



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 259 of 2003

**BALBIR SINGH SANDHU & RAGHBIR SINGH
SANDHU suing as Legal Representatives of the Estate
of the late SATBACHAN SINGH BHABRAPLAINTIFFS**

- VERSUS -

ROSE DETHO1ST DEFENDANT

THE DELPHIS BANK LIMITED2ND DEFENDANT

- AND -

THE DELPHIS BANK LIMITED.....PLAINTIFF

- VERSUS -

BALBIR SINGH SANDHU & RAGHBIR SINGH

SANDHU sued as Legal Representatives of the Estate

Of the late SATBACHAN SINGH BHABRA1ST DEFENDANT

NASIR SHAHINA KHAN2ND DEFENDANT

RUBINA SHAHINA KHAN3RD DEFENDANT

JUDGMENT

1. The plaintiffs seek a declaration that the title registered as I.R. 27528/1 over LR 209/8336/27 held by the 2nd defendant bank belongs to the plaintiffs. The plaintiffs thus pray for an order for delivery of the title and a permanent injunction against the bank restraining it from dealing with the title. The plaintiffs also pray for damages and costs.
2. Delphis Bank Limited (now known as Oriental Commercial Bank Limited) brought a counteraction by way of counterclaim against the plaintiffs and two other defendants: Nasir Ahmed Khan and Rubina Shahina Khan. Those two defendants entered a defence dated 1st October 2003 but did not appear at the trial or call any evidence.
3. In a synopsis, the plaintiffs plead that by a vesting order made on 28th June 2000 by the High Court, the

suit property was vested and transferred to Satbachan Singh Bhabra (now deceased). That action was in High Court case 1799 of 1999 between the deceased, as plaintiff, and Nasir Ahmed Khan and Rubina Shahina Khan as the defendants. But on the date of the vesting order, the title was held by Rose Detho, the 1st defendant, as statutory manager of the 2nd defendant bank, to secure borrowing by the two defendants in that case.

4. By an amended defence and counterclaim dated 28th September 2005, Delphis Bank asserts its right to hold the title. It counterclaims for Kshs 23,417,311.62 being the amounts due from Nasir Khan and Rubina Khan as at 31st May 2003; a declaration that it is entitled to possession of the title; an order to set aside the vesting order and rectify the register; an order to compel the borrowers to execute a charge to secure the principal loan of Kshs 7,000,000; a permanent injunction and costs. In particular, it is pleaded in the counterclaim that the borrowers misrepresented facts to the bank, failed to disclose the other proceedings and vesting order granted, and thus defrauded the bank.

5. The plaintiffs called one witness Raghbir Sadhu. He testified that he and Balbir Singh Sadhu are the executors of the estate of Satbachan Singh Bhabra (now deceased) under a grant of probate of a written will. The grant and the will were produced as document number 1 in the plaintiffs' bundle of documents. He testified that despite the vesting order, the defendant bank has continued to withhold the title. The estate's lawyers wrote a number of demand letters before action (documents 3, 4, 5 and 11 in the plaintiffs' bundle). The last one is dated 24th February 2003. He testified that by virtue of the vesting order, the estate is the lawful proprietor and entitled to possession of the title. As a result of the detinue, the estate had to shelve its plans to develop the land or borrow monies against the title. The property is ½ acre of land in Nairobi and has a tenant. The rent is collected by his nephew.

6. When cross-examined, he conceded that a letter at page 8 of the defendant's bundle dated 13th June 1997 was a request to the bank for a loan by Nasir Khan. He conceded that the bank was not a party in High Court case 1799 of 1999 in which the vesting order was made. He also conceded that Nasir Khan and Rubina Khan did not enter an appearance in that suit. The witness expressed surprise about the loan or the cheque for Kshs 3,000,000 paid to Makhecha & Company advocates dated 28th November 1997, or why it was processed in a day and before perfection of the charge. Towards the end of his testimony, the witness confirmed that Makhecha & Company advocates were holding the title in trust for the deceased and that the deceased was aware of the charge in favour of the bank but was unhappy with it. The witness conceded that the letter at page 176 of the bundle from the Banking Fraud Investigation Department was addressed to his co-executor and copied to him. But he stated that he has never appeared before the department on investigation of fraud over the title.

