



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 346 of 2006

MARY WAMBUI

MUTURI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY

LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff is the administratrix of the estate of the late Daniel Muturi Muraya, (hereinafter referred to as “the deceased”). In her plaint, she avers that the deceased was her husband. According to the plaintiff the deceased Mortgaged L.R. No. Dagoretti/ Riruta/S. 314 which is their matrimonial home to secure the sum of Kshs. 2,160,000/-. The said sum was to be repaid for 15 years in equal monthly installments. According to the plaintiff, the deceased died before repaying the loan. It was the plaintiff’s case that due to the fact that the loan was secured by a Mortgage Protection Cover, upon the death of the deceased, the estate of the deceased was legally discharged from settling the debt.

2. The plaintiff further averred that , the defendant had been negligent in handling the deceased Mortgage Protection Cover and set out the particulars of negligence as:-

- a) **Failing to take out Mortgage Protection Cove inspite of the deceased having complied fully with their requirements.**
- b) **Failing to inform the deceased that he was not on cover.**
- c) **Misrepresenting to the deceased that he was on an Insurance Cover.**
- d) **Causing the Plaintiff to suffer loss and damage.**

3. It is the plaintiff’s contention that despite of this fact the defendant has purported to exercise its statutory right of sale on allegation that the estate of the deceased still owed the defendant the sum advanced.

4. In the circumstances, the plaintiff seeks judgment against the defendant for the following orders:-

- i. **A permanent injunction restraining the defendant by itself, agent and/or servant form alienating, transferring, disposing and/or interfering with the suit property in any manner whatsoever.**
- ii. **A declaration that there existed a valid mortgage protection cover at the time of the deceased**

death and the mortgage debt of the deceased became redeemed in full upon his death OR ALTERNATIVELY the defendant are estopped from claiming the mortgage debt in the deceased account number 600-0003514 or any part thereof.

iii. An order directing the defendant to release forthwith Title Deed No. L.R. No. Dagoretti/Riruta/S.314 to the plaintiff together with a duly executed discharge of charge.

iv. Costs of this suit.

5. When the defendant was served, it duly entered appearance and filed a defence denying the averments made by the plaintiff in her plaint. In particular, the defendant stated that it had indulged the plaintiff on several occasions in the past and set out the particulars of indulgence as herein below:

a. By a letter dated 3rd October 2002 the plaintiff was informed that the debt stood at Kshs.5,019,076.54

b. By a letter dated 9th December 2002 the plaintiff was advised that the payment by the insurance company was insufficient to cover the entire debt as the charger by the time his demise had not been servicing the debt and the account was heavily in arrears.

c. By a letter dated 20th August 2003 the Bank the Bank exceptionally agreed to accept the sum of Kshs. 555,387.10 reflecting what would have been the shortfall as the time of the chargor's demise. This offer was not accepted.

6. It was the defendant's case that the deceased defaulted in repaying the loan that was advanced to him. Further, that the offer made by the defendant had been rejected and thus in the circumstances its right to realise the security had accrued. In the premises therefore, the defendant urged the court to dismiss the plaintiff's suit with costs.

7. At the hearing of this case, the plaintiff testified that her husband secured the sum of Kshs. 2,160,000.00 from the defendant to purchase a house. The terms of the contract required the deceased to take up an insurance cover to protect the mortgage. It was the plaintiffs' testimony that the deceased filed and signed a proposal form. Further that the terms of the letter of offer required the deceased to go for medical cover and pay premium for the cover. The deceased was then insured for the sum of Kshs. 3,600,000.00.

8. Upon the demise of her husband, the plaintiff stated that she wrote to the defendant informing them of the same and subsequently forwarded the requisite documentation. It was the plaintiff's testimony that on furnishing the requisite documents, she got a demand letter from the defendants' advocates demanding payment of Kshs. 2,889,480.09 and, later, a further demand for Kshs. 3,017,912.95. The plaintiff further stated that she received a response from the defendant claiming that her husband had not been covered under their Group Mortgage Protection Scheme. However, she informed them that her husband had fulfilled the requirements for Mortgage Protection Cover and that it was out of the defendants' negligence that no cover had been put in place.

