



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 1224 OF 2004

DANIEL KARIYU MUNGAIPLAINTIFF

VERSUS

**1. EQUITY BUILDING SOCIETY
2. RAHAB MWIHAKI KAROKIDEFENDANTS**

J U D G M E N T

1. The Plaintiff filed this suit originally against the 1st Defendant only. By an order granted on 21st November 2008 upon his application, the 2nd Defendant, who was at all material times his wife, was added as the 2nd Defendant.

2. The Plaintiff's case as pleaded in the **further amended plaint dated 21st November and filed on 2nd December 2008** (the original plaint was dated 23rd October and filed on 21st November 2003) is as follows: That on or about 30th November 1999 the Plaintiff and the 2nd Defendant (as chargor and borrower respectively) executed a joint charge in favour of the 1st Defendant over the Plaintiff's property, **L.R. No 14702/27, Garden Estate, Nairobi**, to secure the sum of KShs 3 million to be advanced to the Plaintiff and the 2nd Defendant jointly; that the said sum was to be repaid within a period of twelve (12) months at the monthly rate of KShs 300,000/00 beginning the end of December 1999; and that the said charge was registered on 1st December 1999.

3. The Plaintiff has further pleaded that in breach of the conditions set out in the charge the 1st Defendant in collusion with the 2nd Defendant denied the Plaintiff access to the said sum of KShs 3 million by granting exclusive access thereof to the 2nd Defendant; that the Plaintiff's intention to access half of the said sum to re-capitalize his electronics business was thereby "crippled"; that with the intended re-capitalization his said business would have fetched him additional monthly profits of KShs 500,000/00 "and more from January 2000 onwards"; and that the 1st Defendant's said breach thereby occasioned the Plaintiff a "cumulative or total loss" of KShs 6 million, which the Plaintiff claims from the Defendants as damages.

4. It is the Plaintiff's further case that "in further and fundamental

breach of the repayment period of twelve (12) months", and in collusion with the 2nd Defendant, and without any prior consultation with him and without his consent, the 1st Defendant altered the repayment period to thirty-six (36) months, thereby illegally detaining the Plaintiff's original title deed for L.R. No

14702/27 for an extra twenty-seven (27) months; that the Plaintiff was thereby denied use of his said title deed “to source for and borrow funds...to re-develop (his said land) as initially planned to put up rental premises thereon from which...he expected to generate an additional monthly profit of KShs 650,000/00 for the said 27 months”; and that the Plaintiff was thereby occasioned a total loss of KShs 17,550,000/00 which he claims from the Defendants as damages.

5. The Plaintiff has pleaded in the alternative and without prejudice that the 1st Defendant fraudulently and through written misrepresentations colluded with the 2nd Defendant to cause him the losses already pleaded “owing to personal business relationships the 1st Defendant’s Chief Executive had with the 2nd Defendant resulting in the breaches of terms of the said executed charge”. Particulars of the fraud and misrepresentation have been pleaded at paragraph 8 of the further amended plaint.

6. The main relief sought in the further amended plaint is damages in the total Sum of KShs 23,550,000/00 “but with interest on the initial KShs 6 million claimed in paragraph 6...from 31st December 2000 and on the balance thereof from the date of filing suit”. Costs of the suit and interest thereon at court rates are also sought.

7. On 23rd February 2004 the 1st Defendant had filed an **amended defence dated 20th February 2004** (its original defence was dated 15th December 2003). The 1st Defendant’s defence is that it advanced to the 2nd Defendant a loan of KShs 3 million that was secured by a charge over the Plaintiff’s title, L.R. No 14702/27; that the borrower was the 2nd Defendant and not the Plaintiff and the 2nd Defendant jointly; that the Plaintiff was merely a chargor to secure the loan with a charge over his property; that the Plaintiff never at any time, either alone or jointly with any other person, applied for a loan from the 1st Defendant; that the Plaintiff’s assertion that the loan of KShs 3 million advanced to the 2nd Defendant was to be shared equally with him was unfounded; and that the 2nd Defendant, who was the borrower of the KShs 3 million loan, held an individual’s account with the 1st Defendant, not a joint account with the Plaintiff.

