



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Magembe v SBM Bank Kenya Limited (Environment & Land Case
327 of 2016) [2022] KEELC 4756 (KLR) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 327 OF 2016
EK WABWOTO, J
AUGUST 30, 2022**

BETWEEN

WILFRED MAGEMBE PLAINTIFF

AND

SBM BANK KENYA LIMITED DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this instant suit vide a plaint dated January 14, 2016 which was subsequently amended on September 20, 2019. In the amended Plaint, the plaintiff sought for the following reliefs: -
 - a. Special damages of Kshs 2,130,000/= together with interest thereon at court rates from February 10, 2016 until payment in full.
 - b. Costs of the suit.
 - c. Any other relief that this honourable court may deem fit to grant.
2. The defendant filed an amended statement of defence dated January 27, 2020.

The Plaintiff's Case

3. The plaintiff averred that he was the registered owner of the property known as apartment No 5 of LR No 330/576 and that sometimes in the year 2014 he deposited his original lease of the said property with Chase Bank for purposes of enabling the said bank process an equity release to him so as to undertake certain construction projects.
4. The plaintiff also averred that the Chase Bank Kenya Limited pursuant to a transfer of its assets and liabilities duly approved by the Central Bank of Kenya and contained in Gazette Notice No 6388



of 2018 published in the Kenya Gazette dated July 6, 2018 changed its names to SBM Bank Kenya Limited.

5. It was also the plaintiff's case that sometimes in September 2015, he notified the defendant that he had entered into an agreement for sale of the said property with Mr and Mrs John Njega and required the defendant to return the original lease to him to facilitate completion of the transaction. The same was not returned despite him making several follow up on the same.
6. The plaintiff further averred that as a result of the defendant's failure to return the original title, the intended purchaser rescinded the agreement for sale and demanded a refund of the deposit paid. The plaintiff maintained that the defendant lost his original document due to negligence and breach of duty of care upon which he sought for the reliefs pleaded in his plaint.
7. The Plaintiff Wilfred Magembe testified as PW1. The hearing of the suit commenced on May 5, 2022. During his testimony he relied and adopted his witness statement and bundle of documents that were on the court record. He states that owing to the defendant's failure to return his original lease, he incurred expenses and paid his advocates Kshs50,000/= as costs of processing the new title. He also added that the later sold the property for Kshs 15,000,000/= which was less than the initial Kshs 15,800,000/= that had been offered.
8. When cross examined, he stated that there was no ownership dispute in this matter. He also stated that he deposited his original lease with Chase bank and not SBM Bank Ltd. He also confirmed that he was refunded the initial deposit when the transaction was rescinded.

The Defendant's Case

9. The defendant filed an amended defence dated January 27, 2020. It averred that it only acquired some assets and liabilities of Chase Bank Limited and the plaintiff's claim did not fall under it but rather under Kenya Deposit Insurance Corporation (KDIC) which was not a party to the suit.
10. The defendant denied knowledge of any involvement in the transaction between the plaintiff or any loss of his original lease and maintained that it could not be held liable for the same.
11. DW1, Karen Kimani, the Legal Manager of the defendant testified on June 8, 2022. He stated that Chase Bank was placed under receivership on April 7, 2015 and SBM bank acquired certain assets and liabilities. He told the court that SBM Bank did not acquire any claims against negligence which was the plaintiff claim herein. He also testified that the plaintiff's suit ought to have been made against Chase Bank and the same was not sustainable in its current form.
12. On cross examination, he stated that the case was initially instituted against Chase Bank and he was aware of the amendment that was done substituting the name of Chase Bank to SBM Bank Limited.
13. He also stated that he did not have the agreement specifying the assets and liabilities that had been taken over by SBM Bank. It was also his testimony that the Plaintiff never suffered any loss since his initial deposit was refunded and he was also able to sell the property after obtaining a provisional title.
14. When re-examined, he stated that he did not produce the agreement on assets and liabilities because it had sensitive customer data that remained confidential.
15. At the close of the oral testimonies, both parties filed their written submissions.



