the 19.2.2003 giving the plaintiff forty five days redemption notice. The letter was sent by registered post but the certificate of posting was not produced. The sale was not conducted after the expiry of the forty five days and the evidence shows that over one year later on the 27.3.2004 the auctioneers placed an advertisement in the People's Daily indicating that the suit property was going to be auctioned. There is a letter dated 26.3.2004 from the auctioneers addressed to the plaintiff indicating that the suit property was to be sold on the 19.4.2004. Again the said letter was sent by registered post and the certificate of posting was not annexed.

The plaintiff maintains that it was not aware that the auction was to take place. From the time the statutory notice was given on 11th November 2000 to the time the property was sold in April 2004 it is a period of over three years. Having found that the loan had been fully paid and there was no right to auction the plaintiff's property on the basis of the further advances I do further hold that the auction that occurred on the 19.4.2004 was illegal and the same was uncalled for. There was no proper statutory notice as envisaged under the provisions of **Section 74** of the Registered Land Act. The statutory power of sale was not available to the 1st defendant as the advances made to the plaintiff was not secured through the suit property. It is clear from the evidence on record that the 1st defendant is only relying on the acknowledgment by the plaintiff that the further advances were made as its evidence, but there is no written document showing that the 1st defendant was advancing money to the plaintiff based on any given security. I do agree with the contention by counsel for the plaintiff that the 1st defendant took advantage of the plaintiff and unlawfully auctioned the suit property. The purported auction was not also conducted as per the law and was mainly done to justify the defendants' unlawful acts. Although the people's newspaper can be referred to as a daily newspaper, it is evident that it is not one of the dailies with a wider coverage. The decision to place the advertisement on the newspaper was intentional and intended not to be seen by many people.

The 2nd defendant contends that it is an innocent purchaser for value without notice. The 2nd defendant's position is that the only remedy available to the plaintiff is to sue the 1st defendant for damages. I do find that that position is self-serving. The auction was unlawful and the beneficiary of that auction should not be left to benefit from it. The extract from the Land registry indicates that the plaintiff was registered as the owner of the suit property on the 14.8.2000. The property was charged on the 30.11.1976 and the title was opened on the 14.8.2000. It appears that the title had not been processed by the time the charge was registered. The transfer to the 2nd defendant was done on the 22.10.2004 and the consideration is given as KShs.1 million. Although the 2nd defendant contends that it was the highest bidder during the auction and it bought the property with its bid of KShs.3.5 million there is nowhere to show that indeed that money was paid to the 1st defendant as even the transfer itself in favour of the 2nd defendant is for only KShs.1 million as the consideration. Other than documents from the auctioneer recording that the property was sold for KShs.3.5 million there is no evidence to show that indeed that was true. The second charge to Giro Bank is indicated in one of the extracts from the Land registry and the loan was obtained on the 22.10.2004 the same date the 2nd defendant took its title deed.

In the end, I do find that the suit property was not a continuing security for the further advances made by the 1st defendant to the plaintiff. The further advances were secured by a government guarantee and the 1st defendant's remedy for the unpaid amount was to pursue the government or file a suit against the plaintiff to recover those amounts. The right to exercise a chargee's statutory power of sale was not available to the 1st defendant. The purported sale was also unlawful as no statutory notice was given. **Section 74** of the Registered Land Act envisages a three months statutory notice. The 1st defendant's notice was given over three years before the auction was conducted. There is no evidence that the plaintiff received the purported forty five days redemption notice as the letters were allegedly sent by registered post with no proof of such posting. I do find that the plaintiff has proved its case on a balance of probabilities. The alleged sale of the suit property conducted on the 19.4.2004 is hereby declared as illegal, null and void. The suit property plot number **KAKAMEGA/MUNICIPALITY BLOCK I/182** shall revert to the plaintiff. The plaintiff is at liberty to utilize the property. All the rent proceeds

deposited in a joint account as per the court order made on 15.11.2005 shall be released to the plaintiff. The plaintiff shall have the costs of this suit.

Delivered, dated and signed at Kakamega this 29th day of May 2013

**SAID J. CHITEMBWE
J U D G E**