8. It is the 1st Defendant’s further defence that on 22nd October 1999 it received from the 2nd Defendant an application for a loan facility of KShs 3 million and the same was approved after appraisal; that the loan was to be secured by a first legal charge over L.R. No 14702/27; and that the loan would be repaid directly from the 2nd Defendant’s savings account by 36 equal monthly instalments of KShs 140,000/00.

9. The 1st Defendant has further pleaded that the Plaintiff charged his title over L.R. NO. 14702/27 to secure the loan of KShs 3 million extended to his wife, the 2nd Defendant, by the 1st Defendant. It has also denied the impropriety alleged against its Chief Executive, or that the Plaintiff suffered the losses that he has pleaded.

10. The 2nd Defendant also filed a **statement of defence**. It is **dated 21st and filed on 22nd July 2009**. Just like the 1st Defendant, the 2nd Defendant has asserted that she was the borrower from the 1st Defendant of the KShs 3 million; and that the Plaintiff merely secured the loan by a charge over his property. She denies that the money was loaned jointly to her and the Plaintiff, or that it was to be released into a joint account to which the Plaintiff had access.

11. The 2nd Defendant has also pleaded, again like the 1st Defendant, that the loan was to be repaid over a maximum period of 36 months by monthly instalments of KShs 140,000/00; and that she repaid the loan fully and on schedule. The alleged fraud and loss suffered by the Plaintiff are denied.

12. Hearing of this case commenced on 12th March 2012 and was concluded on 19th June 2013. The Plaintiff testified on his own behalf. He adopted as his testimony-in-chief his **witness statement dated 19th and filed in court on 21st September 2011**. He called no other witness.

13. The 1st Defendant called one witness, **Ambrose Makanga Ngari (DWI)**. He adopted as his

testimony-in-chief his **witness statement** (which is in the form of an affidavit) **dated 14th and filed on 16th November 2013**. The 2nd Defendant did not testify or call any witness.

14. All the parties subsequently filed written submissions on 16th September 2013. I have considered those submissions as well as all the evidence placed before the court. That evidence includes the documents contained in the **Plaintiff's amended list and bundle of documents dated 25th December 2009** and the **1st Defendant's list and bundle of documents filed on 24th February 2011**.

15. The parties filed individual statements of issues. The Plaintiff's statement dated 29th March 2010 was filed on 1st April 2010. That of the 1st Defendant is dated and filed on 14th February 2011. The 2nd Defendant's statement of issues dated 16th was filed on 19th April 2010.

16. I consider the following to be the main issues to be decided in this case –

- i. Were the Plaintiff and the 2nd Defendant joint applicants for the loan advanced by the 1st Defendant?**
- ii. Was the loan granted to the 2nd Defendant only or to both the Plaintiff and the 2nd Defendant jointly?**
- iii. Was the repayment period for the loan 12 months or 36 months?**
- iv. Was the Plaintiff entitled under the terms of the charge or any relevant document that may bind the Defendants to have access to any portion of the loan proceeds?**
- v. Has the Plaintiff proved to the required standard the breaches, collusion, fraud and misrepresentations alleged against the Defendants?**
- vi. Did the Plaintiff suffer the losses claimed, and is he entitled to the damages sought?**

All these issues are intertwined and they are best dealt with together. I will consider and determine all in one narrative.

17. Although the Plaintiff in his submissions questioned the validity of the charge he executed in favour of the 1st Defendant to secure a loan of KShs 3 million, the pleadings and the evidence before the court establish that indeed the Plaintiff so charged his property. The charge was duly registered. There is also clear evidence from documents laid before the court and DW1's testimony that this loan was applied for and granted to the 2nd Defendant, who was then the Plaintiff's wife. The Plaintiff merely charged his property to secure the repayment of the loan by the 2nd Defendant. The loan was to be repaid over 36 months, not over 12 months as alleged by the Plaintiff.

18. By his own testimony and also from evidence adduced by the 1st Defendant, the Plaintiff did not take part at all in the repayment of this loan. Although he claimed that the loan was repaid by two family businesses that he had entrusted to the 2nd Defendant to run, as far as the 1st Defendant was concerned, the loan was fully and timeously repaid by the 2nd Defendant through her individual bank account that she held with the 1st Defendant. The loan proceeds themselves were deposited by the 1st Defendant into the 2nd Defendant's individual account from where she drew the money.