The Plaintiff's Submissions

16. The plaintiff filed his written submissions dated June 13, 2022. Counsel submitted that SBM Bank purchased certain assets of Chase Bank Limited which necessitated the amendment of the plaint. The said amendment was not objected to by the defendant and also their application to include Chase bank Limited as a party to the suit was earlier dismissed by Eboso, J.
17. In respect to the orders sought, counsel relied on the decision of *Millicent Perpetua Atieno Wandiga and Lois Onyango Otieno v John Chege* [2013] eKLR and submitted that the plaintiff was entitled to his claim of Kshs 800,000/= for loss of bargain. Counsel also submitted that the plaintiff was entitled to Kshs 300,000/= and Kshs 50,000/= which was the cost of legal fees paid by the purchasers advocates Kosgei & Masese Advocates to act for them in the sale transaction and the cost of reconstruction of the title respectively.
18. Counsel also submitted that the plaintiff was entitled to an award of nominal damages for the acts of the defendant and he relied on the case of *James Gichuhi Mutero v Lolldaiga County Homes & Resort Limited* [2019] eKLR where the court awarded Kshs 1,500,000/= for breach of an agreement for sale. Counsel quantified the same to be Kshs 1,150,000/= for the plaintiff.

The Defendant's Submissions

19. The defendant's submissions were dated July 15, 2022. Counsel for the defendant submitted that the following issues arise for consideration by the court. Whether this suit falls within the jurisdiction of the court. Whether the plaintiff suffered any damages to warrant the orders sought. Whether the defendant's amended statement of defence ought to be struck out. Who should bear the costs of the suit.
20. On the issue of jurisdiction, counsel submitted that the subject matter of the plaintiff's case was in respect to loss of original lease through negligence by the defendant hence the suit ought to have been filed in the High Court and not ELC. Counsel also added that the court lacked pecuniary jurisdiction in view of the fact that the amount claimed was for Kshs 2,130,000/= and hence the court of first instance ought to be at the Magistrate's Court.
21. On whether the plaintiff had suffered any damage to warrant the prayers sought, counsel submitted that none had been suffered since the plaintiff had been able to retain his property and was also able to sale the same at Kshs 15,000,000/=. On the claim for loss of bargain, counsel submitted that no loss was suffered and the deposit was refunded. Reliance was made to the case of *Erick Omuodo Ougo v Kenya Commercial Bank Limited* [2017] eKLR.
22. On the claim of Kshs 300,000/= as legal fees, counsel submitted that had the plaintiff asked for the original lease prior to entering into an agreement with 3rd parties, he could have avoided incurring the legal costs since he would have learnt that the same was missing and avoided the transaction all together. Counsel faulted the plaintiff for the said predicament and he relied on the case of *Nalinkumar Shah v Mumias Sugar Company Limited* [2013] eKLR.
23. On travel expenses of Kshs 200,000/= counsel submitted that no evidence had been adduced in support of the same and reliance was made to the case of *Jackeline Njeri kariuki v Moses Njunge Njau* [2021] eKLR.
24. On the claim for reissuance of the lease for Kshs 50,000/= counsel submitted that the same could have been awarded if he court had pecuniary jurisdiction to hear the suit. In respect to the claim of nominal damages, counsel argued that the same was not pleaded and it was only introduced at the submissions that were filed. Reliance was made to the case of *Independent Electoral and Boundaries Commissions*



§ another v Stephen Mutinda Mule & 3 others [2014] eKLR and Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR .

25. In respect to the defendant's amended defence which was filed without leave of the court, counsel submitted that the same should not be struck out since no objection was raised at the time of its filing and striking out the same at this stage would be prejudicial to the parties herein
26. Counsel for the plaintiff also pointed out that the defendant entered into an agreement between Central Bank of Kenya, Kenya Deport Insurance Corporation and SBM Bank (K) Ltd in relation to acquisition of certain assets and liabilities of Chase Bank (K) Ltd (in receivership) and that the same was not filed due to a confidentiality clause. Reliance was made to section 6(1) (d) & (e) of the Access to information Act No 31 of 2016 and the case of Chase Bank (Kenya) Limited Employee Ownership Plan & another v Kenya Deport Insurance Corporation & 4 others [2020] eKLR