7. The defence also called one witness, Wilfred Machini, a credit officer of Oriental Commercial Bank. He testified that Rose Detho was the bank's statutory manager from 2001 to 2003. She had no personal interest in the bank. The bank is no longer under statutory management. He relied on the defendants' bundle of documents (defendants' exhibit 1) pages 1 to 183. He testified that in 1997, Nasir Ahmed Khan sought a loan of Kshs 7 million from the bank to pay contractors and to meet legal fees and a debt of Kshs 4.2 million owed to ABC Bank Limited. On 28th August 1997 and 20th November 1997, the debtors opened savings account number 12768803 and current account number 127804001. The bank disbursed Kshs 4,000,000 to the debtors: Kshs 3,000,000 by the bankers cheque mentioned and Kshs 1,000,000 to their account. The money has never been repaid. The principal sum and interest stood at Kshs 23,417,311.62 as at 31st May 2003. Interest continues to accrue at 6% above the bank's base rate of 30% per annum. In the meantime, the title for the property was released by Makhecha and Company advocates to the bank's lawyer Rustam Hira. The deceased or the two defendants in the counterclaim did not execute the charge prepared by the bank's lawyer. The title is in the joint names of the debtors. He testified that the debtors did not disclose about the proceedings in High Court case 1799 of 1999 in which the vesting order was issued. He also stated that the deceased had lodged a caveat dated 9th December 1997 claiming a chargee's interest. As a result of those matters the charge could not be registered. For the same reasons, the bank's position is that the debtors committed fraud as pleaded at paragraph 15 of the amended defence and counterclaim. That is why the matter was referred to the Banking Fraud Investigation department. The investigations are ongoing.

8. I have considered the pleadings, evidence and submissions. I take the following view of the matter. The key issues for determination are the following:

- a) Is the 2nd defendant bank entitled to a lien over the suit title?
- b) What is the legal effect of the vesting order dated 28th June 2000?
- c) Did Nasir Khan and Rubina Khan borrow monies from the 2nd defendant bank on security of the title?
- d) Did the two misrepresent certain facts or commit fraud in the process of obtaining the loan?
- e) Do the two owe the bank the sums claimed in the counterclaim?
- f) Can the two and the plaintiffs be compelled to execute the charge dated 27th November 1997?
- g) Are the plaintiffs entitled to the prayers in the plaint?, and
- h) Who should bear the costs of the suit?

9. I am satisfied that on 28th November 1997, Nasir Ahmed Khan executed a letter of offer from the bank for a loan of Kshs 7,000,000. The amount was to be secured by a legal charge over the certificate of title registered as I.R 27528/1. The title was over LR 209/8336/27, a ½ acre piece of land in Loresho Nairobi. Prior to that, Nasir Khan, had at his own request and instance, applied for the facility to pay contractors, legal expenses and a debt of Kshs 4,200,000 owed to another bank, ABC Bank Limited. Interest was to be charged at 6% over and above the base rate then standing at 30% p.a. It is instructive that the letter was executed by Nasir Ahmed Khan only. The title itself was in the joint names of Nasir Khan and Rubina Khan as per entry number 4 on the title dated 5th May 1995.