19. The Plaintiff has claimed that the loan was granted to him and the 2nd Defendant jointly, and that he was entitled to 50% of the loan proceeds (KShs 1.5 million). He tendered no evidence of his application for such a loan. His claim appears based upon two facts: One, that he, as well as the 2nd Defendant, executed the charge document, and two, that the 2nd Defendant was his wife and therefore it was expected that he would have equal access to the loan proceeds. The charge document itself shows clearly that the

Plaintiff executed it as the **chargor** while the 2nd Defendant signed it as the **borrower**. It was **not a joint charge** by the Plaintiff and the 2nd Defendant. It could not have been a joint charge because the 2nd Defendant does not appear to have been a joint owner with the Plaintiff of the property.

20. The mere fact of the marriage relationship between the Plaintiff

and the 2nd Defendant, without more, could not entitle the Plaintiff to the loan proceeds when the loan was applied for and granted to the 2nd Defendant. The 1st Defendant's witness (DW1) also testified that the terms and conditions of the loan could not have permitted the sharing of the loan proceeds between the 2nd Defendant and anyone else because the loan was granted for the specific purpose of improving the 2nd Defendant's business.

21. The Plaintiff was thus not denied access to the KShs 3 million as he was not entitled to the same, notwithstanding that he would have been ultimately liable to repay the loan in the event that the 2nd Defendant defaulted, or risk the 1st Defendant realize its security. Happily for him the 2nd Defendant did not default.

22. If there was any private arrangement between the husband (Plaintiff) and the wife (2nd Defendant) regarding the loan proceeds, that is a matter that cannot concern the 1st Defendant. It is also hardly justiciable against the 2nd Defendant as there is no sufficient evidence of such arrangement.

23. The reason for filing this suit that the Plaintiff gave in the course of his testimony and in answer to a question asked by the Court is telling. He said -

“I filed this suit after my wife left me. If my wife had not left I would not have filed this suit because we would have used the money as a family. But she left with everything. The 1st Defendant was to blame for my wife leaving me because there was a lot of relationship between the 1st Defendant's officials and her – business and personal. The suit is not vindictive. I filed the suit because the 1st Defendant conspired with my wife to deny me of the funds borrowed. I have documents here to show that the 1st Defendant had something to do with my matrimonial problems. They are all in my bundle of documents”.

24. The breakdown of his marriage to the 2nd Defendant prompted the Plaintiff to file this suit. We cannot here interrogate the reasons for that breakdown, but clearly the Plaintiff was highly suspicious of the 2nd Defendant's personal relationship with one or two high officials of the 1st Defendant. He blamed them for the breakdown of his marriage with the 2nd Defendant. What I cannot understand is why the Plaintiff appeared to equate those two high officials of the 1st Defendant with the 1st Defendant which appears to have been, and in all likelihood still is, a limited liability company. The suit, by the Plaintiff's own words quoted above, appears to be some kind of pay-back against the 1st Defendant for (somehow) causing the breakdown of his marriage.

25. Enough said! As it is, I am satisfied on balance upon the evidence now before the court that the 2nd Defendant applied for a loan of KShs 3 million from the 1st Defendant; that the 1st Defendant granted that loan upon certain terms and conditions, one of which was for the 2nd Defendant to provide appropriate security; that the 2nd Defendant provided security in the form of a first legal charge executed by her husband, the Plaintiff, over his property in Garden Estate, Nairobi; that the Plaintiff himself did not apply for that loan from the 1st Defendant, nor was he granted the same either alone or jointly with the 2nd Defendant; that the 1st Defendant duly released the loan proceeds to the borrower (2nd Defendant); and that the Plaintiff was not entitled to have access to any portion of the loan proceeds.

26. I am also satisfied that the 2nd Defendant duly repaid the loan over the 36 months period agreed with

the 1st Defendant without default; that the Plaintiff did not pay a single cent towards the loan repayments and never sought to do so; and that after repayment of the loan the 1st Defendant duly discharged the charge and released the title documents to the Plaintiff.

27. The Plaintiff cannot therefore have suffered the claimed losses. These claims in any event are in the nature of special damages which were never particularly pleaded nor strictly proved as required by law.

28. In the circumstances, I am not satisfied that the Plaintiff has proved his case on a balance of probability. He has fallen far short of that standard of proof. I must, and hereby do, dismiss his suit with costs to both the Defendants. There will be judgment accordingly.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE