



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 940 OF 2012

BENSON WANJOHI..... PLAINTIFF

VERSUS

GEORGE MUGAI MBENGEI.....DEFENDANT

JUDGMENT

The Plaintiff in the suit he filed herein sought judgment against the Defendant as follows:

- a. Payment of One hundred thousand Kenyan shillings (Kshs.100,000/=)
- b. An order that the court allows him to sell Parcel number Donyo Sabuk Komarock Block 1/5639.
- c. Interest on the above at the rate 20% until payment in full.
- d. Costs of the suit.

The Plaintiff filed a plaint dated 3rd December 2012, which he served upon the Defendant together with summons to enter appearance on 7th December 2012. This is attested to in an affidavit of service filed in court on 19th February 2013 and sworn on the same date by Joel Ndunda Mutala, a court process server of the High Court of Kenya. The Defendant did not enter appearance and/or file a defence, and interlocutory judgment was entered against him on 27th February 2013, and the suit set for formal proof on 22nd July 2013.

The Plaintiff's claim is that on the 6th of January 2012 the Defendant wrote a letter to him in which he admitted that he was indebted to the Plaintiff to the amount of Kshs.100,000/=, which debt he undertook to pay in three months in installments together with an interest of Kshs.20,000/=. The Plaintiff further stated that the Defendant also agreed to pay him Kshs.1000 for each day he was in default after the expiry of the three months. Further, that the Defendant also handed over the title deed to a parcel of land being Donyo Komarock Block 1/5639 as security for the said amount owing to the Plaintiff.

The Plaintiff averred that the Defendant had defaulted in paying the amount owing, and the Defendant prayed that he be paid Kshs 300,000/= being the amount owing with interest of 20% per month until payment in full. Further, that he be allowed to sell the parcel of land offered as security by the Defendant. He produced as his exhibit 1 the original title deed for Donyo Komarock Block 1/5639 and his bundle of documents dated 3rd December 2012 and filed on 4th December 2012.

The Plaintiff in his submissions dated 6th August 2013 and filed in court on the same date argued that that it is only this Court that can grant the orders sought considering that no security had been registered at the land registry or on the title as is the norm, and considering that this was an informal agreement between the Plaintiff and the Defendant. Further, that this would be the easiest way of the Plaintiff to recover the amounts owing as the title document is still in possession of the Plaintiff, and he does not intend to

continue keeping the title as he does not intend to utilize the land.

I have considered the evidence and submissions made by the Plaintiff, and find that the issue is whether he is entitled to the orders sought. He produced in his Exhibit 1 the written admission by the Defendant dated 6th January 2012 of his indebtedness to the Plaintiff to the amount of Kshs 100,000/= and interest of 20,000/=, and of his deposit of the title to Donyo Komarock Block 1/5639 with. The Plaintiff also produced the said title given to him by the Defendant in evidence. To this extent I find that he has proved on the balance of probabilities that the Defendant owes him Kshs 120,000/= with interest, and that he is entitled to payment of this sum of money.

The Plaintiff has however not provided the legal basis for his prayer that this court allows him to sell the land to recover the said money. I have noted that the title given to the Plaintiff with respect to the parcel of land known Donyo Komarock Block 1/5639 was issued under the Registered Land Act (since repealed). I find that the said repealed Act is the applicable law as the admission of indebtedness by the Defendant and deposit of the title was made on 6th January 2012, before the repeal of the Act. The continued application of the repealed Act is in addition saved by section 162 of the Land Act of 2012.

The only provisions that granted the power to a court to order the sale of land under the repealed Registered Land Act were with respect to the power of sale that is accorded a charge in section 77. However, for the power of sale to arise there must be a charge in existence, and section 65 of the repealed Act provided as follows as to the form and effect of such a charge:

“ (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money’s worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the charge on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.

(3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

(4) A charge shall not operate as a transfer but shall have effect as a security only.”

The written admission by the Defendant dated 6th January 2012 produced in evidence does not meet the above requirements of a charge. As no other law was cited by the Plaintiff that empowers this court to allow him to sell the parcel of land known as Donyo Komarock Block 1/5639, I find that he has not proved on a balance of probabilities that he is entitled to the said order. In any event the Plaintiff can proceed satisfy a decree granted by this court of payment of the money owed to him by way of normal execution proceedings.

I accordingly enter judgment for the Plaintiff as against the Defendant only to the extent of ordering that the Defendant pays to the Plaintiff the sum of Kshs 120,000/= together with interest at court rates from 3rd December 2012 until payment in full. The prayer for the Plaintiff to be allowed to sell the land parcel of Donyo Komarock Block 1/5639 is hereby denied.

The Defendant shall meet the Plaintiff’s costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29th day of
November, 2013.

P. NYAMWEYA

JUDGE