10. The plaintiffs' counsel took issue with that fact and submitted that the letter of offer was defective for want of Rubina's signature. But I have noted that the bank mandates held at the bank did not require her signature. The document that would have been mandatory for her to sign and to have any legal effect would be the charge instrument. Furthermore, at paragraph 4 of the statement of defence by Nasir Khan and Rubina Khan dated 1st October 2003, they admit as follows:

“The defendants admit that they approached the defendant bank for a loan of Kshs 7,000,000 which loan was to be secured by a legal charge over LR 209/8336/27”

11. Parties are bound by their pleadings. The admission that the borrowers approached the bank for the loan is unequivocal. In any event, I also find that Rubina Khan was aware of the lending. The defendants witness referred the court to hand written notes on the letter of offer at page 13 of the defendant's bundle. The witness said the signature there was that of Rubina. He knew it from the mandate cards held at the bank. The plaintiffs did not controvert that adequately or at all. The note was stating:

“We have opened loan account of Kshs 3,000,000 yesterday 28.11.1997. Please debit account with 1,000,000 and credit account 127804001. Signed, on 29.11.1997.”

The borrowers, like I said, were operating that current account number 127804001 and another savings account number 12768803 opened on 28th August 1997 and 20th November 1997. I have thus formed a firm opinion that both Nasir Ahmed Khan and Rubina Khan requested for a loan of Kshs 7,000,000 from the 2nd defendant bank on the security of the title and on the terms more particularly set out in the letter of offer dated 28th November 1997.

12. On the same date, a sum of Kshs 3,000,000 was released by the bank to Makhecha & Company Advocates. Makhecha were acting for the borrowers. The plaintiffs also conceded that the lawyer was

holding the original title in their trust. That was the answer by Raghbir Sadhu in cross-examination. When the witness was shown a copy of the cheque at page 24 of the bundle, he did not dispute it or offer another explanation why Mr. Makhecha was receiving the money. I have then looked at a letter dated 24th November 1997 from the firm of Makhecha & Company addressed to the General Manager, Delphis Bank. It states:

“The above matter and our previous communications herein refers. We have now forwarded the original certificate of title to your advocates as per the attached letter. Kindly release the agreed sum of Kshs 3,000,000 to ourselves pending the completion of the security”

13. There is then a handwritten instruction at the foot of the letter dated 25th November 1997 authorizing release of the sums to Mr. Makhecha. I must say that matters were moving at break neck speed for reasons that are not borne out by the evidence. The bank was being a little reckless. It was releasing a substantial sum without perfection of securities merely on the receipt of the original title by its lawyers. But this is not a matter in tort. From a contractual and legal standpoint, the borrowers applied for the loan and a sum of Kshs 3,000,000 was drawn down by payment to their recognized agent. True, the arrangement fee of Kshs 140,000 had not been paid. The borrowers had not even furnished security for deposit of all monthly rents from the units they were constructing. Those facts would not invalidate the simple lending contract.

14. The plaintiffs’ counsel raised questions about Makhecha & Company. The defendant’s witness said he was not sure whether Makhecha was on the bank’s panel of lawyers. I do not think that was necessary or is the issue. The bank’s lawyers were Rustam Hira, to whom the title was sent by Makhecha. From the documentary evidence, the borrowers have admitted that Makhecha & Company were holding the title in their trust.

15. The plaintiffs’ counsel has raised the question of whether the Kshs 3,000,000 reached the borrowers. But the plaintiffs’ witness Raghbir Sadhu did not say such a thing. The denial at paragraph 5 of the statement of defence by Nasir Khan and Rubina Khan dated 1st October 2003 is a bare pleading: they did not appear at the trial or lead evidence in rebuttal. Pleadings are not evidence. See CMC Aviation Ltd Vs Crusair Ltd (No 1) [1978] KLR 103, John Didi Omulo Vs Small Enterprise Finance Company Ltd and another [2005] e KLR. When I juxtapose that against their unequivocal admission at paragraph 4 of their defence that they sought the loan of Kshs 7,000,000, I am left in no doubt that they are trying to escape liability by all means. I am also satisfied that a further sum of Kshs 1,000,000 was credited directly to the borrowers’ account at the bank. The total sum drawn down was thus Kshs 4,000,000.

16. Parties are bound by commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E A 605 and National Bank of Kenya Limited Vs Pipeplastic Samkolit and another [2001] KLR 112. That answers issue letter (c) above in the affirmative.