9. The plaintiff testified further that on 3rd October 2002, she got a demand letter from the defendant claiming Kshs. 5,019.076.54 and a further letter informing her that the insurance had paid a sum of Kshs. 1,183,563.00 as an ex gratia payment. Later on, the defendant invited the plaintiff to meet them for negotiations on mutual settlement of the debt and a proposal was made. The defendant then wrote demanding that the estate pay Kshs. 555,387.10. The Plaintiff did not accede to the offer insisting that as the cover was for Kshs. 3,600,000.00, the full loan ought to have been fully secured by the insurance cover. Notwithstanding that, she instructed her advocate to offer to settle the debt by payment of Kshs. 100,000/-, which was not acceptable to the defendant, who reacted by serving a statutory notice demanding Kshs.5, 869,104.45. Subsequently, she received a 45 day notice for the sale of the suit property, constraining her to move to court for injunction orders.

10. For the Defendant, Mr. Migui Wangai, the defendant's Legal Manager, litigation, testified. In his testimony, he stated that the deceased borrowed Kshs. 2,160,000.00, and executed a charge to secure the loan. The terms of the facility were that the deceased would make monthly repayments of Kshs. 49,650.00 which amount included a monthly life insurance premium of Kshs. 974 and a fire premium of Kshs. 900 per month. In breach of that contractual obligation, the deceased did not make any monthly mortgage payment since draw down and until his demise 16 months later. He stated that the amount insured under the policy of Kshs. 3,600,000.00 was for fire cover and that the life cover was only limited to the Mortgage loan amount outstanding as at the time of death. He further testified that although the deceased fulfilled the loan conditions, the insurance cover was not effected. However, defendant managed to convince the insurance to pay an *ex-gratia* sum of Kshs. 1,183,563.00.

11. Mr. Mungai testified further that at the time of the plaintiff's death, the mortgage loan account was in arrears, caused by failure to pay the monthly loan repayments. He testified that the offer of Kshs.555, 387.10 made to the Plaintiff for settlement of the debt was the difference between what would have been paid by the insurance if a cover had been in place and the actual outstanding amount at the time of death of the plaintiff. Even if there was an insurance cover in place, there would be an outstanding sum of Kshs. 555, 387.10. However, this offer was not accepted by the estate of the deceased. Further that the defendant absorbed the difference between the actual amount paid by the insurer as *ex-gratia* and the amount of cover that would have been payable and only demanded the arrears.

12. Mr. Mungai further testified that when no settlement was made, the bank issued statutory notice as well as the redemption notice. The bank was thereafter entitled to exercise its statutory power of sale as the plaintiff was in default. He denied that there was negligence on the part of the defendant in procuring the insurance cover.

13. I have carefully considered the pleadings, oral evidence and supporting documentation relied upon by the parties. I have also considered the respective written submissions by counsel for the parties. I make my view on the matter in the following paragraphs.

14. The following are the issues that in my view emerge for determination.

1. *Whether the deceased took a Mortgage with the defendant bank.*
2. *Whether the deceased paid for the premiums of the Mortgage protection cover.*
3. *Whether the Mortgage contained a Mortgage protection Cover.*
4. *Whether the defendant is entitled to claim any further sum from the estate of the deceased in respect of the advanced mortgage.*
5. *What will be the orders as to costs?*

15. As regards the first issue for determination, from the evidence adduced there is no dispute that the deceased entered into an agreement with the defendant bank to be advanced the sum of Kshs. 2,160,000/-. This sum was to be secured by a charge over property registered as L.R. No. Dagorretti/Riruta/S. 314. From the evidence on record, the instrument of mortgage was properly executed and the same was registered as an encumbrance over the suit property. In fact from the evidence of the defendant, the said sum of Kshs. 2,160,000/- was disbursed to the deceased before the mortgage was actually registered. It is further not disputed by the Plaintiff that since drawdown of the loan, no single installment in the agreed sum of Kshs. 49,650.00 per month was ever paid by the deceased. The answer to issue No. 1 is therefore in the affirmative – a valid instrument of mortgage was registered against the title to the suit property.

16. As regards issue No. 2, it is equally plain that the deceased did not pay any premiums for the mortgage protection cover. This position is not altered by the fact that the insurance company eventually offered to make an *ex gratia* payment, which payment was, anyway, duly credited in reduction of the debt.