Analysis and Determination

27. Having carefully considered the pleadings, the testimonies and submissions herein, the issues that are for determination are: -
 - i. Whether the court has jurisdiction to hear the suit
 - ii. Whether the amended defence filed herein ought to be struck out.
 - iii. Whether the plaintiff has proved his case to the required standard.
 - iv. Whether the remedies sought are available.
28. On the issue of jurisdiction, counsel for the defendant submitted that this court lacked the jurisdiction to hear and determine the suit. The issue of jurisdiction is a fundamental aspect in any litigation and as such it ought to be pleaded and raised at first instance. The court cannot consider the same when it is not raised in the defendant's pleadings. In the instant case, the defendant on filing its amended statement of defence dated January 27, 2020 at paragraph 12 thereof stated as follows- "the jurisdiction of this honourable court is admitted". I will therefore not address myself any further on the same.
29. As to whether this court should strike out the defendant's amended statement of defence, the parties herein had an opportunity and participated during the pre-trial conference and no objection was raised by the plaintiff in respect to the said amended defence. In view of the foregoing I will exercise my discretion and consider the same as having been duly admitted as part of the pleadings in court record since no prejudice will be suffered by any party.
30. According to the plaintiff, the defendant purchased certain assets of Chase Bank Limited who were the custodian of his original lease document. The defendant subsequently breached their duty of care and due to their own negligence when they failed to return the same despite making several follow up with them. As a result of the said action he suffered loss and damages which necessitated filing of this suit.
31. The defendant on the other hand submitted that no loss and damages were suffered by the Plaintiff since he was able to reconstruct his title and sale the property.
32. From the evidence that was tendered by the plaintiff it was evident that the cause of action herein arose from the negligence of the defendant who failed to secure his original title document when the same was deposited by the defendant. Had the defendant properly kept the said document and availed the same when it was demanded the suit herein would have never been filed. In the instant case, the bank had a duty of care with the plaintiff to exercise reasonable care and skill in carrying out its part with regard to its operations with the Plaintiff and owing to its negligence they failed the plaintiff.



33. In view of the foregoing, it is the finding of this court that the plaintiff has proved his case on a balance of probabilities against the defendant. Having made a finding that the plaintiff has proved his case on a balance of probabilities against the defendant, he is also entitled to the prayers sought. The plaintiff's primary prayer was a claim for special damages of Kshs 2,130,000/= together with interest payable from February 10, 2016 until payment in full. The particulars of the special damages sought were particularized at paragraph 13 of the plaint as follows: -

- i. Loss of bargain (10% liquidated damages).
- ii. Legal fees incurred by the vendor plaintiff in the sole transaction kshs.300,000/=.
- iii. Travel expenses from US to Kshs 200,000/=
- iv. The cost of reissuance of the lost lease over apartment A5 LR No 330/576 at Kshs 50,000/=.

28. The claim of special damages is one which must be specifically pleaded and proved with a degree of certainty and particularity. In the case of *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR, the Court of Appeal observed thus: -

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but must add that, that degree and certainty must depend on the circumstances and the nature of the act complained of”.

In the case herein, the plaintiff was able to prove the claim of Kshs 300,000 being legal fees paid to his Advocates Kosgey Masese Advocates and payment of Kshs 50,000/= being costs for reconstruction of the title. However, the claim for Kshs 1,150,000/= being nominal damages for breach of duty was not pleaded and therefore the same is not for granting. As regards to the claim for Kshs 800,000/- being loss of bargain this court notes that the subsequent sale agreement entered into between the plaintiff and the other party was purely on a basis of willing buyer and willing seller and to that extent it is evident that the plaintiff accepted the same and hence the said claim is declined.

29. On costs, the same is a discretion of the court and as a general rule, costs follow the event unless for good reasons the court orders otherwise. The plaintiff has partially succeeded in his claim and in the circumstances, I will direct each party to bear own costs of the suit.

Final orders:

30. In conclusion, I enter judgement in favour of the plaintiff as against the defendant as follows:-
- i. Kshs 350,000/- being special damages together with interest at court rates payable from the date hereof until payment in full.
 - ii. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS

30TH DAY OF AUGUST 2022

EK WABWOTO

JUDGE

In the Virtual Presence of: -

Mr Masese for the Plaintiff.



Ms Wainaina for the Defendant.

EK WABWOTO

JUDGE