17. The charge over the property dated 27th November 1999 was not fully executed by the chargors, Nasir Ahmed Khan and Rubina Khan. The copy at pages 143 to 159 of the defendants’ bundle is stamped for duty purposes and executed at pages 14 by the chargors. However, the mandatory certificate under section 69 (1) of the Transfer of Property Act (now repealed) has not been signed by the borrowers. It could not thus be registered. There was also a caveat lodged by the deceased. But the date of the charge is also suspicious as it falls one day before the letter of offer. But the first disbursement of Kshs 3,000,000 at least was made the day after the date of the charge. The charge was for Kshs 8,000,000. The amount to be borrowed under the letter of offer was Kshs 7,000,000. But I take the view that in ordinary bank practice, the charge may be drawn for a higher sum. However, the charge can only be enforced for the sums drawn down and the interest. In this case, all that the charge provides is that the lender shall be paid sums “not exceeding 8,000,000”. Nevertheless, it is poor drafting. And considering the opaque nature of the lending by the bank, I would not be prepared to compel the borrowers to execute the charge. I am further fortified there because I have said that the bank was reckless or negligent in releasing monies to the borrowers before perfecting its securities. It thus became the true author of its misfortune. That answers issue letter (f) in the negative.

18. The lawyers for Nasir Khan and Rubina Khan released the original title to the bank's lawyers upon receipt of Kshs 3,000,000. I have no direct evidence to suggest any wrong doing by Makhecha in releasing that title. I will however revisit the matter in view of the allegations of misconduct made in HCCC 1799 of 1999. If the borrowers instructions were breached, they had remedies against their lawyer. The same may be said about the rights of the deceased against Makhecha. Since the borrowers or their agents had received consideration of Kshs 4,000,000, the bank became entitled to a lien over the title as an equitable mortgage irrespective of the failure to register the charge. I am also alive to the provisions of the then applicable The Equitable Mortgages Act. Furthermore, I am of the view that the partially executed charge by the borrowers, the letter of offer and the actual disbursement of the loan are enforceable as ordinary contract. I will return to this issue and the status of the vesting order in favour of the deceased. But as the bank is in possession of the title in the names of the borrowers and for good consideration, I hold that it has an equitable lien giving rise to an equitable mortgage. Issue letter (a) is thus answered in the affirmative.

19. That takes me to the vesting order dated 28th June 2000 issued in High Court case 1799 of 1999 Satbachan Singh Bhabra Vs Nasir Ahmed Khan and Rubina Shahina Khan. Orders were made in the High Court suit on 12th April 2000 and 11th May 2000 requiring that Nasir Ahmed Khan and Rubina Khan, the borrowers in the present suit, to jointly and severally transfer the suit land and title to the plaintiff, Satbachan Bhabra (now deceased). That is why the current plaintiffs, as administrators, are pursuing the title.

20. The proceedings in the High Court suit are annexed at pages 72 to 82 of the bundle. The plaintiff had pleaded that he lent the defendants Kshs 6,200,000. It was on security of the title over LR 209/8336/27. It is the same title in contest in this suit. The 2nd defendant did not enter an appearance. Interlocutory judgment was entered on 6th March 2000. On 17th April 2000, further interlocutory judgment was also entered against the 1st defendant. The matter then proceeded for formal proof on 12th April 2000. Judgment was delivered the same day. A further judgment was made on 11th May 2000 after the court was satisfied that interlocutory judgment had been entered against both defendants. A bill of costs was taxed on 5th February 2001 for Kshs 779,679.10. In his testimony in that court, the plaintiff alleged that Mr. Makhecha released the title to Mr. Rustam Hira without his consent. In December 1997, he became suspicious and lodged a caveat against the title. The key question that the plaintiffs are avoiding is why the deceased, as the original proprietor of the land, transferred the title to Nasir Khan and Rubina Khan on 5th May 1995. What was the consideration and why was he lending them money on the title? The defendants have exhibited two copies of the same title. The one at page 1 to 3 of the bundle does not state the consideration for the transfer. The one at pages 4 to 7 of the bundle states the consideration was Kshs 6,500,000. The oral evidence in court was completely silent on that matter. The deceased was aware of the creation of the charge. That was confirmed by the plaintiffs' witness. He testified that the deceased was unhappy about the charge. That evidence leaves the court deliberately in a blind spot. Why was he unhappy about the charge? What were the true reasons for lodging the caveat on 9th December 1997? There is then a letter from Makhecha and Company to the deceased (document 6 in the plaintiff's bundle) confirming receipt of Kshs 5,000,000 towards a loan agreement dated 23rd June 1997 between him and Nasir and Rubina. The loan agreement was not produced before this court.