17. As regards issue No.3, it is clear from the testimony of both the plaintiff and the defendant's witness that mortgage protection cover was a condition that had to be fulfilled alongside registration of the mortgage. Similarly, such cover was required to be in place before the first drawdown of the loan. Evidence was led by the plaintiff demonstrating that the deceased executed all the forms that he was required to sign before the sum advanced was disbursed to him. Although the Defendant retorted that failure to effect the insurance cover was due to failure by the deceased to pay premiums, I take the view that it was incumbent for the defendant as a prudent mortgagee and lender to ensure that cover was put in place in terms of the mortgage protection policy as an integral part of the security documentation held. That the Defendant went on to plead with the insurance company for payment of an ex gratia sum to settle part of the debt corroborates the view that it was the Defendant's obligation to ensure that cover was in place. By pursuing that payment, the Defendant in effect acknowledged the negligence on its part in ensuring that cover was in place. While therefore the Defendant wishes the court to believe that the estate of the deceased was not entitled to benefit at all from the proceeds of the sum that was paid by the insurance company on account of non-payment of premiums by the deceased, I am persuaded that the said payment was wholly deserved and indeed that the shortfall from the insured sum of Kshs. 3,600,000/- ought to have been met by the bank to atone for its negligence in not placing a mortgage protection cover for the facility. For by allowing drawdown before fully securing its exposure, the bank assumed the risk posed by possible default or other events, including death, that were bound to impede performance of the facility but which could have been cushioned through insurance.

18. With regard to issue No. 4, I find the defendant's letter to the plaintiff's advocate dated 20th August, 2003 instructive. The letter stated as follows:

"We write further to our letter dated 30th May, 2003.

The Company has received the account and has decided that taking into account the error on this account, it would only be fair for the estate to pay Kshs. 555,387.10 only arrived at as follows:-

<i>Balance as at time of death</i>	<i>Kshs. 2,702,470.12</i>
<i>Insurance settlement</i>	<i><u>Kshs. 2,147,083.00</u></i>

Balance due from the estate Kshs. 555,387.10

This figure represents what would have been the shortfall as at the time of death if the life policy was in place. This explanation now settles the issues and we look forward to receiving to receiving a cheque for Kshs. 555,387.10 “.

19. The above letter was not qualified in any way. There was no remark that it was written on a without prejudice basis. The defendant made an equivocal offer to the plaintiff as an administrator of the estate of the deceased. There were no conditions attached to that offer. Theoretically therefore, it is legitimate to assert that as of the date of that letter, the maximum claim that the Defendant could sustain against the Plaintiff was Kshs. 555,387.99 and nothing more. Even then, what glaringly sticks out from the contents of the letter is that the Defendant finally acknowledges in very explicit terms that there was **“an error in this account”**. I have little doubt that the error referred to was the failure by the bank to effect a mortgage protection cover which was a prerequisite to the release of any funds to the debtor. Having made this unequivocal acknowledgment of the error, can the bank still sustain the claim against the Plaintiff? In my view, no, simply because had the cover been in place, the mortgage sum would have been insured to the tune of Kshs. 3,600,000/-. The amount outstanding as at the time of death was Kshs. 2, 702,470.12 which sum would have been wholly paid by the insurer thereby settling the full debt in this matter.

20. In the result, the Plaintiff's suit against the Defendant succeeds. While it may appear strange that in this matter the deceased obtained a loan facility, repaid nothing and now his estate is absolved of any repayment obligation in respect of the facility, this court is minded that a lender is in a position of knowledge and experience and should exercise utmost prudence and circumspection in all its lending procedures. An omission of effecting cover to a mortgage facility is not an omission a prudent banker should be seen to have overlooked as such cover provides a fairly straightforward recourse in the event of

the risk insured taking place. Lenders should therefore bear the full brunt whenever omissions of the nature in this suit are committed.

21. I therefore hereby enter judgment for the Plaintiff against the Defendant in all the prayers set out in the Plaint dated 29th June 2006. Costs of the suit are awarded to the Plaintiff.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF OCTOBER, 2012.

**J.M. MUTAVA
JUDGE**