The deceased was aware of the mortgage on the suit land because the letter says in part that "upon redemption of the mortgage on the Loresho property LR No 209/8336/27 we will hold the title in trust for you"

21. As a result of want of full execution of the charge, the vesting order and the caveat, the 2nd defendant bank could not register the charge. The two borrowers, Nasir Khan and Rubina Khan did not disclose the existence of the other suit, the vesting order or the caveat. I find they were guilty of material non-disclosure. But assuming that Makhecha was holding the title as a result of the other lending transaction, then the release of title to Rustam Hira upon payment of Kshs 3,000,000 to Makhecha was intended to defraud the bank. It was the only one not in the know. The bank would be left holding the shorter end of the stick. Fraud requires a high standard of proof. I am well alive to the cardinal precept of the law of

evidence that he who alleges must prove it. See *Koinange and 13 others Vs Koinange* [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See *Ratilal Gordhanbhai Patel Vs Lalji Makanji* [1957] E A 314, *Urmila Mahindra Shah Vs Barclays Bank International and another* [1979] KLR 67. It is not lost on me either that the bank forwarded the title to the Banking Fraud Investigation Department on 21st November 2001 alleging fraud on the part of Nasir and Rubina Khan. The results of that investigation, if it proceeded, have not been made available to court.

22. To my mind, there was a concerted scheme by Nasir and Rubina Khan to defraud the bank. I can infer it from the totality of evidence and circumstances. From the decree in High Court case 1799 of 1999, which the two never defended, the scheme seems to have been wider to also defraud the deceased. I entertain that view from the evidence and what I stated earlier about the *bona fides* of the action in High Court case 1799 of 1999 or the veracity of the vesting order. I cannot in this present suit hold as proposed by the 1st and 2nd defendants that the vesting order was unlawful. I cannot even set it aside in the present proceedings. The 1st and 2nd defendants can only do so by moving the court in those other proceedings. Until then, the vesting order, whether irregularly obtained or not stands. That answers issue letter (b). But that does not cure the fraud or change my earlier holding that irrespective of the vesting order, the 2nd defendant bank has an equitable lien over the title. And I have stated that the borrowers misrepresented facts to the bank in a concerted scheme to defraud it of the sums paid to them or their lawyer. Article 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act enjoin the court to do substantial justice to the parties. Substantial injustice would result to the bank if I were to hold otherwise.

23. I have to weigh the competing interests of the bank (as an innocent lender in good faith) against those of the plaintiffs. While I commiserate with their predicament, I would decline to order the bank to release the title to the plaintiffs in the present circumstances. I have already found that the bank is entitled to withhold the title until full payment. Issue letter (d) is thus answered in the affirmative. For the same reason I am prepared to grant a permanent injunction against the plaintiffs from alienating, charging or dealing with the property LR No 209/8336/27 until payment by Nasir Khan and Rubina Khan of the amounts due to the bank as detailed below.

24. I have found that Nasir Khan executed the letter of offer dated 28th November 1997. I have also found that Rubina Khan has unequivocally admitted that she and Nasir applied for the loan of Kshs 7,000,000 from the 2nd defendant bank. They partially executed a charge dated 27th November 1997 but failed to execute the mandatory certificate under section 69 (1) of the Transfer of Property Act (now repealed). I have also found that they drew down a sum of Kshs 4,000,000. They are thus liable to the bank to repay that sum together with interest. The interest rate stated in the unregistered but partially executed charge was a minimum of 30% plus 4% commitment fees. The letter of offer had provided for interest at 6% above the base rate of 30%. The bank's witness did not however lead cogent evidence to show how the amount rose to Kshs 23,417,311.62 as at 31st May 2003. He said the amount comprised interest and penalties. He said during cross-examination:

“In the counterclaim we are claiming Kshs 23,000,000. This is because of interest. Interest and penalty. Even deposits were being paid highly. Bank was earning nearly 46%”.

25. If the court is to award interest and such high penalties, the contractual and evidential basis must be clear. For want of explanation, I find the amounts charged as interest and penalties to be unconscionable and usurious. I would then enter judgment in favour of the bank against Nasir Khan and Rubina Khan, the named 2nd and 3rd defendants in the counterclaim, for Kshs 4,000,000 together with simple interest at court rates from 14th October 2003 (the date of the original defence and counterclaim) until full payment. That answers issue letter (e).

26. The plaintiffs had claimed damages for unlawful detention of the title. The plaintiffs' witness did not lead any evidence to allow the court assess such damages. All he stated was as follows;

“The estate has suffered immense damage due to the absence of the title. We had plans to develop the plot by using the title as security. The said land is about ½ acre and we have a tenant. The rents are being collected by my nephew”.

The plans or immense damage referred to were not provided or elaborated upon. I have also stated that I entertain serious doubts about the *bona fides* of the action in High Court case 1799 of 1999 and the *ex parte* judgment for a vesting order. Granted those circumstances, the claim for damages fails for want of proof and want of merit. I have come to the conclusion that the plaintiffs’ claim in the suit must be dismissed but with no order as to costs. That answers issue letter (g).

27. The claim by the bank for aggravated damages against Nasir and Rubina Khan also fails for want of proof. The bank’s witness did not lead any evidence at all on that head of exemplary damages or any other damages.

28. In the result, I enter judgment as follows;

a) The plaintiffs’ suit is hereby dismissed but with no order as to costs.

b) I enter judgment on the counterclaim in favour of Delphis Bank Limited as follows;

(i) As against Balbir Singh Sadhu and Raghbir Singh Sadhu, the administrators of the estate of Satbachan Singh Bhabra (deceased), a permanent injunction is issued restraining them, their servants, agents, employees or howsoever from transferring, charging, selling or in any other manner whatsoever dealing with the property known as title I.R 27528/1 over LR 209/8336/27 until payment of the decretal sums in order (ii) below.

(ii) As against Nasir Ahmed Khan and Rubina Shahina Khan, the named 2nd and 3rd defendants in the amended defence and counterclaim, there shall be judgment in favour of Delphis Bank Limited for Kshs 4,000,000 together with simple interest at court rates from 14th October 2003 (the date of the original defence and counterclaim) until full payment.

(c) I award Delphis Bank Limited, the plaintiff in the counterclaim, costs of the counterclaim to be paid by Nasir Ahmed Khan and Rubina Shahina Khan, the 2nd and 3rd defendants named in the counterclaim.

(d) The remainder of the counterclaim in prayers b), c), d), e), f), and h) are dismissed with no order as to costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of November 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Goswami for the Plaintiffs

(Balbir Sadhu & Raghbir Sadhu).

Mr. Mureithi for Mr. Marete for the 1st and 2nd Defendants

(Rose Detho and Delphis Bank) also named as plaintiffs in the counterclaim.

No appearance for the 2nd and 3rd defendants in the counterclaim (Nasir Khan & Rubina Khan)

Mr. Collins Odhiambo – Court Clerk.